Arbitration CAS CAS 2010/O/2132 Shakhtar Donetsk v. Ilson Pereira Dias Junior, award of 28 September 2011

Panel: Mr. José Juan Pintó Sala (Spain), President; Mr. Michele Bernasconi (Switzerland); Mr. Rui Botica Santos (Portugal)

Football
Contract of employment between a player and a club
Validity of an 'extension clause' providing for an extension of the contract
Breach of contract by the player without just cause
Liquidated damages clause
Compensation or 'set off' of claim between an employer and an employee in an employment relationship
Compensation for termination

1. **A contractual clause providing for the extension of the contract of employment between the parties under certain conditions previously stipulated in the agreement is valid as long as both the Player and the Club could compel the counterparty to conclude the agreed extension of the Agreement. Accordingly, this cannot be considered a unilateral right of the Club and it cannot be understood that the clause was drafted in the interest or detriment of one of the parties only. The fact that the event triggering the obligation of the parties to conclude a new contract also depended on both parties' will is also relevant. Moreover, the fact that the clause only foresees the consequences of its potential breach by the Player does not mean at all that in case it was the Club the one breaching the clause, no consequence would arise.**

2. **By repeatedly refusing to sign the extension of the employment contract as provided by the extension clause, the Player breached its obligations under this clause.**

3. **According to the valid extension clause, the Player shall be ordered to pay to the Club the sum contractually agreed in the said clause (liquidated damages) increased with the corresponding interest, which in accordance with article 102 *et seq.* of the Swiss Code of Obligations (CO), is to be fixed in 5 % per annum from the date of the Agreement's termination. However this agreed sum shall be reduced in (i) the amounts already retained by the Club on account of such sum and (ii) the amounts that the Player should have received for the days he remained with the Club.**

4. **The compensation or "set-off" of claims between an employer and an employee in an employment relationship is governed by the general provisions of art. 120 et seq. of the Swiss CO as well as by the specific provision of Art. 323b para. 2 of the Swiss CO. A set-off by the Club of a part of the salary with the Club's claim against the Player because of the breach of a contractual clause is valid, unless it violates the limits permitted by Swiss law, in particular those set out in article 323b para. 2 of the Swiss**

CO. According to article 323b para. 2 of the Swiss CO, the salary may be set-off (i) for the part that is above the so-called minimum living wage and (ii) in full if the claim is for compensation of an intentional damage (e.g. theft, forgery, fraud, …). The *dolus eventualis* is sufficient, for example when an employee has not the direct intent of causing a damage to his employer, but knows or should know that his behaviour will cause a damage to the employer, for example when he leaves his working place (that is, when he unilaterally terminates his employment contract) without just cause. Where a Club is entitled to set-off its claim against part of the salary of the Player, the Player is not entitled to terminate the Agreement.

5. **Article 17.1 of the FIFA RSTP, extensively commented in CAS jurisprudence sets the principles and method of calculation of compensations in case of breach of contract. It gives utmost importance to what the parties have agreed in the contract concerning the consequences of contractual breaches, even to the point of superseding the other criteria referred to in such article. As a consequence, the compensation to be awarded to the Club as regards of the Player's premature termination of the Agreement shall take into due consideration the liquidated damages clause contained in the Agreement and can therefore under such particular circumstances be quantified as corresponding to the aggregate of the salaries that would have been payable to the Player during the period comprised between the termination date and the end of the contractual initial duration increased with the corresponding interest of 5 % per annum.**

FC Shakhtar Donetsk ("Shakhtar" or the "Claimant" or the "Club") is a football club with seat in Donetsk (Ukraine), affilliated to the Football Federation of Ukraine.

Mr. Ilson Pereira Dias Junior (the "Player" or the "Respondent") is a Brazilian professional football player.

A summary of the most relevant facts and the background giving rise to the present dispute will be developed on the basis of the parties' submissions and the evidence taken. Additional factual background may be also mentioned in the legal considerations of the present award.

On 28 July 2007 the Player was transferred from São Paulo Futebol Clube ("São Paulo") to Shakhtar in exchange of EUR 10.000.000.

On the same date, the Player and Shakhtar signed an employment agreement (the "Agreement").

The referred Agreement was submitted to the Laws of Ukraine and to the extent compatible with such law, to the FIFA governing the Status and Transfer of Players (edition 2005) - the "FIFA RSTP"- and Swiss Law.

The duration of the Agreement was ruled in clause 7.1. as follows:

> *"The present Contract is valid from July 30, 2007 till June 30, 2011. The Player and the Club have agreed that unless the Club sells the Player's right during 2 first seasons of this Contract validity, the parties shall sign new three seasons Labour contract on the same conditions valid until June 30, 2012. If the player refuses to extend this Contract he shall pay to the Club the fine equal to the Player's salary per 5th season stipulated in Appendix 1 of this Contract".*

The Player's salary was included in an appendix to the Agreement, which was afterwards re-negotiated twice in successive additional agreements dated 20 February 2008 and 1st March 2009.

The Player was not transferred to a third party within the first two seasons of the Agreement.

Thereafter the Club started asking the Player to, in accordance with clause 7.1 of the Agreement, sign a new contract valid until 30 June 2012.

On 14 December 2009 the Club requested the Player in writing via Notary Public to sign the new contract at the latest on 20 December 2009, and warned him about the situation of breach in which he would be incurs if he failed to do so.

On 23 December 2009 the Club sent a letter to the Player in which it mentioned, *inter alia*, that the deadline given to sign the new contract had expired, that the Player's behaviour constituted a breach of the Agreement and that the penalty clause convened in the Agreement to such purpose would be applied.

On 9 January 2010 the Player's legal representative sent a communication to the Club in which it was basically mentioned that clause 7.1. of the Agreement was unilateral and could not be enforced by the Club and thus, that the Player was not obliged to sign a new employment agreement in the terms requested by the Club. However it was also stated that the Player was interested in agreeing an extension of the Agreement, but in terms to be negotiated by both parties.

On 20 January 2010 the Club replied to the above mentioned communication, rejecting the alleged unilateral nature of clause 7.1 of the Agreement.

On 3rd February 2010 the Club sent a letter to the Player informing him that in light of the breach of his obligation under clause 7.1 of the Agreement, it would retain the amount of the fine contractually foreseen for such a breach from his future salaries. The referred letter, in its pertinent part, reads as follows:

> *"Following to the above mentioned the Club has applied the fine stipulated in clause 7.1 of the contract. The Club will retain the amount of fine from your future salary starting from January 2010. Below is a breakdown of the amount to be paid by the Club under the labour contract:*
>
> *138,103 EUR * 18 month (outstanding salary) + 5389 * 18 month (house rent compensation) – 2.130.228 EUR (salary to fifth season/fine)= EUR 452.628*
>
> *So your monthly salary will be reduced to the amount of 452.628/18 months = 25.146 EUR before tax, which after tax deduction will be equal to EUR 21.166 net".*

On 7 February 2010 the Player's legal representative sent another communication to the Club opposing to the reduction of salary it intended to apply, and warned the Club that such a reduction constituted a breach of the Club's contractual commitment to pay the salary, which entitled the Player to terminate the Agreement.

On 11 February 2010 the Club, in a letter addressed to the Player's legal representative, refused again the alleged unilateral nature of clause 7.1. of the Agreement as well as other statements made in the previous letter of the Player's representative dated 7 February 2010.

During March 2010 the parties negotiated the terms of a new employment contract, but finally they did not reach an agreement. The Club, in a fax to the Player's legal representative dated 1st April 2010, referred to this absence of agreement as follows:

> *"Following your position that denies your obligation to sign the fifth season of the Labour Contract, FC Shakhtar invited you and your representatives to negotiate a new long term labour agreement in Donetsk on March 17-18, 2010 which Club has offered you in order to avoid any further problem due to your breach of the Labour Contract.*
>
> *In good faith and in course of that meeting FC Shakhtar offered you to sign the four seasons labour contract amounting to 8.000.000 euro net (i.e. 2.000.000 euro net per season) plus match bonuses. However, you filed a counteroffer to sign the four-five season contract amounting to 3.000.000 euro net per season plus match bonuses. The counteroffer has not been accepted by the Club as excessive and as showing a clear intention of not willing to reach an agreement.*
>
> *I appreciate your efforts to find an amicable solution but I am definitely frustrated that the agreement has not been reached when we were trying to finalize a situation coming from your non fulfilment of the Labour Contract.*
>
> *Anyhow, I believe that the dispute will not influence your performance in the football pitch".*

On 5 April 2010 the Player's legal representative replied to such fax of 1st April, regretting the impossibility of reaching an agreement but at the same time rejecting any breach on the Player's side and requesting that the Player's wages regular payment was restored.

On 28 April 2010 the Player's legal representative sent a new letter to the Club claiming for the payment of salaries due to the Player.

On 5 May 2010 the Club answered to the Player that there were no outstanding payments but the application of a fine due to the Player's breach of his duty to extend the duration of the Agreement.

Within all this period the Player kept on playing for the Club.

On 17 May 2010 the Player's legal representative sent a letter to the Club terminating the Agreement with just cause due to the lack of payment of the salary, and warned that it would start actions in front of FIFA to obtain an indemnification from the Club.

On 19 May 2010 the Club rejected in writing the unilateral termination of the Agreement executed by the Player and informed him that the Club would start proceedings against him before the CAS.

On the same date the Player's legal representative replied to the last communication of the Club, insisting in the termination of the Agreement with just cause and in the fact that the Club was not entitled to deduct the alleged penalty from the Player's salaries.

On 24 May 2010 the Player filed a claim against the Club before FIFA, which on 20 August 2010 resolved that it was not competent to deal with such claim.

On 31st July 2010 the Player signed an employment contract with the Brazilian sport entity Desportivo Brasil Participaçoes Ltda. ("Desportivo Brasil").

On 30 August 2010 the Player signed another employment agreement with São Paulo.

On 3rd June 2010 the Club filed before the CAS a Request for Arbitration against the Player, asking the CAS to:

1. *Accept this request for arbitration against the Respondent Ilson Pereira Dias Junior.*
2. *Adopt an award condemning the Player to pay the Club compensation for his unilateral breach of contract without just cause in the amount of EUR 20.000.000 in accordance with article 7.2.4c of the Agreement.*
3. *In the alternative, to adopt an award condemning the Player to pay the Club for his unilateral breach of contract without just cause in the amount of EUR 13,715,286.53 in accordance with article 17 of the Regulations, Ukrainian and Swiss Law.*
4. *Condemn to the Player to the payment of the whole CAS administration costs and Panel fees.*
5. *Condemn the Player to pay 5% annual interest on the amount from the date of the breach of the contract in accordance with Swiss Law.*
6. *Fix a sum, to be paid by the Player to the Club in order to cover its defence fees and costs in a sum of CHF 35,000.*

On 7 July 2010 the Player filed his Answer to the Request for Arbitration before CAS, in which he asked CAS to decline jurisdiction in this case and alternatively, should CAS accept jurisdiction, that an award was issued in the following terms:

a. *Rejecting all requests by the Claimant, based on the lack of legal grounds to support them;*
b. *Recognizing the unlawfulness of the Claimant's decision to partially suspend Player's salaries;*
c. *Recognizing that the continued default by the Claimant, even after being put officially on default by the Respondent, constituted an unilateral breach to the Employment Agreement;*
d. *Recognizing that Player's early termination of the Employment Agreement was justified and supported on the Claimant's previous breach to the contract;*
e. *Recognizing clause 7.1. of the Employment Agreement as an unilateral provision, being null and void and not opposable to the Player.*

f. Holding the Claimant liable for the termination of the Employment Agreement and determining the payment of the compensation to the player:

g. Determining the amount of EUR 2.426.826 as due and payable by the Claimant, to the Respondent, as compensation for unilateral breach of the Employment Agreement;

h. Granting the Respondent with 05% (five per cent) interest per annum over the outstanding salaries (EUR 473.384) and the salaries that remain unpaid as of this date and until the date of final payment, according to Swiss Law;

i. Condemning the Claimant to the payment of the entire administrative costs and Panel fees before the CAS; and

j. Fixing the amount of EUR. 30,000.00 to be paid by the Claimant to the Respondent to cover the legal costs and expenses incurred for his defence.

On 17 August 2010 the Club filed written submissions expressing its position on the matter of jurisdiction of CAS in the present case. It confirmed that in its view, CAS has jurisdiction in the case at stake and asked CAS to continue dealing with it.

On 18 October 2010 the Club filed its Statement of Claim asking CAS to render an award in the following terms:

1. To accept this request for arbitration against the Respondent Ilson Pereira Dias Junior.

2. To adopt an award condemning the Player to pay the Club for his unilateral breach of contract without just cause in the amount of EUR 18.018.058,68 in accordance with Article 17 of the Regulations, Ukrainian and Swiss Law.

3. In the alternative, to adopt an award condemning the Player to pay the club for his unilateral breach of contract without just cause in the amount of EUR 16.822.050,68 in accordance with Article 17 of the Regulations, Ukrainian and Swiss law.

4. In the alternative to adopt an award condemning the Player to pay the Club for his unilateral breach of contract without just cause in the amount of EUR 10,049,012.62 in accordance with Article 17 of the Regulations, Ukrainian and Swiss Law.

5. In the alternative, to adopt an award condemning the player to pay the Club for his unilateral breach of contract without just cause in the amount of EUR 10,029,012.62 in accordance with Article 17 of the Regulations, Ukrainian and Swiss Law.

6. We request the CAS find that Desportivo Brasil-SP and/or São Paulo and or any subsequent "new club" with which the Player contracts to be jointly and severally liable to pay compensation.

7. To acknowledge that sporting sanctions may be requested by the Claimant against the Respondent and Desportivo Brasil-SP and/or São Paulo and/or any subsequent "new club" with which the Player contracts at the relevant FIFA Dispute Resolution Body in the future.

8. Condemn the Respondent to the payment of the whole CAS administration costs and Panel fees.

9. Condemn the Respondent to pay 5% annual interest on the amount awarded by the CAS from the date of the breach of contract in accordance with Swiss Law.

10. Fix a sum, to be paid by the Respondent to the Club in order to cover its defence fees and costs in a sum of CHF 35,000.

On 10 November 2010 the Player filed its Statement of Defense and Counterclaim, in which it was requested to CAS to issue an award in the following terms:

a. Rejecting all requests for relief by the Claimant, based on the lack of legal grounds to support them;

b. the unlawfulness of the Claimant's decision to suspend Player's salaries;

c. Recognizing that the continued default by the Claimant, even after being put officially on default by the Respondent, constituted an unilateral breach to the Employment Agreement;

d. Recognizing that Player's early termination of the Employment Agreement was justified and supported on the Claimant's previous breach to the contract, holding the Claimant liable for the termination of the Employment Agreement and determining the payment of the compensation to the player:

(i) n the amount of EUR 2.426.826, corresponding to his outstanding salaries and benefits up to the date of termination and the remuneration due to Player until 30 June 2011; or, alternatively,

(ii) n the amount of EUR 2.166.826 corresponding to his outstanding salaries and benefits up to the date of termination and the remuneration due to Player until 30 June 2011 minus his remuneration for the 2010-2011 season under his current contract (i.e EUR 260.000) or, alternatively,

(iii) in the amount of EUR 473.384 corresponding to his outstanding salaries during the months of January, February, March and April 2010;

e. Granting the Respondent with 5% interest per annum over the outstanding salaries (EUR 473.384) and the salaries that remain unpaid as of this date and until the date of final payment, according to Swiss Law and the hitherto jurisprudence of FIFA and this Court;

f. Condemning the Claimant to the payment of the entire administrative costs and Panel fees before the CAS; and

g. Fixing the amount of EUR. 30.000 to be paid by the Claimant to the Respondent to cover the legal costs and expenses incurred for his defence.

On 15 December 2010 the Club filed its Answer to the Counterclaim, asking the CAS to dismiss such counterclaim.

On 11 January 2011 the Player filed a Final Statement in which he requested again that the Club's claim was rejected and his counterclaim was upheld.

The hearing in the present case took place in Lausanne on 13 May 2011. In the hearing, the parties confirmed their respective requests for relief contained in the Statement of Claim and in the Statement of Defense & Counterclaim respectively, made their respective initial statements, the witness Mr. Hennouda was examined, the Player and the Club's representatives served their respective declarations and at the end, the parties raised their final conclusions. Among other issues, the parties were particularly asked by the Panel to allege on the matter of compensation under the law applicable to the Agreement, which they both did.

The award to be rendered in the present proceedings will be made public as the parties so agreed in the hearing.

LAW

CAS Jurisdiction

1. The jurisdiction of CAS *in casu* is based on clause 8 of the Agreement.

2. Both parties, despite the initial hesitation of the Respondent, have finally accepted CAS jurisdiction accordingly and signed the relevant Order of Procedure.

3. Consequently, CAS is competent to deal with this matter.

Applicable law

4. Article R45 of the CAS Code reads as follows:

   The Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The parties may authorize the Panel to decide ex aequo et bono.

5. Clause 1.2 of the Agreement stipulates the following:

   1.2. The present Contract is a special form of a labour agreement and is regulated by the law of Ukraine and – to the extent compatible with Ukraine law - is subject to the FIFA regulations governing the status and transfer of players (edition 2005) and to Swiss law.

6. The Claimant holds in this respect that (i) in accordance with clause 1.2 of the Agreement, the law applicable to the dispute shall be Ukrainian Law and to the extent compatible with it, the FIFA RSTP and Swiss Law, and (ii) Swiss Law is not incompatible with Ukrainian Law concerning the matters object of discussion in the present proceedings (which has not been contested by the Player).

7. The Respondent is of the opinion that in spite of the wording of clause 1.2 of the Agreement, the law applicable to the present dispute shall be FIFA rules and subsidiarily Swiss Law given the international dimension of the dispute, as CAS and FIFA jurisprudence so have proclaimed in other cases of this kind.

8. In light of the above mentioned, the Panel considers that it shall resolve the present dispute in accordance with the FIFA RSTP and Swiss Law, as (i) the Claimant has expressly mentioned that for the matters involved in this dispute, such regulations are not incompatible with

Ukrainian Law (which content, by the way, has not been proven in these proceedings) and (ii) the Player has not only not challenged such Claimant's statement, but also called for the applicability of FIFA regulations and Swiss Law. It is to be mentioned that both before and at the hearing, the parties were asked and had ample opportunity to comment on Swiss Law.

9. Therefore the present dispute will be decided according to the FIFA RSTP and Swiss Law.

Merits

A. The object of the dispute

10. According to the parties' written submissions and the arguments raised by them in the hearing, the object of the dispute may be briefly summarized as follows: the Claimant considers that the Player terminated the Agreement without just cause and that therefore he shall compensate the Club for this, while the Player understands that he was entitled to terminate the Agreement with just cause, and thus intends to get an indemnification from the Club as regards of such termination.

B. The validity of clause 7.1 of the Agreement. The breach of the Player's obligations. Consequences

11. The Panel shall start the assessment of the *quaestio litis* by analyzing clause 7.1 of the Agreement, and specifically by determining (i) if it is a valid and binding clause or if as the Respondent holds, this clause is null and void, and (ii) in case the clause is deemed valid, if the Player breached the obligations contained therein.

12. The referred clause reads as follows:

"The present Contract is valid from July 30, 2007 till June 30, 2011. The Player and the Club have agreed that unless the Club sells the Player's right during 2 first seasons of this Contract validity, the parties shall sign new three seasons Labour contract on the same conditions valid until June 30, 2012. If the player refuse to extend this Contract he shall pay to the Club the fine equal to the Player's salary per 5th season stipulated in Appendix 1 of this Contract".

13. The Player has challenged the validity of this clause by basically stating that it constitutes a unilateral option only providing obligations and consequences for the Player but not for the Club.

14. The Panel, after the corresponding checking of the mentioned clause, cannot share the Player's view on its alleged invalidity, mainly for the following reasons:

- According to the clause's wording, in case the Player was not transferred within the first two contractual seasons, both parties -and not only the Player- were bound to enter into a new contract under certain conditions previously stipulated in the Agreement (*"… the parties shall sign …"*). This means that both the Player and the Club could compel the counterparty to conclude the agreed extension of the Agreement. Accordingly, this

cannot be considered a unilateral right of the Club. Therefore it cannot be understood that the clause was drafted in the interest or detriment of one of the parties only, but in the interest or detriment of the two of them.

- The event triggering the obligation of the parties to conclude a new contract (i.e. no transfer of the Player to a third club within the first two contractual seasons) also depended on both parties' will: both the consent of the Player and of the Club would have been necessary for such a transfer of the Player.
- The fact that the clause only foresees the consequences of its potential breach by the Player does not mean at all that in case it was the Club the one breaching the clause, no consequence would arise. This consequence could be well established in accordance with the applicable law to the Agreement. In fact, if the Club had breached its obligation under clause 7.1 of the Agreement the Player could have asked the enforcement of the clause, offering to the Club his working services, and claiming the salary for the whole (i.e. the extended) duration of the employment period.

15. Therefore the Panel understands that clause 7.1 of the Agreement is valid and binding for both parties.

16. This being said, the Panel shall determine if the Player breached its obligations under this clause, and if it is the case, which consequences arise out of the mentioned breach.

17. It is clear for the Panel that the Player indeed infringed said obligations. It has been proven that the Club asked the Player to sign the new contract in the terms foreseen in clause 7.1 of the Agreement and that the Player repeatedly refused to do so. This can be clearly derived from the content of the correspondence exchanged between the parties during the months of December 2010 to May 2011, and was even admitted by the Player at the hearing.

18. With regard to the consequences of such a breach, the parties specifically ruled on them in the same clause 7.1. of the Agreement in the following terms:

"If the player refuses to extend this Contract he shall pay to the Club the fine equal to the Player's salary per 5th season stipulated in Appendix 1 of this Contract".

19. In line with it the Panel considers that the Player shall be ordered to pay to the Club the sum contractually agreed in clause 7.1 in fine. However this agreed sum shall be reduced in (i) the amounts already retained by the Club on account of such sum and (ii) the amounts that the Player should have received for the days of May 2010 he remained with the Club (17 days).

20. The sum contractually agreed in clause 7.1 in fine of the Agreement is the Player's salary for the 5th season stipulated in Appendix 1 of the Agreement, which is to be quantified, as per the Claimant's request and the additional agreements dated 20 February 2008 and 1 March 2009, in EUR 2.194.896 in accordance with the following breakdown:

- Salary of the 5th season: (177.519 x 12) EUR 2.130.228
- Accommodation payments: (5.389 x 12) EUR 64.668

21. The Club retained EUR 473.384 on account of the sum contractually agreed in clause 7.1 (EUR 118.346 x 4 months -January to April 2010-). This has not been contested by the Club.

22. The Player's salary for the 17 days of May 2010 amounts EUR 81.312,14 in accordance with the following breakdown:

    - Salary: EUR 78.258,37 (138.103/30 x 17)
    - Accommodation payments: EUR 3.053,77 (5.389/30 x 17)

23. Therefore the amount payable by the Player to the Club is EUR 1.640,199,86, increased with the corresponding interest, which in accordance with article 102 et seq. of the Swiss Code of Obligations (the "Swiss CO") and the request of the Club in this respect (*"condemn the Respondent to pay 5% annual interest on the amount awarded by the CAS from the date of the breach of contract in accordance with Swiss Law"*) is to be fixed in 5% per annum from the date of the Agreement's termination, i.e. as from 17 May 2010.

C. The termination of the Agreement by the Player. Just cause or not.

24. The Panel shall now examine the termination of the Agreement executed by the Player as well as the consequences of such termination.

25. In this respect, the Panel notes that the Player holds that he had just cause to terminate the Agreement as the Club did not pay him the full agreed salary, while the Club argues that it was entitled to pay a reduced amount of salary to the Player at the time of the Agreement's termination and thus, that the Player terminated such Agreement without just cause.

26. The Panel deems indisputable (in fact, it is admitted by the parties) that from January 2010 on, the Player did not receive the total agreed salary.

27. The discrepancy between the parties' lies on the Club's legitimacy not to pay a very substantial part of the Player's salary on account or in application of the penalty stipulated in clause 7.1 of the Agreement given the breach of the Player's duties under such clause.

28. Therefore the Panel shall determine whether or not such partial payment of the salary constituted just cause and entitled the Player to unilaterally terminate the Agreement.

29. In this regard, the Panel is aware that given the rejection of the Player to sign the extension of his contractual relationship with the Club, Shakhtar decided to act in the way announced in its letter to the Player dated 3rd February 2010, which relevant part reads as follows:

    "Following to the above mentioned the Club has applied the fine stipulated in clause 7.1 of the contract. The Club will retain the amount of fine from your future salary starting from January 2010. Below is a breakdown of the amount to be paid by the Club under the labour contract:

*138,103 EUR * 18 month (outstanding salary) + 5389 * 18 month (house rent compensation) – 2.130.228 EUR (salary to fifth season/fine) = EUR 452.628*

So your monthly salary will be reduced to the amount of 452.628/18 months = 25.146 EUR before tax, which after tax deduction will be equal to EUR 21.166 net".

30. It is thus clear that Shakhtar decided to apply the penalty foreseen in clause 7.1 of the Agreement against the future salaries of the Player, which in practice led to a very significant reduction of the Player's monthly salaries.

31. It is also noted that the Player repeatedly opposed to this salary reduction, not only on the basis of the purported nullity of the clause providing for the penalty itself, but also on the basis of an alleged lack of legal or contractual grounds to reduce the Player's salary. For instance, in the Player's representative letter of 19 May 2010 to the Club it is mentioned that *"even if the clause [7.1] was valid, there was no ground or provision for any deduction of the player's salaries"*. Therefore the fact of having remained in the Club from January to May 2010 (period of reduction of salary) rendering his professional services shall not be understood as an unqualified acceptance by the Player of the salary reduction.

32. The Club has alleged that under Swiss Law (which is applicable to this case on the basis of the grounds given above in this award), it was entitled to proceed in the way it did, mainly because articles 120 and 323.2b of the Swiss CO allow an employer to compensate employees' salaries with the employer's claim (such as the penalty stipulated in clause 7.1 of the Agreement).

33. The Panel indeed agrees that in accordance with the referred legal provisions, compensation of employees' debts with salaries is feasible under Swiss Law.

34. The compensation or "set-off" of claims between an employer and an employee in an employment relationship is governed by the general provisions of art. 120 et seq. of the Swiss CO as well as by the specific provision of Art. 323b para. 2 of the Swiss CO, in accordance with the following principles and conditions (cf. TERCIER P., Le droit des obligations, 4th ed., Zurich 2009, n. 1520 *et seq*.; WYLER R., Droit du travail, 2nd ed., Bern 2008, p. 269; STAEHELIN/VISCHER, Zürcher Kommentar, Vol. V2c, Der Arbeitsvertrag, Art. 319-330a OR, 4th ed., Zurich 2006, n. 8 *et seq*. ad Art. 323b):

- The reciprocity of claims: each party must be at the same time obligee and obligor of the other;
- The similarity of the performances: the performances must be of the same kind (usually, monetary claims);
- The setting-off counterclaim must be due: although art. 120 para. 1 in fine Swiss CO seems to require that both claims be due, Swiss scholars and case law admit that the claim to be set-off can be only likely to be performed;
- The opportunity to claim the setting-off counterclaim in court: art. 120 para. 1 Swiss CO does not expressly set up this condition; however, it conveys the principle according to which a party shall not because of the set-off lose the benefit of the

defences (set-off is an objection, cf. ATF 63 II 133, JdT 1937 I 566) that it could oppose to its obligee;

- The absence of reasons of prohibition: set-off is not permitted if ruled out or limited (i) by law (art. 125 CO, which refers to art. 323b para. 2 CO as one of the limitations), or (ii) by the agreement of the parties (art. 126 CO).
- The declaration or expression of set-off: according to art. 124 para. 1 Swiss CO, the obligor (here: the employer) must demonstrate to the obligee that he wishes to take advantage of his right to set-off, either by express statement or by conclusive act (for instance by paying only the difference between the two debts). In other words, the expression of set-off is a unilateral act which, under Swiss law, does not have to comply with any formal requirements and can even result from conclusive act (cf. Swiss Federal Tribunal, Decision of 23 March 2011, 4A_23/2011 at consid. 3.2, with further references; GAUCH P., Schweizerisches Obligationenrecht, Zurich, 2008, 9th ed., n. 3248 *et seq.*).

35. Therefore, taking into consideration the above mentioned, it is correct to say that a set-off by the Club of a part of the salary with the Club's claim against the Player because of the breach of clause 7.1 of the Agreement is valid, unless it violates the limits permitted by Swiss law, in particular those set out in article 323b para. 2 of the Swiss CO.

36. According to article 323b para. 2 of the Swiss CO, the salary of an employee may be set-off only to the extent that it can be the subject of attachment in debt enforcement proceedings. However, such quantitative limitation is not applicable, and an employer can set off its claims against the whole salary in case the employer is setting-off a claim resulting from damages imputable to the intentional misconduct of the employee.

37. In brief, the salary may be set-off (i) for the part that is above the so-called minimum living wage and (ii) in full if the claim is for compensation of an intentional damage. There is wilful damage when the employee has the intent of causing a damage to the employer (e.g. theft, forgery, fraud, …). The *dolus eventualis* is sufficient, for example when an employee has not the direct intent of causing a damage to his employer, but knows or should know that his behaviour will cause a damage to the employer, for example when he leaves his working place (that is, when he unilaterally terminates his employment contract) without just cause (CARUZZO P., Le contrat individuel de travail, Commentaire des articles 319 à 341 du Code des obligations, Zurich 2009, n. 8, p. 173; STREIFF/VON KAENEL, Arbeitsvertrag, Praxiskommentar zu Art. 319-362 OR, 6th ed., Zurich 2006, n. 6 ad Art. 323b CO, with further references; STAEHELIN/VISCHER, *op. cit.*, n. 15 ad art. 323b).

38. The Panel notes that the Player has not argued that the part of the salary paid to him was in any way insufficient for him to live. In fact, it has remained undisputed between the parties that the Club continued to pay part of the salary but also that considerable bonuses were paid to the Player until he left the Club.

39. Therefore, the Panel is satisfied that the set-off by the Club of its claim resulting from the breach of clause 7.1 by the Player against part of the Player's salary claim was in line with the

restrictions set out in article 323b Swiss CO. Furthermore, the Panel is not satisfied that the Club was prevented to set-off its claim because of a "general principle of law", as argued by the Player.

40. Finally, based on the evidence produced by the parties, the Panel is satisfied that also the other requirements for a set-off mentioned above were met. In particular, it has remained undisputed between the parties that for several months the parties were discussing whether or not the Club, as employer, was or was not entitled to pay only a part of the salary. Therefore, not only for the Club but also for the Player it was clear that the Club had the intention, and in fact executed, a set-off of its claim based on clause 7.1 of the Agreement against the salary of the Player. Since, as mentioned above, Swiss Law and in particular article 124 of the Swiss CO does not request a formal notification of set-off, it cannot be argued by the Player, and in fact the Player did not raise this argument, that it was unclear for him that the Club had the intention to set-off the claim for compensation based on clause 7.1 of the Agreement with part of the salary. The Panel is well aware that in the past, there have been clubs that have tried to justify a failure to pay whole or part of the salary to a player, by alleging counterclaims. Such counterclaims, often raised only ex post, have been correctly considered as mere abusive attempts of clubs to justify their failure. However, based on the specific circumstances of the present dispute, the Panel is satisfied that the Claimant had no abusive intent when it declared to set-off its claim against part of the salary of the Player.

41. For all these reasons, the Panel concludes that the Club was entitled to set-off its claim against part of the salary of the Player, as it did. Accordingly, the Player was not entitled to terminate the Agreement as he did: the set-off by the Club of its claim based on clause 7.1 of the Agreement against the salary was not a breach of the Club of its obligations, even if the claim based on clause 7.1 was contested (cf. article 120 para. 2 Swiss CO).

42. The termination of the Agreement by the Player was therefore without just cause.

D. The consequences of the breach

43. At this stage, the Panel shall determine the consequences of the referred Agreement's termination without just cause, in accordance with the parties' petitions in this respect and the applicable rules.

44. In this respect the Panel notes that:

- The Claimant has requested that (i) the Player is ordered to pay a compensation, (ii) Desportivo Brasil and/or São Paulo and or any subsequent new club of the Player is held joint and severally liable to pay such compensation and (iii) it is acknowledged that sporting sanctions may be requested by the Club against the Respondent and Desportivo Brasil and/or São Paulo and/or any subsequent new club of the Player at the relevant FIFA Dispute Resolution Body in the future.
- The rules to be applied are those contained in the FIFA RSTP and Swiss Law, for the grounds already explained above.

a) The calculation of the compensation due to the Club

45. To such purpose the Panel shall take as standpoint the provisions of article 17.1 of the FIFA RSTP, which reads 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.

46. The referred article, extensively commented in CAS jurisprudence (inter alia, CAS 2007/A/1298, 1299 & 1300 *Webster*, CAS 2007/A/1358 & 1359 *Pyunik*, or CAS 2008/A/1519 & 1520 *Matuzalem*, sets the principles and method of calculation of compensations in case of breach of contract. Just for the reference, the recent award in the case CAS 2010/A/2145, 2146 & 2147 summarizes, in a brief and concise way, some of the most relevant CAS pronouncements on article 17 of the FIFA RSTP as follows:

"60. The Panel notes that there have been a number of previous awards delivered by CAS panels on this very issue (Webster, Matuzalem, El-Hadary and Pyunik, to mention a few where the breach is on the part of the player). The Panel also notes both the different facts and outcomes in these awards, and the views of those panels in relation to the method of calculation, i.e. that "each of the factors listed in Article 17 is relevant, but that any of them may be decisive on the facts of a particular case... Article 17.1 does not require the judging authority... to necessarily evaluate and give weight to any and all of the factors listed therein" (paras 201 and 202 of El-Hadary); "Article 17.1 includes a broad range of criteria... some of which may be appropriate to apply to one category of case and inappropriate to apply in another" (para 135 of Webster); and "the task for the body assessing the entity of the compensation due is therefore to verify and analyze as carefully as possible all the elements above and take them in due consideration" (para 77 of Matuzalem).

61. The Panel also notes the "positive interest" principle that was referred to in Matuzalem and equally applied in El-Hadary, as such a panel "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"(para 86 of Matuzalem).

62. As such, it is this Panel's role to consider each of the criteria within Art. 17.1 of the Regulations and indeed any other objective criteria in the light of the specific facts of this case and to determine how much weight, if any at all, to apply to each in determining the amount of compensation due in this particular case. In addition, the onus is on the parties to provide the evidence for the panel to carry out this task. The Panel notes the facts involved in the previous awards, and suspects that those in cases to follow, are and will be different from each other, but that the role of a panel remains the same, to apply all of the Art. 17.1 criteria and any other objective criteria to the specific facts and determine which are relevant and which are not and to ensure "the calculation made ...shall be not only just and fair, but also transparent and comprehensible" (para 89 of Matuzalem) […]".

47. The Panel has thus analyzed the Agreement and the circumstances surrounding the present case in light of the terms of article 17 FIFA RSTP and the criteria gathered therein.

48. In performing such task it has been noticed that article 17 of the FIFA RSTP gives utmost importance to what the parties have agreed in the contract concerning the consequences of contractual breaches, even to the point of superseding the other criteria referred to in such article (*"unless otherwise provided for in the contract"*).

49. Taking the above mentioned in mind, the Panel notes that the parties ruled on the consequences of a unilateral termination in clause 7.2.4 of the Agreement. Given that the termination occurred in the 3rd season of the Agreement, such consequences are to be determined in accordance with the FIFA RSTP as per the parties' will (para. b of clause 7.2.4).

50. However it is also observed by the Panel that the parties agreed on something else which in the Panel's view, has influence (even if indirectly) in the determination of the compensation for breach: the parties specifically agreed in clause 7.1 that if the Player did not agree to extend the Agreement for 1 extra year, he would pay to the Club of an amount equal to his salary in the 5th season. In the Panel's opinion, by doing so the parties, in mutual agreement, somehow quantified or gave a value to the loss of utility or the damage that the Club would suffer in case the Player decided not to extend the Agreement for 1 extra year, this in spite of being obliged to do so. This means that the Club (which agreed on such clause 7.1) was satisfied with the referred value for not counting with the Player's services during 1 year.

51. It is therefore reasonable to understand (or at least no valid reason to think otherwise has been brought by the parties in these proceedings) that if this was the parties agreed criterion to quantify the loss or damage consisting of not having the Player rendering his services for the Club in the 5th season, the same criterion was accepted by them, though in an implicit manner, to quantify the damages consisting of not counting on the Player in other periods, such as, in the case at stake, the period comprised between the termination date (17 May 2010) and the end of the contractual initial duration (30 June 2011), including all concepts. Following the above mentioned grounding and taking in mind the relevance given by article 17 of the FIFA RSTP to the agreement between the parties in the determination of the compensation, the Panel considers that the compensation to be awarded to the Club as regards of the Player's premature termination of the Agreement shall take into due consideration the liquidated damages clause contained in the Agreement and can therefore under such particular circumstances be quantified as corresponding to the aggregate of the salaries that would have been payable to the Player during the period comprised between the termination date and the end of the contractual initial duration, consisting of 1 year and 44 days.

52. It is also stressed that in any case:

- This calculation of the compensation is, in the Panel's opinion, also consistent and in line with some of the objective criteria expressly mentioned in article 17.1 of the FIFA RSTP, such as the remuneration and other benefits due to the player under the existing contract or the time remaining on the existing contract.

- The compensation awarded is felt by the Panel as legally adequate and fair, so there is no need to correct or adjust it in accordance with the *"specificity of sport"* factor.
- As occurred in the so-called *Matuzalem* case, none of the parties have submitted to the Panel any compelling legal arguments according to which a national law could have an effect on the calculation of the compensation due, nor have they specified in particular any arguments of Ukrainian (or of Swiss) law which – within the meaning of the criterion – should be taken into due consideration by the Panel. Thus the Panel it is not in position to take the criterion of *"law of the country concerned"* foreseen in article 17 of the FIFA RSTP into further, due consideration.

53. This being said, the amount of the referred compensation, which shall be added to the amount to be paid by the Player for the breach of clause 7.1 (see above), shall be calculated as follows:
    - Remaining 44 days of the 3rd contractual year: EUR 210.454,94 in accordance with the following breakdown:
        - Salary: EUR 202.551,07 [138.103 + (138.103/30 x 14)]
        - Accommodation payments: EUR 7.903,87 [5.389 + (5.389/30 x 14)]
    - 4th contractual year: EUR 1.721.904 in accordance with the following breakdown:
        - Salary: EUR 1.657.236 (138.103 x 12)
        - Accommodation payments: EUR 64.668 (5.389 x 12)

54. This results in an aggregate amount of EUR 1.932.358,94 to be paid by the Player to the Club increased with the corresponding interest, which in accordance with article 102 et seq. of the Swiss CO and the request of the Club in this respect (*"condemn the Respondent to pay 5% annual interest on the amount awarded by the CAS from the date of the breach of contract in accordance with Swiss Law"*) is to be fixed in 5% per annum from the date of the Agreement's termination, i.e. as from 17 May 2010.

b) Other consequences

55. The Panel has now to return to the requests made by the Claimant in points 6 and 7 of its Statement of Claim's request for relief with regard to potential liabilities of Desportivo Brasil, São Paulo or any other new club of the Player and to potential sanctions to be imposed on such clubs and the Respondent:

    "6. We request the CAS find that Desportivo Brasil-SP and/or São Paulo and or any subsequent "new club" with which the Player contracts to be jointly and severally liable to pay compensation.

    7. To acknowledge that sporting sanctions may be requested by the Claimant against the Respondent and Desportivo Brasil-SP and/or São Paulo and/or any subsequent "new club" with which the Player contracts at the relevant FIFA Dispute Resolution Body in the future".

56. With regard to the pleadings made in point 6 of the Claimant's request for relief, the Panel is of the view that the request contained therein must be dismissed, for the following reason: neither Desportivo Brasil nor São Paulo nor any other third club have been party in the present proceedings. In fact, neither the Club nor the Player have called them to participate herein. Thus the Panel is therefore not in position to issue an order affecting a party that did not participate in these proceedings.

57. Concerning the request contained in point 7 of the referred request for relief, the Panel is of the opinion that it shall be dismissed with respect to Desportivo Brasil, São Paulo and any other third club for the same reason explained in para. 56 of this award: these entities have not been party in these proceedings and thus the Panel cannot issue an order affecting them. With respect to the Respondent, the Panel considers that if the Claimant believes that sporting sanctions shall be imposed to the Respondent, it may request for them before the FIFA competent bodies. It is free to do so. However the Panel wishes to stress that this statement made in the present award (the fact that the Claimant may, potentially and in abstract, request for sporting sanctions before the FIFA competent bodies) does not mean at all that this Panel makes any pronouncement on (i) the admissibility of such a request in the referred bodies and (ii) the imposition or not of such sporting sanctions, as this does not fall within the scope of the present proceedings.

E. Conclusion

58. To summarize, the Panel has decided that:

- The claim filed by Shakhtar is partially upheld, and the Player is ordered to pay to Shakhtar the amount of EUR 3.572.558,80 (2.194.896 + 1.932.358,94 – 554.696,14) plus 5% interest per annum from the date of the Agreement's termination (17 May 2010).
- The counterclaim filed by the Player is rejected.

59. The above conclusion, finally, makes it unnecessary for the Panel to consider the other requests submitted by the parties to the Panel. Accordingly, all other prayers for relief are rejected.

Confidentiality

60. In accordance with Article R43 of the Code *"[p]roceedings under these Procedural Rules are confidential. The parties, the arbitrators and the CAS undertake not to disclose to any third party any facts or other information relating to the dispute or the proceedings. Awards shall not be made public unless the award itself so provides or all parties agree"*.

61. In the present procedure, at the hearing of 13 May 2011, both parties have agreed that the award shall be made public.

62. Therefore, the present award is not confidential and shall be published.

The Court of Arbitration for Sport rules:

1. The claim filed by FC Shakhtar Donetsk is partially upheld.

2. Mr. Ilson Pereira Dias Junior is ordered to pay to FC Shakhtar Donetsk the amount of EUR 3.572.558,80 plus 5% of interest per annum from 17 May 2010.

3. It is acknowledged (in the terms, extent and scope expressed in this award) that sporting sanctions may be requested by FC Shakhtar Donetsk against Mr. Ilson Pereira Dias Junior at the relevant FIFA Dispute Resolution Body in the future.

4. The counterclaim filed by Mr. Ilson Pereira Dias Junior is rejected.

5. All other or further petitions, claims and counterclaims are dismissed.

6. (...).