CAS 2019/A/6337 Maksim Maksimov v. FIFA & FC Trakai

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Mr H. Pat Barriscale, Barrister, Limerick, Ireland

Ad hoc Clerk: Mr Dennis Koolaard, Attorney-at-law, Arnhem, the Netherlands

in the arbitration between

Mr Maksim Maksimov, Russian Federation

Represented by Mr Alexander Bogdanov and Ms Solomiya Boyar, London, United Kingdom

- Appellant -

and

Fédération Internationale de Football Association (FIFA), Zurich, Switzerland

Represented by Mr Miguel Liétard, Director of Litigation, Ms Audrey Cech, Legal Counsel Litigation Department, and Mr Ennio Bovolenta, Group Leader / Legal Counsel Players' Status Department, FIFA, Zurich, Switzerland

- First Respondent -

&

FC Trakai, Trakai, Lithuania

Represented by Mr Mikhail Prokopets and Mr Ilya Chicherov, SILA International Lawyers, Moscow, Russian Federation

- Second Respondent -

I. PARTIES

1. Mr Maksim Maksimov (the "Appellant" or the "Player") is a professional football player of Russian nationality.

2. The *Fédération Internationale de Football Association* (the "First Respondent" or "FIFA") is an association under Swiss law, which has its registered office in Zurich, Switzerland. FIFA is the world governing body of international football. It exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials and football players worldwide.

3. FC Trakai (the "Second Respondent" or the "Club") is a professional football club with its registered office in Trakai, Lithuania. The Club is registered with the Lithuanian Football Federation (the "LFF"), which in turn is affiliated with FIFA.

4. The Player, FIFA and the Club are hereinafter jointly referred to as the "Parties".

II. INTRODUCTION

5. The present appeal arbitration procedure primarily concerns an employment-related dispute between the Player and the Club. Whereas the Player maintains that he validly invoked a "buy-out clause" in his employment contract (the "Employment Contract") with the Club, the Club submits that this was not a "buy-out clause", that the Player terminated the Employment Contract without just cause and that the Player is therefore liable to pay compensation for breach of contract. The FIFA Dispute Resolution Chamber (the "FIFA DRC") considered in its decision of 11 April 2019 (the "Appealed Decision") that the Player did not have just cause to terminate the Employment Contract and that the Player had to pay compensation in an amount of EUR 132,998 to the Club, and accordingly imposed a four-month period of ineligibility to play in official matches on the Player, all of which are challenged by the Player in the present proceedings.

III. FACTUAL BACKGROUND

6. Below is a summary of the main relevant facts, as established on the basis of the written submissions of the Parties, the hearing and the evidence examined in the course of the proceedings. This background information is given for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion.

A. Background facts

7. On 28 March 2017, the Player and the Club entered into the Employment Contract for a period of three sporting seasons, i.e. valid as from the date of signature until 24 March 2020. The Employment Contract contains the following relevant clause:

> "*9.6. In the event of unilateral termination of the* [Employment Contract] *by the* [Player]*, on grounds and procedures that are not stipulated in this* [Employment Contract]*, or in the event of unilateral termination of this* [Employment Contract] *by the Club due to the Player's wrongdoing, the* [Player] *is obliged to pay a fine in the amount of EUR 50,000 (fifty thousand) to the Club within 14 days, as well as to compensate the expenses incurred by the Club and related to the implementation of this* [Employment Contract]."

8. On 30 August 2017, the Club sent a letter to the Macedonian football club FK Vardar indicating that, despite the fact that the Player was registered with the Club, he was training with FK Vardar without the Club's permission. The Club alleged that FK Vardar was inducing the Player to terminate his Employment Contract with the Club and suggesting the latter "*not to engage with the* [Player]".

9. On the same date, the Player sent a letter to the Club, informing the latter about his intention "*to exercise* [his] *rights under art. 9.6 of the* [Employment Contract]" and requested the Club's bank details.

10. On 31 August 2017, the Club informed the Player that it did not intend to terminate the Employment Contract and argued that Article 9.6 of the Employment Contract was not a "buy-out clause", but that it stipulated the minimum damages to be paid by the Player in case he terminated the Employment Contract without just cause. The Club also invited the Player to return to the team's training sessions within the two following days.

11. On the same date, the Player and FK Vardar entered into an employment contract for a period of three sporting seasons, i.e. valid as from the date of signature until 14 June 2020.

12. On the same date, FK Vardar publicly announced that it had concluded a "*three-year contract*" with the Player.

13. On the same date, the Club requested FK Vardar to immediately terminate "*all agreements signed with the* [Player] *and urge the* [Player] *to come back to* [the Club] *as soon as possible*".

14. On 8 September 2017, the Club informed FK Vardar, acknowledging receipt, on 7 September 2017, of the payment of EUR 50,000, the bank receipt of which bore the reference "*remittances of the required buyout amount under clause 9.6 from 28.03.2017*". The Club informed FK Vardar that Article 9.6 of the Employment Contract did not stipulate any buy-out clause, and maintained that it was still in force and reiterated its previous requests.

15. On 2 October 2017, the Single Judge of the FIFA Players' Status Committee (the "FIFA PSC Single Judge") passed a decision, upon the request of the Football Federation of the Former Yugoslav Republic of Macedonia (the "FFM"), authorising the latter to provisionally register the Player for FK Vardar with immediate effect.

B. Proceedings before the FIFA Dispute Resolution Chamber

16. On 19 October 2017, the Club lodged a claim against the Player and FK Vardar before the FIFA DRC, requesting as follows:

> "*a) the* [Player] *to pay compensation for breach of contract in the amount of EUR 362,957 or, alternatively, EUR 244,825, plus 5% interest p.a. as from 30 August 2017;*
>
> *b)* [FK Vardar] *to be held jointly and severally liable for the payment of the aforementioned compensation;*
>
> *c) sporting sanctions on the* [Player] *and* [FK Vardar]."

17. The Player contested the Club's arguments and claim, arguing that he had validly exercised a buy-out clause in the Employment Contract.

18. FK Vardar also contested the Club's arguments and claims, arguing that the Player had validly exercised a buy-out clause in the Employment Contract, and that it had only contacted the Player afterwards and therefore did not induce the Player to breach his Employment Contract with the Club.

19. On 11 April 2019, the FIFA DRC rendered the operative part of the Appealed Decision, as follows:

> "*1. The Claim of the* [Club] *is partially accepted.*
>
> *2.* [The Player] *is ordered to pay to the* [Club]*,* ***within 30 days*** *as from the date of notification of this decision, compensation for breach of contract in the amount of EUR 132,988, plus 5% interest p.a. as from 19 October 2017 until the date of effective payment.*
>
> *3.* [FK Vardar] *is jointly and severally liable for the payment of the aforementioned compensation.*
>
> *4. In the event that the aforementioned amount plus interest is not paid within the stated time limit, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.*
>
> *5. Any further claim lodged by the* [Club] *is rejected.*
>
> *6. The* [Club] *is directed to inform the* [Player] *and* [FK Vardar]*, immediately and directly of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received.*
>
> *7. A restriction of four months on his eligibility to play in official matches is imposed on the* [Player]*. This sanction applies with immediate effect*

as of the date of notification of the present decision. The sporting sanction shall remain suspended in the period between the last official match of the season and the first official match of the next season, in both cases including national cups and international championships for clubs.

8. [FK Vardar] *shall be banned from registering any new players, either nationally or internationally, for the two next entire and consecutive registration periods following the notification of the present decision.*"

20. On 24 May 2019, the grounds of the Appealed Decision were communicated to the Club and the Player determining, *inter alia*, the following:

- "[…] [T]*he DRC first went to carefully analyse the content of the clause under art. 9.6 of the* [Employment Contract] *and emphasised that the relevant provision appears to deal with the consequences of the termination of the* [Employment Contract] *in the event that the* [Player] *breaches the* [Employment Contract]*, rather than providing the* [Player's] *entitlement to terminate the* [Employment Contract] *by paying a certain predetermined amount. In particular, the members of the Chamber stressed that the amount of EUR 50,000 indicated therein not only appears to be payable as a consequence of the termination of the* [Employment Contract]*, but also seeks at fixing the minimum amount of compensation due to the* [Club] *in case of breach by the* [Player]. *What is more, as the relevant clause provides not only the* [Player's] *obligation to pay EUR 50,000, but also to "compensate the expenses incurred by the club and related to the implementation of this contract", the final amount of such compensation remains open as to its maximum.*

- *Furthermore, as to the* [Player's] *arguments that the clause under art. 9.6 of the* [Employment Contract] *was not negotiated but, rather, it was imposed by the* [Club] *and that he was not assisted by a legal advisor at the time of the conclusion of the* [Employment Contract]*, the members of the DRC emphasised that the* [Player] *did not corroborate his allegations with any conclusive evidence. In this respect, the DRC deemed also important to point out that, pursuant to the long-standing jurisprudence of the DRC, any party signing a document of legal importance without knowledge of its precise content does so on its own responsibility. Consequently, the Chamber concluded that the aforementioned arguments of* [the Player] *could not be upheld.*

- *On account of the aforementioned considerations, the Chamber was of the opinion that it had no other option than to consider that the* [Player] *had no contractually stipulated right to prematurely terminate the* [Employment Contract]. *Consequently, the Chamber deemed that* [the Player] *had no just cause to unilaterally terminate the employment*

relationship and, therefore, concluded that he terminated the [Employment Contract] *without just cause on 30 August 2017.*

- *Subsequently, after having established that* [the Player] *terminated the* [Employment Contract] *without just cause, the DRC established that, in accordance with art. 17 par. 1 of the Regulations, the* [Player] *is liable to pay compensation to the* [Club] *for breach of contract. Furthermore, in accordance with the unambiguous contents of art. 17 par. 2 of the Regulations, the Chamber established that the* [Player's] *new club, i.e.* [FK Vardar]*, shall be jointly and severally liable for the payment of compensation. In this respect, the Chamber was eager to point out that the joint liability of* [FK Vardar] *is independent from the question as to whether the new club had committed an inducement to contractual breach or any other kind of involvement by the new club. This conclusion is in line with the well-established jurisprudence of the Chamber that was repeatedly confirmed by the Court of Arbitration for Sport (CAS).*

- […] [T]*he Chamber considered noteworthy to mention, from the outset, that, due to their important objective of setting forth, in advance, the indemnity to be payable by a party in case of breach of contract, compensation clauses should be clear and give no room for ambiguity. In other words, the DRC emphasised that, as a deciding body, when assessing the existence or not of compensation clause, it must be in a position to clearly establish the precise intention of the parties as to the matter.*

- *Taking into account the clause at stake, the members of the Chamber underlined again that no fixed amount was set out in art. 9.6 of the* [Employment Contract]*, but that said amount remains open as to its maximum and the clause only seeks fixing the minimum amount payable to the* [Club] *(i.e. EUR 50,000) in case of breach by the* [Player].

- *In light of the above, the Chambers considered that the aforementioned clause cannot be considered by the DRC when establishing the amount of compensation for breach of contract. What is more and for the sake of good order, the Chamber wished to emphasise that, in any case, the clause at stake was not reciprocal, meaning that it did not foresee the consequences of the unilateral termination without just cause by the* [Club] *and that, as much, it could not be seen as enforceable.*

- *In continuation, the members of the Chamber determined that the amount of compensation payable in the case at stake had to be assessed in application of the other parameters set out in art. 17 par. 1 of the Regulations.* […]

- [T]*he Chamber established that, as it had no indications at its disposal regarding possible fees and expenses paid or incurred by the* [Club] *for the acquisition of the* [Player]*, it could not further consider that criterion in the specific case at hand.*

- *The Chamber further noted that, in its calculation of the amount of compensation, the* [Club] *had included costs relating to the acquisition of another player that allegedly replaced the* [Player]. *In this regard, the Chamber was eager to emphasise that the* [Club] *failed to provide documentary evidence in order to establish, at the Chamber's satisfaction, a direct nexus between the loss of the* [Player's] *services and the hiring of the new player. Therefore the Chamber decided not to take into consideration the alleged extra-costs for the new player's salary, let alone the alleged intermediary's fee, in order to determine the payable compensation.*

- *Likewise, the members of the Chamber agreed that the amount of EUR 175,000, which was put forth by the* [Club] *in its claim maintaining that it would have accepted to negotiate the* [Player's] *transfer to another club on the basis of such offered amount, could not be accepted, since it was considered to be speculative.*

- […] [T]*he Chamber proceeded with the calculation of the fixed remuneration payable to the* [Player] *under the terms of both the* [Employment Contract] *signed with the* [Club] *and the one signed with* [FK Vardar] *for the period that was remaining since the unilateral termination of the* [Employment Contract] *by the* [Player] *until its expiry, i.e. from 30 August 2017 until 24 March 2020.*

- *In this regard, the Chamber noted that, as per the* [Employment Contract] *signed with the* [Club], *the* [Player] *was entitled to a monthly remuneration in the amount of EUR 1,500 for the remaining contractual period, i.e. a total fixed remuneration of EUR 46,500. In this respect and referring to art. 12 par. 3 of the Procedural Rules, the DRC wished to emphasise that the* [Club] *did not provide satisfactory evidence about the alleged higher gross monthly remuneration of the* [Player] *and about an allegedly agreed monthly house allowance.*

- *In continuation, the DRC equally took note of the* [Player's] *remuneration under the terms of his employment contract with* [FK Vardar], *which corresponds to EUR 319,477 for the relevant period.*

- *Taking into account the above, the Chamber concluded that, for the relevant period, the* [Player's] *average remuneration amounts to EUR 182,988.*

- *Furthermore, the members of the DRC deemed necessary to recall that the* [Club] *acknowledged receipt of the amount of EUR 50,000 from* [FK Vardar] *after the termination of the* [Employment Contract] *and that it remained undisputed that such amount was retained by the* [Club]. *Consequently, the DRC concluded that the aforementioned amount shall be deducted in the calculation of the compensation for breach of contract payable to the* [Club].

- […] *In addition and with regard to the* [Club's] *request for interest, the Chamber decided that the* [Club] *is entitled to 5% interest p.a. on said amount as of 19 October 2017 until the date of effective payment.*

- […] *In continuation, the Chamber focussed its attention on the further consequences of the breach of* [the Employment Contract] *and, in this respect, it addressed the question of sporting sanctions against the* [Player] *in accordance with art. 17 par. 3 of the Regulations.* […]

- *In this regard, the DRC pointed out that the* [Player]*, whose date of birth is 4 November 1995, was 21 years of age when he signed his* [Employment Contract] *with the* [Club] *on 28 March 2017, entailing that the unilateral termination of the* [Employment Contract] *occurred within the applicable protected period.*

- *With regard to art. 17 par. 3 of the Regulations, the Chamber emphasised that a suspension of four months on a player's ineligibility to participate in official matches is the minimum sporting sanction that can be imposed for breach of contract during the protected period.* […]

- *Having stated that, the DRC was eager to emphasise that the* [Player] *raised his income considerably by concluding an employment contract with* [FK Vardar] *and underlined that only one day passed between the termination of the* [Employment Contract] *and the execution of the new contract with* [FK Vardar].

- *Consequently, taking into account the circumstances surrounding the present matter, the Chamber was of the opinion that the* [Player] *only terminated the* [Employment Contract] *with the aim of signing a new contract with FK Vardar. As such, the DRC decided that, by virtue of art. 17 par. 3 of the Regulations, the* [Player] *is to be sanctioned with a restriction of four months on his eligibility to participate in official matches.*

- […] [T]*he Chamber decided that, in accordance with art. 17 par. 4 of the Regulations,* [FK Vardar] *shall be banned from registering any new players, either nationally or internationally, for the two entire and consecutive registration periods following the notification of the present decision.* […]"

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

21. On 13 June 2019, the Player filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") against the Appealed Decision, in accordance with Articles R47 and R48 of the 2019 edition of the CAS Code of Sports-related Arbitration (the "CAS Code"). In his Statement of Appeal, the Player nominated the Hon Michael Beloff QC, Barrister in Oxford, England, as arbitrator, impliedly requesting a panel of

three arbitrators. In addition, the Player requested a stay of execution of the Appealed Decision.

22. On the same date, the Player filed his Appeal Brief in accordance with Article R51 CAS Code.

23. On 1 July 2019, the Club informed the CAS Court Office that the issue of sporting sanctions was solely between the Player and FIFA, but that the Player's request for provisional measures was to be dismissed because the Player omitted to address the "*irreparable harm*" and "*balance or probability*" criteria in Article R37 CAS Code.

24. On 3 July 2019, FIFA requested that the Player's request for provisional measures be dismissed because he failed to demonstrate how his request fulfils the conditions established by Article R37 CAS Code.

25. On the same date, the Player filed an additional submission on provisional measures.

26. In addition, also on 3 July 2019, the Respondents agreed to appoint Mr Michele Bernasconi, Attorney-at-law in Zurich, Switzerland, as arbitrator.

27. On 4 July 2019, the Parties were informed that Mr Bernasconi had accepted his appointment, subject to a disclosure to the Parties pursuant to Article R33 CAS Code.

28. On 9 July 2019, the Appellant challenged the appointment of Mr Bernasconi further to Article R34 CAS Code.

29. On 10 July 2019, the Parties were informed that Mr Bernasconi had decided to decline his nomination as arbitrator.

30. On 16 July 2019, the Club informed the CAS Court Office that the Player's additional submission on provisional measures still failed to comply with the "*irreparable harm*" criterion.

31. On 17 July 2019, FIFA filed an additional submission on provisional measures, reiterating its request that the Player's application be dismissed.

32. On 18 July 2019, the Respondents agreed to appoint Mr Fabio Iudica, Attorney-at-law in Milan, Italy, as arbitrator.

33. Also on 18 July 2019, the Appellant submitted three exhibits, including a witness statement from the Appellant.

34. On 23 July 2019, the Appellant submitted an Application for Legal Aid.

35. On 24 July 2019, the Parties were informed that, in connection with his Application for Legal Aid, the Player had reconsidered his request for a three-member panel of arbitrators to be appointed and instead requested for the appointment of a sole arbitrator.

36. On 26 and 30 July 2019 respectively, FIFA and the Club objected to the appointment of a sole arbitrator.

37. On 2 August 2019, the Player insisted on the urgency of his application for provisional measures.

38. On the same date, the Deputy President of the CAS Appeals Arbitration Division issued an Order on Request for a Stay, with the following operative part:

> "*1. The application for a stay of the decision issued by the Dispute Resolution Chamber of FIFA on 11 April 2019, filed by Maksim Maksimov on 14 June 2019, in the matter CAS 2019/A/6337 Maksim Maksimov v. FIFA & FC Trakai, is granted.*
>
> *2. The costs of this Order shall be determined in the final award or in any other final disposition of this arbitration.*"

39. On 9 August 2019, the CAS Court Office informed the Parties that the Deputy President of the CAS Appeals Arbitration Division had decided to submit this case to a sole arbitrator, the identity of whom would be communicated to the Parties in due course.

40. On 26 August 2019, the Parties were informed that the Legal Aid Commission of the International Council of Arbitration for Sport had granted the Appellant's Application for Legal Aid and, in accordance with Article R54 CAS Code and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the arbitral tribunal appointed to decide the present matter was constituted as follows:

- Sole Arbitrator: Mr H. Pat Barriscale, Barrister in Limerick, Ireland

41. On 9 and 23 September 2019 respectively, the Club and FIFA filed their Answers in accordance with Article R55 CAS Code.

42. On 1 October 2019, the Player requested authorisation from the Sole Arbitrator for a further round of written submissions while briefly already addressing the points he wanted to make in such further round of written submissions. Furthermore, following a request from the CAS Court Office, the Player indicated his preference for a hearing to be held.

43. On 1 and 2 October 2019 respectively, the Club and FIFA indicated that they did not require a hearing to be held.

44. On 4 and 8 October 2019 respectively, the Club and FIFA objected to a further round of written submissions being held and requested that the Player's submission dated 1 October 2019 be declared inadmissible.

45. On 11 October 2019, on behalf of the Sole Arbitrator, the CAS Court Office informed the Parties as follows:

> "[T]*he Parties are informed that the Appellant's request to file additional submissions pursuant to Article R56 of the* [CAS Code] *is denied, on the basis that the Appellant has not succeeded in establishing exceptional circumstances necessary to warrant such additional submissions under Article R56 of the Code. Therefore, the Appellant's relevant observations of 1 October 2019 are stricken from the case file.*"

46. On 11 October 2019, the CAS Court Office informed the Parties that Mr Dennis Koolaard, Attorney-at-Law in Arnhem, the Netherlands, had been appointed as *ad hoc* Clerk.

47. On 28 October 2019, the CAS Court Office informed the Parties that the Sole Arbitrator had decided to hold a hearing.

48. On 17, 21 and 25 November 2019, the Player, the Club and FIFA returned duly signed copies of the Order of Procedure to the CAS Court Office.

49. On 9 December 2019, a hearing was held in Lausanne, Switzerland. At the outset of the hearing, all three Parties confirmed not to have any objection as to the constitution and composition of the Arbitral Tribunal.

50. In addition to the Sole Arbitrator, Ms Kendra Magraw, CAS Counsel, and Mr Dennis Koolaard, *ad hoc* Clerk, the following persons attended the hearing:

    a) For the Player:

        1) Mr Alexander Bogdanov, Counsel;
        2) Mrs Solomiya Boyar, Counsel.

    b) For FIFA:

        1) Mr Miguel Liétard, Director of Litigation;
        2) Ms Audrey Cech, Legal Counsel Litigation Department;
        3) Mr Ennio Bovolenta, Group Leader / Legal Counsel Players' Status Department.

    c) For the Club:

        1) Mr Mikhail Prokopets, Counsel;
        2) Mr Ilya Chicherov, Counsel.

51. The Sole Arbitrator heard evidence from the Player (by video conference) and Mr Virmanto Lemezio, Director of the Club (by video conference), a witness called by the Club.

52. The Parties had the full opportunity to examine the Player and Mr Lemezio, present their cases, submit their arguments and answer the questions posed by the Sole Arbitrator.

53. Before the hearing was concluded, the Parties expressly stated that they did not have any objection with the procedure adopted by the Sole Arbitrator and that their right to be heard had been respected.

54. The Sole Arbitrator confirms that he carefully heard and took into account in his decision all of the submissions, evidence, and arguments presented by the Parties, even if they have not been specifically summarised or referred to in the present arbitral award.

V. SUBMISSIONS OF THE PARTIES AND PRAYERS FOR RELIEF

A. The Appellant

55. The submissions of the Player, in essence, may be summarised as follows:

- In the Appealed Decision, the FIFA DRC was wrong in its finding that the Player did not provide any conclusive evidence to the fact that the Employment Contract was not negotiated. The FIFA DRC failed to take into account the direct evidence that neither the Club nor the Player disputed the fact that no negotiation took place.

- In the Appealed Decision, the FIFA DRC was wrong to say that the Player did not provide any conclusive evidence of the fact that he was not represented and/or assisted by any legal adviser during the negotiations of the Employment Contract. The FIFA DRC failed to take into account the factor that the Player himself evidenced to the fact that no legal assistance was provided to him. The Club not only did not dispute this, but also averred that it had no obligation to inform the Player about the importance of legal advice.

- Importantly, in its analysis of the facts in question, the FIFA DRC failed to reflect upon Article 6.2 of the FIFA Regulations on Working with Intermediaries, under which the Club was obliged to include into the Employment Contract a note about whether or not any services of an advisor were engaged into the process of conclusion of an employment contract.

- The FIFA DRC was wrong to read the terms of Article 9.6 of the Employment Contract in a literal interpretative way. Instead, the FIFA DRC was required by the law to ask itself whether the terms of Article 9.6 of the Employment Contract were open to more than one interpretation in the particular circumstances of the case. Even on the literal reading of the terms of Article 9.6 of the Employment Contract, the FIFA DRC failed to engage with an analysis of the phrase "*[…] on grounds and procedures that are not stipulated in this Contract […]*", as well as with the specific circumstances of the case relevant to this phrase. The FIFA DRC's literal interpretation is inadequate because it read the word "breach" into the wording of Article 9.6

of the Employment Contract. The FIFA DRC should have addressed the question of relevance of the principle of *contra proferentem.*

- The FIFA DRC fell in error of law by stating that "*[…] any party signing a document of legal importance without knowledge of its precise content does so on its own responsibility*". The FIFA DRC erred in shifting such responsibility upon the Player.

- Had the FIFA DRC asked itself the right question, the FIFA DRC could not have concluded that the terms of Article 9.6 of the Employment Contract were not capable of granting a right of unilateral termination, in the sense of a buy-out option, to the Player. This is so, because both the direct evidence and the undisputed facts of common ground pointed, ineluctably, to the conclusion that the terms in question were capable of granting the right concerned.

- The FIFA DRC was also wrong to: i) engage with the notion of reciprocity for the purposes of assessment of the enforceability of Article 9.6 of the Employment Contract; ii) factor in the relevant considerations of (a) mitigation and (b) saved remuneration; and iii) fail to consider that sporting sanctions are not applicable automatically.

- The FIFA DRC failed to properly assess the amount due as financial compensation, as well as the approach the imposition of sporting sanctions in a balanced manner, as required by the context of the particular circumstances of the case-at-hand.

56. On this basis, the Player submits the following prayers for relief:

"*1) Accept the present appeal against the challenged decision;*

2) Annul the sporting sanctions imposed on the Player/the Appellant;

3) Annul the financial sanctions imposed on the Player/the Appellant;

4) Condemn/order the Respondent_1 and/or the Respondent_2 to bear all costs, including administrative and arbitration, incurred with the present procedure, as well as to cover all legal expenses of the Player/Appellant related to the present proceedings.

5) In respect of ground 7, and without any prejudice to the above grounds: if ground 7 becomes relevant, then the CAS is requested to reassess the proportionality of all of the sanctions concerned."

B. The First Respondent

57. The submissions of FIFA, in essence, may be summarised as follows:

- A buy-out clause is generally understood as a clause which unequivocally confers one of the parties to an employment contract (in general the player) the right to prematurely terminate the contractual relationship at any time against the payment of a clearly fixed and predetermined amount stipulated in the contract. Such definition of a buy-out clause has also been acknowledged by CAS, which ruled that a "buy-out" clause is a clause "*that determines in advance the amount to be paid by a party in order to terminate prematurely the employment relationship*" (*CAS 2007/A/1358*).

- The party making use of such contractual right does not need to invoke a valid reason for putting an end to the contract, provided that said party pays the agreed sum without reservation or objection. Furthermore, the consequence of making use of such contractual right is that the party will not be imposed any sporting sanction.

- However, as rightfully qualified by the FIFA DRC in the Appealed Decision, Article 9.6 of the Employment Contract is not a "buy-out clause".

- A contractual clause should be interpreted in accordance with the principles established in Swiss law and the practice of the Swiss Federal Tribunal (the "SFT"), pursuant to which the wording of the clause should be the starting point in order to establish the real and common intention of the parties. Based on the so-called *Vertrauensprinzip*, a court must evaluate what was the intention of the parties at the time the contract was concluded, notably starting by the literal meaning of the words, which will, determine the presumed intention. CAS confirmed that if the "*meaning of those words is clear, it is not permissible for the parties to adduce evidence of their intentions*" (*CAS 2004/A/642*). The party seeking to rely on a subjective interpretation which diverges from the literal interpretation of the text bears the burden of proof.

- There is no room for the application of the *contra proferentem* principle in the present case. Indeed, the wording of Article 9.6 of the Employment Contract is clear and unambiguous. Moreover, the Player did not provide any evidence that the clause was not negotiated or that it was somehow imposed on him and FK Vardar:

    - The wording of Article 9.6 of the Employment Contract is clear in that it does not grant the Player the right to terminate but sets the consequences "*in the event*" the Employment Contract is terminated by the Player "*on grounds and procedures that are not stipulated in the contract*", or by the Club "*due to the player's wrongdoing*". It is therefore evident that the application of the clause is consequent to the unilateral termination of the Employment Contract, either by the Player or the Club.

    - The expression "*fine*" is inconsistent with a "*buy-out*" clause. A fine, per definition, cannot be regarded as the consideration for the exercise

of a contractual right, but it rather recalls a monetary sanction imposed as a consequence of a previous event.

- In addition to the payment of the fine, the clause also provides (by using the expression "*as well as*") the Player's obligation to "*compensate*" the Club, however without specifying the amount of such compensation. It is evident that the provision for a compensation can only lead to the conclusion that the clause at stake deals with the consequences of the termination of a contract due to a breach of contract.

- The clause only mentions a fine of EUR 50,000 to be paid together with an unquantified amount of compensation. Therefore, the amount to be paid by the Player in accordance with Article 9.6 of the Employment Contract is not determined in advance by the aforementioned clause and, consequently, also this basic requirement for a buy-out clause is absent.

- The clear meaning of the clause makes it unnecessary to resort to the *contra proferentem* or *in dubio contra stipulatorem* rules of interpretation. There is no room for interpretation diverging from the clear wording of the clause, which excludes any buy-out clause whatsoever. Moreover, from the analysis of the clause, it is evident that the common intention of the parties was to set the minimum economic consequences in case of breach of contract by the Player. What is more, the Player did not bring any new elements in order to establish any alleged common intention of the parties to insert a buy-out clause or that Article 9.6 of the Employment Contract was not negotiated or that it was imposed by the Club.

- The reasoning of the FIFA DRC in the Appealed Decision is convincing. The FIFA DRC followed the criteria set out in Article 17(1) FIFA RSTP and, in particular, it followed its well-established principle of the average value of the contracts (in this case of the Club and FK Vardar), which has already been confirmed by CAS.

- Because the Player did not terminate the Employment Contract on the basis of a valid buy-out clause, he is subject to the imposition of sporting sanctions as per Article 17(3) FIFA RSTP, which establishes a minimum sanction of a four-month period of ineligibility in playing official matches. The circumstances surrounding the present matter clearly warrant the imposition of sporting sanctions. It is crystal clear that the only plausible reason that can explain the decision of the Player to unilaterally terminate the Employment Contract with the Club was to be able to leave the Club and immediately sign a new and more remunerative employment contract with FK Vardar. The Player therefore clearly failed to prove that, in the present matter, there were clear or strong arguments to deviate from the wording of Article 17(3) FIFA RSTP or that the sanction imposed is evidently or grossly disproportionate.

58. On this basis, FIFA submits the following prayers for relief:

"*a) To reject the Appellant's appeal in its entirety.*

b) To confirm the decision rendered by the Dispute Resolution Chamber on 11 April 2019.

c) To order the Appellant to bear all costs incurred with the present procedure and to cover all the expenses of FIFA related to the present procedure."

C. The Second Respondent

59. The submissions of the Club, in essence, may be summarised as follows:

- It is common ground between the Parties that the Player prematurely and unilaterally terminated the Employment Contract with immediate effect by his email to the Club dated 30 August 2017, which constitutes a notice of termination, relying on Article 9.6 of the Employment Contract.

- In order to answer the question of whether the Player had just cause to terminate the Employment Contract, Article 9.6 of the Employment Contract needs to be interpreted. Since the Player relies on an alleged right, pursuant to Article 8 of the Swiss Civil Code (the "SCC"), he carries the burden of proof.

- A contractual clause needs to be interpreted in accordance with Article 18 of the Swiss Code of Obligations (the "SCO"). Pursuant to this provision, the parties' common intention must prevail over the wording of their contract. Therefore, the principle of *in claris non fit interpretatio* is prohibited in Swiss law, which is confirmed in CAS jurisprudence. Rather, the court must, first of all, inquire as to the real and common will of the parties. If the court succeeds in establishing a real and mutual will of the parties, this is a factual finding which binds the court. If the real intent of the parties cannot be established, the court must interpret the statements and behaviour of the parties according to the principle of reliance, by investigating how a statement or an attitude could be understood in good faith under all circumstances. Only once the application of this principle fails to bring about a conclusive result, some alternate means of interpretation may be resorted to, such as the so-called rule of ambiguous clauses (*in dubio contra stipulatorem*), which states that when in doubt, the contract must be interpreted against the drafter. This is however usually only applied in situations involving standardised contracts or where the parties have unequal bargaining power.

- Commencing with such exercise, the Player has not adduced any witness statement or material evidence with his Appeal Brief that would allow the Sole Arbitrator to establish the real and common intent of the Player and the

Club regarding the construction of Article 9.6 of the Employment Contract. In other words, the Player failed to discharge his burden of proof.

- Mr Virmanto Lemezio, the Club's Director, confirmed in a witness statement that he explained to the Player that Article 9.6 of the Employment Contract concerned the financial consequences in case of termination by the Player without just cause, or by the Club with just cause, but that it was never discussed that Article 9.6 of the Employment Contract might be interpreted as a buy-out right for the Player, which was confirmed in the Club's letter to the Player dated 31 August 2017 and the Club's letter to FK Vardar dated 8 September 2017.

- The payment by the Player of EUR 50,000, and the Club's acceptance thereof, does not support the Player's interpretation of Article 9.6 Employment Contract.

- By refusing to issue the Player's International Transfer Certificate (the "ITC"), the Club made it clear that it did not accept the Player's interpretation of Article 9.6 of the Employment Contract.

- Rather, Article 9.6 of the Employment Contract sets the consequences in two analogous scenarios, i.e.: i) when the Player terminates the Employment Contract without a contractual basis; or ii) when the Club dissolves the Employment Contract with just cause.

- Unlike in other clauses of the Employment Contract, no reference is made to a "right" for the Player to terminate it in Article 9.6 of the Employment Contract. The terminology of "*wrongdoing*" and "*fine*" in the same sentence is inconsistent with a buy-out clause, since when a buy-out clause is exercised, there is no wrongdoing and any payment to be made would not be a fine.

- Also, the Player claims that the purported buy-out right was "*imposed*" on him by the Club, and even complains about that, but, at the same time, seeks to avail of that clause. The Player's contradictory position does not merit protection from the Sole Arbitrator.

- Consequently, by grounding the termination of the Employment Contract on Article 9.6 and paying EUR 50,000 to the Club, the Player terminated the Employment Contract without just cause.

- As to the consequences of such unilateral termination without just cause, the Player invited the Sole Arbitrator to reassess the financial sanctions imposed on the Player without providing any further explanation or tangible evidence. This request is not specific enough and exposes the Sole Arbitrator to the risk of deciding *ultra petita*, and he is therefore limited in his power to modify the compensation for damages as awarded in the Appealed Decision.

- The Club agrees that the compensation is not to be calculated on the basis of Article 9.6 of the Employment Contract, but on the basis of Article 17(1) FIFA RSTP.

- Given the meagre submissions of the Player on the issue of compensation, there is no reason for the Sole Arbitrator to modify the Appealed Decision as to the financial part. However, should the Sole Arbitrator deem it necessary to recalculate the compensation, the following criteria should be taken into account:

  - On 14 August 2017, FC Fastav Zlin offered the Club EUR 175,000 for the transfer of the Player. Deducting the amount of EUR 50,000 already paid, the Club is therefore entitled to a minimum amount of compensation of EUR 125,000.

  - The time remaining under the Employment Contract was 31 months.

  - The Club paid the Player's former club FC Atlantas EUR 9,000 for training compensation. The non-amortized amount of EUR 7,750 should be added to the compensation.

  - The Player's average remuneration under the Employment Contract (EUR 46,500) and the employment contract with FK Vardar (EUR 319,477) was EUR 182,988. This figure gives an additional indication as to the value of the Player's services at the time of the termination of the Employment Contract and forms part of the compensation due to the Club.

- Consequently, the Sole Arbitrator should dismiss the appeal and confirm the Appealed Decision regarding the issue of compensation for damage.

- The issue of sporting sanctions under Article 17(3) FIFA RSTP is *res inter alios acta* between FIFA and the Player (i.e. this is a vertical dispute), for which the Club has no *locus standi*. Therefore, the Club shall not express its view on the point.

60. On this basis, the Club submits the following prayers for relief:

"*1. Dismiss the appeal filed by the Appellant against the decision passed on 11 April 2019 by the FIFA Dispute Resolution Chamber insofar as it is admissible.*

2. Confirm the decision passed on 11 April 2019 by the FIFA Dispute Resolution Chamber.

3. Order the Appellant to bear all the costs incurred with the present procedure.

4. *Order the Appellant to pay the Second Respondent a contribution towards its legal and other costs in an amount to be determined at the discretion of the Sole Arbitrator.*"

VI. JURISDICTION

61. The jurisdiction of CAS, which is not disputed, derives from Article 58(1) FIFA Statutes (2018 Edition), as it determines that "[a]*ppeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, members or leagues shall be lodged with CAS within 21 days of notification of the decision in question"* and Article R47 CAS Code. The jurisdiction of CAS is not contested and is further confirmed by the Order of Procedure duly signed by the Parties.

62. The Sole Arbitrator notes that Article 10.1 of the Employment Contract provides as follows:

> "*All disputes related to this Contract shall be resolved through negotiations and mutual agreement. In the event of failure to reach an agreement within 30 days, any disputes in accordance with the FFL's statute referring to the competence of the FFL Disciplinary Authorities shall be considered by the Disciplinary Authorities of FFL. All other disputes arising out of or in relation to this Contract shall be finally resolved by arbitration in the Vilnius Commercial Arbitration Court, in accordance with the rules of the Arbitration procedure.* […] *The arbitral tribunal shall consist of three arbiters. Vilnius, Republic of Lithuania shall be the place of arbitration. In the course of the arbitration process. Lithuanian shall be used. The substantive right of the Republic of Lithuania shall be applied to the dispute.*"

63. Notwithstanding the Parties' initial choice to submit disputes to the Vilnius Commercial Arbitration Court, the Sole Arbitrator takes note of the Parties' mutual, implicit agreement to submit the present dispute to CAS.

64. It follows that CAS has jurisdiction to adjudicate and decide on the present dispute.

VII. ADMISSIBILITY

65. The appeal was filed within the deadline of 21 days set by Article 58(1) FIFA Statutes. The appeal complied with all other requirements of Article R48 CAS Code, including the payment of the CAS Court Office fee.

66. It follows that the appeal is admissible.

VIII. APPLICABLE LAW

67. The Player did not make any specific submissions on the law to be applied in the matter-at-hand.

68. FIFA and the Club submit that, pursuant to Article R58 CAS Code, in conjunction with Article 57(2) FIFA Statutes, the various regulations of FIFA apply primarily, in particular the FIFA Regulations on the Status and Transfer of Players (edition 2016) (the "FIFA RSTP"), with the subsidiary application of Swiss law should the need arise to fill any gaps or lacuna in the FIFA regulations.

69. Article 10.1 of the Employment Contract provides, *inter alia*, as follows:

> "[…] *The substantive right of the Republic of Lithuania shall be applied to the dispute*."

70. Article R58 CAS Code determines as follows:

> "*The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.*"

71. Article 57(2) FIFA Statutes determines the following:

> "*The provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law.*"

72. The Sole Arbitrator notes that, even though based on Article 10.1 of the Employment Contract one could come upon the idea that the Law of the Republic of Lithuania may be applicable in the matter-at-hand, none of the Parties have pleaded Lithuanian law in the matter-at-hand.

73. The Player also did not object to or rebut the Respondents' submissions on the primary application of the FIFA RSTP and the subsidiary application of Swiss law in the matter-at-hand.

74. Accordingly, the Sole Arbitrator finds that the various regulations of FIFA are to be applied primarily, in particular the FIFA RSTP, and, subsidiarily, Swiss law should the need arise to fill a possible gap in the various regulations of FIFA.

IX. MERITS

A. The Main Issues

75. The main issues to be resolved by the Sole Arbitrator are the following:

i. Did the Player have just cause to terminate the Employment Contract?

and if so:

ii. What are the financial consequences thereof?
iii. What are the disciplinary consequences thereof?

i. Did the Player have just cause to terminate the Employment Contract?

76. Whereas the Player maintains that he had just cause to terminate the Employment Contract as Article 9.6 of the Employment Contract allegedly constitutes a "buy-out clause" that he validly exercised, the Club submits that Article 9.6 is not a buy-out clause, but a "liquidated damages clause", and that the Player did not have just cause to terminate the Employment Contract.

77. The Sole Arbitrator is therefore put to the task of assessing whether Article 9.6 of the Employment Contract constitutes a buy-out clause or a liquidated damages clause.

78. The Commentary to the FIFA RSTP contains a definition of a buy-out clause:

> "*The parties* […] *may stipulate in the contract the amount that the player shall pay to the club as compensation in order to unilaterally terminate the contract (a so-called buyout clause). The advantage of this clause is that the parties mutually agree on the amount at the very beginning and fix this in the contract. By paying this amount to the club, the player is entitled to unilaterally terminate the employment contract. With this buyout clause, the parties agree to give the player the opportunity to cancel the contract at any moment and without a valid reason, i.e. also during the protected period, and as such, no sporting sanctions may be imposed on the player as a result of the premature termination"*.

79. The wording of Article 9.6 of the Employment Contract is repeated here for the sake of convenience:

> "*9.6. In the event of unilateral termination of the* [Employment Contract] *by the* [Player]*, on grounds and procedures that are not stipulated in this* [Employment Contract]*, or in the event of unilateral termination of this* [Employment Contract] *by the Club due to the Player's wrongdoing, the* [Player] *is obliged to pay a fine in the amount of EUR 50,000 (fifty thousand) to the Club within 14 days, as well as to compensate the expenses incurred by the Club and related to the implementation of this* [Employment Contract]."

80. The Sole Arbitrator notes that Article 9.6 contains the word "fine" and finds this word to be incompatible with the functioning of a buy-out clause, because the word presupposes the commission of some kind of breach, whereas the execution of a buy-out clause is a contractual right. A fine is typically imposed before a certain event

occurs, i.e. payment of a fine *ex ante* does still not allow one to commit the violation sanctioned by the fine.

81. The Sole Arbitrator also agrees with FIFA that in order for a contractual clause to be considered as a buy-out clause, the clause must clearly stipulate the exact amount to be paid in order to validly execute the buy-out clause. Article 9.6 is not clear in this respect. A fine of EUR 50,000 would have to be paid, but the Player should also "*compensate the expenses incurred by the Club*" without indicating what such expenses are comprised of.

82. Article 9.6 of the Employment Contract also does not indicate in any way that the Player has a right or is entitled to terminate the Employment Contract. Rather, Article 9.6 describes the consequences in case: i) the Player terminates the Employment Contract on grounds not provided for therein; or ii) the Club terminates the Employment Contract due to the Player's wrongdoing.

83. The above considerations, the wording of the clause and the logic behind the clause are all entirely consistent with the functioning of a liquidated damages clause, i.e. a clause by means of which the contractual parties deviate from the regime to calculate damages in case an employment contract has been terminated without just cause as provided for in Article 17(1) FIFA RSTP. Article 17(1) FIFA RSTP expressly permits doing so:

> "[U]*nless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria.*"

84. For the reasons above, the Sole Arbitrator finds that the wording of Article 9.6 clearly suggests that the parties intended to conclude a liquidated damages clause, as opposed to a buy-out clause.

85. The Sole Arbitrator finds that the alternative methods of interpreting contractual clauses suggested by the Player do not lead to any other conclusion. There is simply no indication on file suggesting that Article 9.6 of the Employment Contract was intended to function as a buy-out clause, while the burden of proof in this respect lies with the Player.

86. The Player's reference to the principle of *contra proferentem* or *contra stipulatorem* is of no avail, for this principle only comes into play as a last resort, i.e. if the intention of the parties cannot be established by any other method of interpretation. The Sole Arbitrator feels comforted in this regard by the following considerations of another CAS panel:

> "*The latter principle, however, has a limited scope of application. It only comes into play where the contents of a contract cannot be determined, i.e. where the terms of the contract remain ambiguous (see BK-OR I/WIEGAND, Art. 18 N. 40). In addition, this principle may apply on a subsidiary basis, i.e if the primary interpretation in application of the principle of good faith does*

> *not lead to a clear result (BKOR I/WIEGAND, Art. 18 N. 40). The Panel finds that there is no room for the principle in dubio contra stipulatoremin the case at hand, because the Panel arrived at a clear and unambiguous result in application of the principles enshrined in Article 18 para. 1 CO.*" (*CAS 2017/A/5172*, para. 84 of the abstract published on the CAS website)

87. The Player's contention that the content of the Employment Contract was not negotiable and was merely imposed on him is of no relevance. The Sole Arbitrator finds that the Player failed to establish that he was somehow forced to enter into the Employment Contract. Even accepting the Player's contention that no negotiations took place, this still does not lead to any other conclusion, for the Player was free to decline the Club's offer.

88. Furthermore, even accepting that the Player was not represented by legal counsel or an agent/intermediary, this also does not lead to any other conclusion, for the Player failed to establish that he insisted on consulting a legal expert and that such request was declined by the Club. To the contrary, Mr Lemezio testified that he suggested the Player to have the draft Employment Contract reviewed by a lawyer, but that the Player did not consider this necessary. Although questioned in this respect by counsel for the Club at the hearing, the Player did not deny that he was offered such possibility prior to signing the Employment Contract. Considering this, the Sole Arbitrator finds that it must be concluded that the Player voluntarily opted to enter into the Employment Contract without consulting any advisors.

89. The Sole Arbitrator is also not convinced by the Player's allegation during his testimony that he had reached an oral agreement with Mr Lemezio about a buy-out clause for an amount of EUR 50,000. The Player's allegation was denied by Mr Lemezio and the Player's contention does not find support in any other aspect of the evidence on file.

90. The absence of any reference in the Employment Contract to the fact that the Player was not represented by any agent/intermediary is of no relevance. A football player is not obliged to be represented during contractual negotiations.

91. On the basis of the above, the Sole Arbitrator finds that Article 9.6 of the Employment Contract is not a buy-out clause and that the Player should in good faith have understood that Article 9.6 was not a buy-out clause. This is particularly so, because the Club informed the Player that Article 9.6 was not a buy-out clause by letter dated 31 August 2017, while urging the Player to report at the training ground. Despite such good faith warning from the Club, the Player persisted in relying on Article 9.6 as a buy-out clause.

92. In any event, the Sole Arbitrator finds that Article 9.6 of the Employment Contract did not give the Player the right to prematurely terminate the Employment Contract against the payment of EUR 50,000. Even if Article 9.6 would be interpreted as a buy-out clause, *quod non*, the clause was still not validly exercised by the Player because the wording clearly indicates that besides paying a fine of EUR 50,000 the Player was also required to "*compensate the expenses incurred by the Club and*

related to the implementation of this [Employment Contract]", which the Player undisputedly did not.

93. The Player does not invoke any other basis that would potentially have justified his premature termination of the Employment Contract.

94. Consequently, the Sole Arbitrator finds that the Player terminated the Employment Contract without just cause.

ii. What are the financial consequences thereof?

95. Article 17(1) FIFA RSTP provides as follows:

> "*The following provisions apply if a contract is terminated without just cause:*
>
> *1. In all cases, the party in breach shall pay compensation. Subject to the provisions of article 20 and Annexe 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the 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 the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period.*"

96. As indicated *supra*, the Sole Arbitrator finds that the parties attempted to deviate from the application of Article 17(1) FIFA RSTP by means of Article 9.6 of the Employment Contract.

97. The FIFA DRC however reasoned in the Appealed Decision that Article 9.6 of the Employment Contract could not be applied, because it was not sufficiently clear in determining the amount or the method of calculation to be applied and that "*the clause at stake was not reciprocal, meaning that it did not foresee the consequences of the unilateral termination without just cause by the* [Club] *and that, as much, it could not be seen as enforceable*". The FIFA DRC therefore applied Article 17(1) FIFA RSTP in calculating the amount of compensation to be paid by the Player to the Club.

98. Whereas the Player objected to the FIFA DRC's conclusion in respect of reciprocity, he did not object to the considerations in the Appealed Decision that Article 9.6 could not be applied because its content was not sufficiently clear and that Article 17(1) FIFA RSTP was therefore to be applied.

99. Despite the fact that the Player did not object to the FIFA DRC's approach in this regard, the Sole Arbitrator does not consider such approach of the FIFA DRC to be unreasonable. Besides the requirement to pay a fine in the amount of EUR 50,000, Article 9.6 of the Employment Contract is indeed not clear in terms of the financial

consequences of a unilateral breach of contract by the Player, and the Sole Arbitrator therefore opts to apply Article 17(1) FIFA RSTP.

100. The Sole Arbitrator takes due note of previous CAS jurisprudence establishing that the purpose of Article 17(1) FIFA RSTP is basically nothing else than to reinforce contractual stability, i.e. to strengthen the principle of *pacta sunt servanda* in the world of international football, by acting as a deterrent against unilateral contractual breaches and terminations, be it breaches committed by a club or by a player (*CAS 2008/A/1519-1520*, para. 80, with further references to: *CAS 2005/A/876*, p. 17*: "*[…] *it is plain from the text of the FIFA Regulations that they are designed to further 'contractual stability'* […]*"*; *CAS 2007/A/1358*, para. 90; *CAS 2007/A/1359*, para. 92: *"*[…] *the ultimate rationale of this provision of the FIFA Regulations is to support and foster contractual stability* […]*"*; confirmed in *CAS 2008/A/1568*, para. 6.37).

101. In respect of the calculation of compensation in accordance with Article 17(1) FIFA RSTP and the application of the principle of "positive interest", the Sole Arbitrator follows the framework set out by a previous CAS panel as follows:

> "*When calculating the compensation due, the judging body will have to establish the damage suffered by the injured party, taking in consideration the circumstances of the single case, the arguments raised by the parties and the evidence produced. Of course, it is the injured party that requests compensation who bears the burden of making, as far as possible, sufficient assertions and who bears as well the burden of proof.*
>
> *As it is the compensation for the breach or the unjustified termination of a valid contract, the judging authority shall be led by the principle of the so-called positive interest (or "expectation interest"), i.e. it will aim at determining an amount which shall basically put the injured party in the position that the same party would have had if the contract was performed properly, without such contractual violation to occur. This principle is not entirely equal, but is similar to the praetorian concept of in integrum restitution, known in other law systems and that aims at setting the injured party to the original state it would have if no breach had occurred.*
>
> *The fact that the judging authority when establishing the amount of compensation due has a considerable scope of discretion has been accepted both in doctrine and jurisprudence (cf. CAS 2008/A/1453-1469, N 9.4; CAS 2007/A/1299, N 134; CAS 2006/A/1100, N 8.4.1. In relation to Swiss employment law, see Streiff/von Kaenel, Arbeitsvertrag, Art. 337d N 6, and Staehelin, Zürcher Kommentar, Art. 337d N 11 – both authors with further references; see also Wyler, Droit du travail, 2nd ed., p. 523; see also the decision of the Swiss Federal Tribunal BGE 118 II 312f.) (…).*
>
> *The principle of the "positive interest" shall apply not only in the event of an unjustified termination or a breach by a player, but also when the party in breach is the club. Accordingly, the judging authority should not satisfy itself in assessing the damage suffered by the player by only calculating the net*

> *difference between the remuneration due under the existing contract and a remuneration received by the player from a third party. Rather, the judging authority will have to apply the same degree of diligent and transparent review of all the objective criteria, including the specificity of sport, as foreseen in art. 17 FIFA Regulations.*" (*CAS 2008/A/1519-1520*, para. 85 *et seq.* of the abstract published on the CAS website)

102. The Sole Arbitrator finds that the legal framework set out above and the principle of positive interest are applicable to the present case. Against this background, the Sole Arbitrator will proceed to assess the Club's objective damages, before applying his discretion in adjusting this total amount of objective damages to an appropriate amount, as necessary.

103. The Sole Arbitrator does not consider the FIFA DRC's approach to calculate the amount of compensation to be paid by the Player to the Club on the basis of the average of the Player's salary with the Club (EUR 46,500) and with FK Vardar (EUR 319,477) unreasonable. The Player also did not object to this methodology, which in principle results in an amount of compensation based on the average of the Player's salary with the Club and FK Vardar during the remaining period of validity of the Player's Employment Contract with the Club, i.e. EUR 182,988 (EUR 319,477 + EUR 46,500 / 2).

104. However, the Player requests that the Sole Arbitrator take into account mitigation and saved remuneration, without however substantiating on which basis this should be done or corroborating this with any evidence. The Sole Arbitrator therefore finds that he is barred from entering into such exercise.

105. Although entitled to adjust the objective amount of compensation to an appropriate amount based on the subjective circumstances of the case, the Sole Arbitrator finds that there are no particular facts or circumstances that should lead to an increase or decrease of the amount of compensation calculated above.

106. One factor that is obviously to be taken into account is however that the Player already paid the Club an amount of EUR 50,000. This amount is therefore to be deducted from the amount of compensation calculated above.

107. Consequently, the Sole Arbitrator finds that the Player shall pay compensation for breach of contract to the Club in an amount of EUR 132,988 (i.e. EUR 182,988 -/- EUR 50,000).

iii. What are the disciplinary consequences thereof?

108. Article 17(3) FIFA RSTP provides as follows:

> "*In addition to the obligation to pay compensation, sporting sanctions shall also be imposed on any player found to be in breach of contract during the protected period. This sanction shall be a four-month restriction on playing in official matches. In the case of aggravating circumstances, the restriction*

> *shall last six months. These sporting sanctions shall take effect immediately once the player has been notified of the relevant decision. The sporting sanctions shall remain suspended in the period between the last official match of the season and the first official match of the next season, in both cases including national cups and international championships for clubs. This suspension of the sporting sanctions shall, however, not be applicable if the player is an established member of the representative team of the association he is eligible to represent, and the association concerned is participating in the final competition of an international tournament in the period between the last match and the first match of the next season. Unilateral breach without just cause or sporting just cause after the protected period shall not result in sporting sanctions. Disciplinary measures may, however, be imposed outside the protected period for failure to give notice of termination within 15 days of the last official match of the season (including national cups) of the club with which the player is registered. The protected period starts again when, while renewing the contract, the duration of the previous contract is extended.*"

109. It remained undisputed that the parties entered into the Employment Contract on 28 March 2017 and that it was terminated by the Player on 30 August 2017. The Employment Contract was therefore terminated during the so-called protected period.

110. Article 17(3) FIFA RSTP provides that the imposition of sporting sanctions in case an employment contract is terminated in the protected period is not optional. It is an automatic consequence thereof and the sanction shall be a four-month restriction on playing in official matches, at a minimum.

111. This is indeed the position taken by FIFA in the proceedings in the matter-at-hand and FIFA therefore supports the decision of the FIFA DRC to impose a four-month restriction on the Player in the Appealed Decision.

112. The Player maintains that, contrary to the wording of Article 17(3) FIFA RSTP, the FIFA DRC does not automatically impose sporting sanctions.

113. The Sole Arbitrator finds that the practice of FIFA is indeed different from the wording of Article 17(3) FIFA RSTP, which is corroborated by for example *CAS 2017/A/4935*, para. 206 of the abstract published on the CAS website; with reference to, *inter alia*, *CAS 2007/A/1359*. Indeed, in *CAS 2017/A/4935*, FIFA apparently submitted itself that Article 17.3 of the FIFA RSTP provides a competent decision-making body, such as the FIFA DRC, with "*the power, but by no means the obligation to impose a sporting sanction on a player found to be in breach of contract without just cause during the protected period*" (*CAS 2017/A/4935*, para. 130 of the abstract published on the CAS website).

114. Also contrary to the position of FIFA, the Sole Arbitrator finds that it is not the Player's burden to prove that there are clear and strong arguments which would warrant a deviation from Article 17(3) FIFA RSTP and that the sanction imposed by

FIFA is evidently and grossly disproportionate. Rather, it is FIFA's burden to prove that the imposition of sporting sanctions is warranted.

115. In this respect, FIFA submits that the only plausible reason that can explain the decision of the Player to unilaterally terminate his Employment Contract with the Club was for the Player to be able to leave the Club, and immediately sign a new and more remunerative contract with FK Vardar.

116. The Sole Arbitrator agrees with this argument of FIFA. In particular, FK Vardar offered the Player a significantly higher salary than the Club. Although maybe understandable from an economic perspective, the Player opted to put his personal interests over his contractual commitment towards the Club. This is clear violation of one of the main premises underlying the FIFA RSTP, namely contractual stability and the principle that contracts must be respected (Article 1(3)(b) FIFA RSTP).

117. Considering such circumstances, the Sole Arbitrator indeed finds it appropriate that the Player is not only held to compensate the Club for its damages, but that also sporting sanctions are imposed on the Player. A four-month ban (suspended between in the period between the last official match of the season and the first official match of the next season) is not considered disproportionate in this regard.

118. Consequently, the Sole Arbitrator finds that a four-month ban on playing in official matches is to be imposed on the Player.

B. Conclusion

119. Based on the foregoing, the Sole Arbitrator finds that:

i) The Player terminated the Employment Contract without just cause.
ii) The Player shall pay compensation for breach of contract to the Club in an amount of EUR 132,988.
iii) A four-month ban on playing in official matches is to be imposed on the Player.

120. All other and further motions or prayers for relief are dismissed.

X. COSTS

121. Article R64.4 CAS Code, which is applicable to this proceeding, provides as follows:

> "*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 fees of the ad hoc clerk, if any, calculated in accordance with the CAS fee scale,*

- *a contribution towards the expenses of the CAS, and*
- *the costs of witnesses, experts and interpreters.*

The final account of the arbitration costs may either be included in the award or communicated separately to the parties. The advance of costs already paid by the parties are not reimbursed by the CAS with the exception of the portion which exceeds the total amount of the arbitration costs."

122. Article R64.5 CAS Code provides as follows:

"*In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule and without any specific request from the parties, 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.*"

123. Having taken into account the outcome of the arbitration, in particular the fact that the Player's appeal has been dismissed, the Sole Arbitrator considers it reasonable and fair that the costs of the arbitration, in an amount that will be determined and notified to the Parties by the CAS Court Office, shall be borne in full by the Player.

124. Furthermore, pursuant to Article R64.5 CAS Code and in consideration of the complexity and outcome of the proceedings as well as the conduct and the financial resources of the Parties – in particular that the Player's appeal has been dismissed in its entirety, that the Player's application for a stay of execution of the Appealed Decision was upheld, that the Player was granted Legal Aid, that FIFA was not represented by external counsel, and that the Player was the only party that requested for a hearing to be held, but that such hearing turned out not to add anything to Player's written submissions while FIFA and the Club had to incur expenses in order to be present at the hearing – the Sole Arbitrator rules that the Player shall pay a contribution towards the legal fees and other expenses incurred in connection with the present arbitration proceedings in the amount of CHF 4,000 to the Club. FIFA shall bear its own costs.

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ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 13 June 2019 by Maksim Maksimov against the decision issued on 11 April 2019 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is dismissed.

2. The decision issued on 11 April 2019 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is confirmed.

3. The costs of the arbitration, to be determined and served to the Parties by the CAS Court Office, shall be borne in full by Maksim Maksimov.

4. Maksim Maksimov shall bear his own costs and is ordered to pay an amount of CHF 4,000 (four thousand Swiss Francs) to FC Trakai as a contribution towards its legal fees and other expenses incurred in connection with these arbitration proceedings.

5. The *Fédération Internationale de Football Association* shall bear its own costs.

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

Seat of arbitration: Lausanne, Switzerland
Date: 28 May 2020

THE COURT OF ARBITRATION FOR SPORT

H. Pat Barriscale
Sole Arbitrator

Dennis Koolaard
Ad hoc Clerk