



Arbitration Newsletter Switzerland

The World of Football - An Insight into "the Specificity of Sport"

The Federal Supreme Court recently published a new decision which gives an interesting insight into the world of football and the money involved therewith. The protagonists of this case are Fenerbahçe Spor Kulübü ("Fenerbahçe"), a Turkish prime league football club in Istanbul, and Stephen Appiah ("the Player"), of Ghanaian nationality, presently employed by the Italian prime league club AC Cesena.

1 Facts of the Case

As of the season 2003/2004 the Player played for the Italian prime league club Juventus Football Club. In July 2005 Juventus agreed to transfer the Player to Fenerbahçe for the sum of EUR 8 million. In connection with such transfer payment, Fenerbahçe also had to pay the Player's agent the amount of EUR 400'000, as well as to make a solidarity contribution in the amount of EUR 390'000.¹

On July 19, 2005, Fenerbahçe signed an employment contract with the Player for a fixed duration from July 1, 2005 up to June 30, 2009. Apart from a signing fee of EUR 250'000, the salary payment was staggered by EUR 50'000 for each year, starting at EUR 1'850'000 and ending at EUR 2 million. In addition, the Player was to be provided with an Audi A4, a furnished apartment and five tickets Istanbul-Ghana-Istanbul per year in business class. Finally, Fenerbahçe had the unilateral option to extend this contract for a further year for a salary of, again, EUR 2 million. Subsequently, the Parties signed an undated contract

confirming the provisions of the contract of July 19, 2005 and specifying that the contribution for the apartment was limited at USD 3'000 and, in addition to the salary, the Player would receive a success related premium based on an incentive scheme of Fenerbahçe. On July 22, 2005, the Parties then signed a third contract corresponding to the standard contract of the Turkish Football Federation, repeating in essence the terms of the two previous contracts, except that the duration of the contract was now limited to May 31, 2009 and the salary was to be paid "free of taxes of the Player". In January 2007 the Player was injured in a friendly match and a subsequent medical consultation revealed that the Player was suffering from a cartilage problem, which required surgery. The Player, however, continued to play until the end of the season 2006/2007 and Fenerbahçe was winning the championship. The surgery was then performed on May 24, 2007, with a specific procedure ("Mosaicplasty"), replacing the injured cartilage with a new one. The Player and his agent commenced negotiation with other clubs and on July 11, 2007, the German prime league club FC Schalke 04 formally confirmed to Fenerbahçe its interest for the Player, offering a transfer fee of EUR 4 million. Fenerbahçe refused, but the agent of the Player continued to push a transfer which made Fenerbahçe involve FIFA, requesting that sanctions be imposed against the agent and FC Schalke 04.

The Player started then to suffer also from pulmonary problems and an analysis revealed that the Player had asthma. Nevertheless, the Player resumed playing for Fenerbahçe for whom he played his last official match on December 1, 2007. As his health condition did not improve, further investigations were made which revealed a thrombosis in his left thigh and a pulmonary embolism. Despite various medical consultations with specialists, the health condition of the

¹ As provided for in Article 21 ("solidarity mechanism") of the FIFA Regulations on the Status and Transfer of Players, compensating in case of a transfer prior to the expiry of the contract earlier clubs that have contributed to the education and training of the player to be transferred.



Player did not improve and Fenerbahçe therefore asked him to formally waive his right to play up to the last match of the season 2007/2008, which would allow Fenerbahçe to employ, under the pertinent provisions of the Turkish Football Federation, a further foreign player. Fenerbahçe also confirmed that the Player would continue to receive his salary and all other fringe benefits under the contract. But the Player refused to accept this since, apparently, he was not really clear on what he would sign. Fenerbahçe asked him then to return from Italy, where he stayed for medical care, to Istanbul by January 19, 2008 at the latest in order to have medical care executed by the doctors appointed by Fenerbahçe. The Player did not appear in Istanbul, but decided to travel to Ghana in order to act as special advisor in the Africa Cup in the time from January 20 to March 10, 2008.

On January 28, 2008, Fenerbahçe called its unilateral option for prolongation of the contract and asked the Player again to immediately return to Istanbul. It repeated this request on January 25, 2008 and informed him that he had to visit a specialised clinic in Arizona on January 29, 2008 for further analysis. As the Player did not follow this request, an internal disciplinary commission of Fenerbahçe fined him with USD 73'500 for violation of various internal rules. In addition, on January 31 and February 4, 2008, Fenerbahçe applied to FIFA asking, amongst other, that the Player be asked to return to Istanbul and that the Player and his agent be sanctioned.

2 Proceedings at the FIFA Dispute Resolution Chamber

On April 21, 2008 Fenerbahçe initiated formal proceedings at the FIFA Dispute Resolution Chamber ("DRC") and asked from the Player compensation in the amount of EUR 12 million and, furthermore, requested that the Player be banned from participating in matches for the following six months. The DRC then rendered its decision on January 9, 2009,² and awarded Fenerbahçe with a compensation of EUR 2'281'915. In particular, the DRC held that the Player was not authorised to attend the Africa Cup since he had not received authorisation from Fenerbahçe to do so. This and his subsequent refusal to comply with

the requests of Fenerbahçe led the DRC to the conclusion that the Player had terminated the contract without just cause as of January 29, 2008. The DRC did then, however, also consider certain mitigating factors in assessing the damage to be awarded. In particular, it held that Fenerbahçe did execute its unilateral option on January 22, 2008 for the sole purpose to increase its potential compensation and awarded "only" EUR 2'281'915 to Fenerbahçe.³ In November 2009, the Player then signed a one year contract with the Italian prime league club FC Bologna for EUR 200'000 to be paid net per year. But he then actually played for FC Bologna in only two official matches. His contract was not prolonged and he plays now for AC Cesena.

3 The Proceedings at CAS

On May 25, 2009, Fenerbahçe filed its appeal at the CAS requesting that it be awarded with EUR 12'131'178 as well as EUR 701'190. On the same day, the Player filed an appeal as well, requesting that the DRC decision be annulled and it be stated that he owes no damages to Fenerbahçe. With its award rendered on June 7, 2010, the CAS Tribunal annulled the decision of the DRC and stated that the Player owes no compensation to Fenerbahçe.⁴ In doing so, the CAS Tribunal confirmed that the Player was actually in breach of contract. As to the duration of such contract, the CAS Tribunal came to the conclusion that Fenerbahçe had acknowledged to be under a duty for further salary payments up to the end of April 2008, as stated by Fenerbahçe in January 2008. Thereafter, the CAS Tribunal concluded that as of the beginning of 2008 and at least up to the end of the contract the Player was not in a position to play without risk of serious damages to his health. Applying Article 17 (1)⁵ of the Regulations for the Statutes

³ N 33 - N 35 DRC decision.

⁴ CAS 2009/A/1856 and 1857; with the arbitrators Efraim Barak, Israel, chairman, Michele Bernasconi, Switzerland and James Robert Reid QC, England. The award is attached to this newsletter as exhibit 2.

⁵ "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 of the breach shall be calculated with die consideration for the law of the country concerned, the

² Available in anonymised form under the FIFA website and attached to this newsletter as exhibit 1.



and Transfer of Players ("FIFA Regulations"), the CAS Tribunal then concluded that with the early termination of the employment contract Fenerbahçe actually saved EUR 2'633'020.85 since it did not have to pay a salary as of May 2008 up to the end of May 2009. Against this amount the not yet amortized part of the transfer fee (EUR 2'445'108.35) and the fine issued in the amount of USD 73'500 (equalling EUR 51'172.50) did not meet the above savings. In arguing its decision the CAS Tribunal made reference to the specificity of sport as follows:

*"Sport, similarly to other aspects of social life, has an own specific character and nature and plays its own important role in our society. Similarly as for the criterion of the "law of the country concerned", the judging body has to take into due consideration the specific nature and needs of sport when assessing the circumstances of the dispute at stake, so to arrive to a solution which takes into reasonable account not only interests of players and clubs but, more broadly, those of the whole football community. Based on this criterion, the judging body shall therefore assess the amount of compensation payable by a party under article 17 par. 1 of the FIFA Regulations, keeping duly in mind that the dispute is taking place in the somehow unique world of sport. In other words, the judging body shall aim at reaching a solution that is legally correct, and that is also appropriate upon an analysis of the specific nature of the sporting interests at stake, the sporting circumstances and the sporting issues inherent to the single case. (CAS 2008/A/1519 – 1520 par. 151 ss)."*⁶

...

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."

⁶ CAS 2009/A/1856-1857, N 219.

*"In view of the above, the Panel concludes that the principle of specificity of sport commands that in these circumstances, when it was established that Fenerbahçe saved more money compared to its losses because of the breach of contract committed by the Player, and taking into account the situation of the Player due to his injury, no compensation shall be awarded to Fenerbahçe. and that no sporting sanction shall be imposed upon the Player."*⁷

4 Federal Supreme Court

Fenerbahçe then filed on July 7, 2010, an action for annulment of the CAS Award. In doing so Fenerbahçe apparently started with an extensive summary of the facts which in various points deviated from the facts as stated by the CAS Tribunal. This was, of course, not acceptable to the Federal Supreme Court which is bound to the facts as established by the CAS Award.

Thereafter, Fenerbahçe argued that the CAS Award did not properly distinguish the three different claims it raised (damages of EUR 12'131'178 for breach of contract, EUR 650'000 for salary paid from January to April 2009 and fines of EUR 51'190.10) and, in particular, did not deal with its claim for reimbursement of the salary paid ("*infra petita*" in accordance with Article 190 (2) (c) PILA) and did in various respects also violate Fenerbahçe's right to be heard (Article 190 (2) (d) PILA).

With regard to *infra petita* the Federal Supreme Court noticed that when the CAS Tribunal decided that the Player would not owe any compensation to Fenerbahçe (Article 1 of the operative part of the Award) and dismissed all further claims (Article 4 of the operative part of the Award) it also dealt with the claim for unjust enrichment for salaries paid, as claimed by Fenerbahçe. There was nothing wrong on the side of CAS Tribunal that it did not specifically address this issue in its considerations. The right to be heard does not include a right for providing reasonings as to the award rendered. Therefore, the CAS Tribunal neither violated *infra petita* nor the right to be heard.

⁷ CAS 2009/A/1856-1857, N 221.



The same applied for the way the fine of USD 73'500 resp. EUR 51'190.¹⁰ was dealt with by the CAS Tribunal. Both parties were represented by experienced counsels, who were aware of the wide area of discretion the CAS Tribunal enjoyed under Article 17 (1) of the FIFA Regulations as to the specificity of sport. It could not be argued that Fenerbahçe had not to anticipate the conclusions derived by the CAS Tribunal from such article.

Fenerbahçe then also argued that the CAS Tribunal did violate its right to be heard in so far as it assumed that the Player was not in the position to actually play in matches as from the beginning of 2008 up to the end of the contract without exposing him to major health complications. The arguments raised by Fenerbahçe as to the qualifying matches for the World Championship, in which the Player apparently participated, could not be heard since these were arguments calling for reconsidering the facts and the merits of the case, which is, however, not the target of an action for annulment under PILA.

Finally, also the arguments raised by Fenerbahçe against the calculation by the CAS Tribunal would not be construed as a surprising application of law which would have required the party to be heard on those issues specifically.

Consequently, the Federal Supreme Court dismissed the action for annulment, assessing, in view of the amount of dispute, its costs at CHF 40'000 and awarding compensation to the Player for the proceedings at the Supreme Court of CHF 50'000.

5 Conclusions

1. The CAS has become "the most valuable customer" of the Federal Supreme Court, but this is not because the decision of the CAS would call for more approval of actions for annulments under the PILA. It simply seems that in sport-related matters the actors develop the same stamina as in their sport itself, they want to become a "finisher", i.e. they want to go to the very end, which is, in legal terms, the Federal Supreme Court.⁸

2. The DRC is a commission providing dispute resolution based on equal representation of players and clubs (10 members each) and an independent chairman. Usually, in each case two representatives each are sitting, together with the chairman. The proceedings are free of charge. Generally there are no hearings, the DRC decides based on written facts only.
3. The CAS is therefore the first instance which hears the case in full, with oral and written witnesses, experts and sees and hears the parties. Consequently, and contrary to the DRC decisions, the CAS Award generally contains a very detailed description of the facts of the case.⁹

In the present case, the CAS Tribunal did certainly deliver a well-reasoned, robust award. Particularly noteworthy are the arguments submitted under N 187 - N 193 of the Award, resolving the question whether Fenerbahçe, as injured party, is entitled to any compensation. The panel's answer was "no", because it held that the present case is

"... atypical from the more common situations where a player unilaterally and prematurely terminates the labor agreement in order to join another employer. The Player, "a world class athlete", highly ranked and paid, whose last transfer fee amounted to EUR 8'390'000, left Fenerbahçe and the football scene for numerous months".¹⁰

The Player could actually have stayed at Fenerbahçe and would have profited from Fenerbahçe's ongoing commitment to pay his salary. He decided not to do so. His underlying reasons were not very clear but health considerations may have been at the forefront

"... the panel is of the opinion that the Player was not in a condition to play without exposing himself to major health complications, at least not before the expiry of the agreed term of the contract signed with Fenerbahçe. Therefore, these exceptional circumstances led the panel to start considering the situation from the perspective

⁸ See also Felix Dasser, International Arbitration and Setting Aside Proceedings in Switzerland - An Updated Statistical Analysis, ASA Bulletin 2010, pp. 82 - 100, in particular p. 95.

⁹ In the present case N 3 - N 61 in 13 pages.

¹⁰ N 187 of the Award.



*of the money saved by Fenerbahçe due to the early termination of the contract by the Player.*¹¹

Under this perspective it became clear that Fenerbahçe had no claim.

4. The Supreme Court

It comes as no surprise that the arguments raised by Fenerbahçe found no positive echo at the Federal Supreme Court.

5. "Specificity of Sport": do we really need this?

If the term "specificity of sport" refers to "trade usages" within the area of sport this specificity certainly becomes relevant and is, consequently, also to be respected. This holds true in particular in the field of doping offences and their sanctions. If, however, "specificity of sport" would go beyond this, the risk is high that this "specificity" calls for exceptions which might undermine reliability and predictability. The same question marks arise as with *lex mercatoria*! But this is obviously a discussion which goes beyond the limited topic of this newsletter.¹²

At least in the particular case there was no need for the CAS Tribunal to seek recourse to such "specificity of sport", as it did with its eloquent attempt under N 219 of its award. It could have dismissed the case based on the simple reasoning that Fenerbahçe could not prove the damage alleged - a well recognised principle of law worldwide!

April 20, 2011

Hansjörg Stutzer

Attachments:

- DRC decision of January 9, 2009
- CAS 2009/A/1856-1857 of June 7, 2010
- 4A_402/2010 of February 17, 2011

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¹¹ N 193 of the Award.

¹² For a more detailed analysis see Antonio Rigozzi, *L'arbitrage international en matière de sport*, 2005, pp. 627 - 653. The Federal Supreme Court voiced at least some scepticism in BGE III 285, however, in proceedings before a state court (see Newsletter of May 29, 2006).

Decision of the Dispute Resolution Chamber

passed in Zurich, Switzerland, on 9 January 2009,

in the following composition:

Slim Aloulou (Tunisia), Chairman

Philippe Diallo (France), member

Mohamed Mecherara (Algeria), member

Theo van Seggelen (Netherlands), member

Carlos Soto (Chile), member

on the claim presented by the club

F,

as Claimant / Counter-Respondent

against the player

S,

as Respondent / Counter-Claimant

regarding a contractual employment-related dispute arisen between the
aforementioned parties.

I. Facts of the case

1. In July 2005, the club F (hereinafter: F or the club), affiliated to the T Football Federation, and the club J, affiliated to the I Football Federation, signed a transfer agreement for the transfer of the player S (hereinafter: the player) to the club F for a transfer compensation amounting to EUR 8'000'000.
2. On 19 July 2005, the club F and the player, born on 24 December 1980, signed a preliminary employment agreement. Subsequently, the club and the player signed an additional undated document entitled "*Agreement*". The preliminary employment agreement and the document entitled "*Agreement*" establish the principal contractual obligations of the parties, as they will be officialised with the signature of the official employment contract.
3. On 22 July 2005, club F and the player signed the official employment contract of the T Football Federation, providing for a validity from 1 July 2005 to 31 May 2009.
4. From a financial point of view, the above-mentioned employment contract stipulates that the player shall receive a signing-on fee of EUR 250'000. The contract provides for a total salary amounting to EUR 1'850'000 net for the 2005/2006 season (beginning in August), payable in ten equal instalments of EUR 185'000 on the 25th of each month. For the 2006/2007 season, the contract stipulates a net payment of EUR 1'900'000, payable in ten equal instalments, for the 2007/2008 season, a net payment of EUR 1'950'000, payable in ten equal instalments, and finally for the 2008/2009 season, a total net salary of EUR 2'000'000 again payable in ten equal instalments.
5. This employment contract also establishes the option for the club to exercise the right to unilaterally extend the duration of the employment relationship for the 2009/2010 season, providing the player with a total net salary of EUR 2'000'000 for the said season.
6. On 4 February 2008, FIFA received a complaint from the club on the grounds that the player had unilaterally terminated the contract having been absent from the club without justification since December 2007.
7. On 20 February 2008, FIFA forwarded the claim lodged by club F to the player.
8. On 21 February 2008, the player requested from FIFA an extension of the deadline, until 5 March 2008, to provide his relevant position with regard to the claim lodged by the club.
9. On 7 March 2008, the player requested the Dispute Resolution Chamber to suspend the present procedure in order to try to amicably settle the present affair.

10. On 18 March 2008, the legal representative of the player informed FIFA that the attempts to find a settlement agreement had failed.
11. On 11 June 2008 and in view of the statements and respective claims of the parties, the FIFA administration, via an informative letter, advised the parties involved in this matter to consider their labour relationship as terminated and to focus on the financial aspects of the present dispute.
12. With regard to the material aspects of the present procedure, the club is claiming from the player the payment of compensation for the unilateral termination of the employment contract by the player without just cause. The club considers that this compensation should be calculated based on a certain number of criteria, as it is detailed below.
13. According to the club, the first criterion to be taken into account when calculating the compensation is the player's salary and other benefits he was entitled to under the existing employment contract.
14. The second criterion to be taken into consideration is the remaining period of validity of the contract as from the termination by the player without just cause, namely two and a half years (thus including the 2009/2010 season based on the extension option, cf. point I., 5. above).
15. The third criterion is composed by the expenses incurred by the club:
 - EUR 400'000 fee for the player's agent;
 - EUR 8'000'000 corresponding to the transfer compensation paid to J;
 - EUR 390'000 in solidarity contribution paid to the player's training clubs;
 - USD 96'000 for the player's house rental;
 - 58'914.81 in airfares and other expenses;
 - EUR 3'000'000 for the transfer of the player T to club F due to the absence of the player (replacement costs).
16. Consequently, and on the basis of the above objective criteria, the club states that compensation to be paid by the player of at least EUR 12'000'000 should be considered justified.
17. Furthermore, the club requests that a sporting sanction corresponding to a six-month restriction on playing matches be imposed on the player.
18. For his part, the player rejects the claim of the club and in a counter-claim requests the following:

- the club to pay compensation of no less than EUR 16'780'000 for breach of the employment contract without just cause (the player details as follows: EUR 2'780'000 for the value remaining on the contract, EUR 14'000'000 for loss of future earnings, EUR 2'000'000 in damages, plus amounts for bonuses in accordance with FIFA's position on the matter);
- sporting sanctions to be imposed on the club;
- the costs of the proceedings.

19. With regard to the facts, the player mentions that in January 2007 he sustained an injury to his left knee during a training session with the club F but that, nonetheless, he continued to play for the club F between January and April 2007 with the help of painkilling injections. He notes that the club misdiagnosed the injury and recommended the wrong medical treatment, as outlined in detail below.
20. According to the player, in May 2007 the club's medical team agreed that the player could undergo a surgery to correct the injury to his left knee. This operation took place on 23 May 2007 and was performed, according to the player, by a surgeon selected by club F.
21. In July 2007, club F ordered the player to attend a pre-season training, but at that time the player began to experience difficulty breathing and pain in his left thigh. Subsequently, in August or September 2007, club F medical staff finally diagnosed him with asthma. According to the player, as a result of the club's misdiagnosis, he developed blood clots in his left thigh. The player stresses that the club, and the medical professionals employed or used by the club were responsible for the diagnosis of his injury, the type of surgery performed, and the post-operative treatment. During the investigation, the player presented to the Dispute Resolution Chamber several alleged medical reports.
22. As asserted by the player, between October and December 2007, while undergoing the wrong medical treatment, he continued to train and play with the club F.
23. During the second week of December 2007, the player was admitted to hospital in order to undergo independent tests. The tests revealed that he had developed blood clots in his left leg and he was immediately prescribed anticoagulants. Ten days later, the club sent the player for further tests, following which he was recommended to start treatment with Coumadin (anticoagulant) for a period of three to six months.
24. Following these difficulties, the player informed the club that he was not satisfied and that he would rather consult doctors known by him. According to the player, club F did not object to this and he went on a treatment with Dr X. The player mentions that he travelled on 20 December 2007 for a medical appointment with

Dr Y which was due to take place on 21 December 2007. Following the tests, the doctors in question agreed that the appropriate course of action following the operation in May 2007 would have been to prescribe anticoagulants, and that club F failure to do so had caused the appearance of the blood clots. The player provided the members of the Chamber with a medical report allegedly signed by Dr D establishing the above-mentioned facts.

25. Dr Y's report mentions in particular:
 - that the club misdiagnosed the player as suffering from asthma;
 - that the club's error led to delayed diagnosis of the player, thus causing a real threat to the player's health;
 - that being under treatment with anticoagulants, the player should have been avoiding major physical exertion;
 - that the player's medical condition will persist for some time.
26. The player adds that on 12 January 2008, the club officials travelled in order to check on the treatment prescribed by the I Doctors.
27. The player alleges that on 14 January 2008, being still in I, the club asked him to sign a statement of written consent allowing the club to "freeze" his employment contract in order for him not to be subject to the restrictions concerning the number of foreign players per team in accordance with the pertinent regulations of the T Football Federation. The player presented to the Dispute Resolution Chamber a letter dated 25 January 2008 sent by his legal representative to the club F, stating that he refused to consent to the above-mentioned deregistration.
28. As regards his absence from the club, the player mentions firstly that club F had given him express verbal consent to continue his treatment in December 2007.
29. At club F's request, the player returned on 10 January 2008. The player notes that it was at the recommendation of the club's President that he returned for a second consultation with Dr X, accompanied by club representatives.
30. Furthermore, at that time, club F allegedly gave the player a verbal consent to attend the Cup of Nations to be held from 20 January 2008 to 10 February 2008, as a special adviser to the representative team of the G Football Association. In addition, the player asserts that the club was obliged to release him in accordance with the request presented by the Football Association to the club F.
31. As regards the requests the club made to the player to attend medical appointments or other meetings, the player outlined that he did not consider himself bound to comply with these requests, in particular due to the fact that on

16 January 2008 he was still in for medical treatment, as authorised by the club, and was also preparing his trip.

32. Consequently, and on the basis of the above-mentioned events, the player claims that the club had breached its duty of confidence and duty of care towards him, particularly due to its misdiagnosis and the incorrect medical treatment he had undergone.
33. Furthermore, the player points out that a number of the club's other actions constituted grounds for termination of contract, including the fact that the club gave medical information to the media without his authorisation, extended the duration of the employment contract unilaterally, and refused to provide him with a copy of the employment contract at the basis of the present litigation.
34. In his statement, the player also mentions that he was still receiving a rehabilitation treatment and that he considers that the employment contract was terminated at the end of the 2007/2008 season. In view of all the above-mentioned facts, the player submitted a counter-claim against the club, as detailed at the beginning of the present facts (cf. point I., 18. above).
35. For its part, the club informed FIFA that before the current proceedings and while the employment contract at the centre of this dispute was in force, secret negotiations had taken place between the player's agent and a number of clubs, in particular FC S, affiliated to the G Football Federation.
36. With regard to the payment of the salaries made to the player, the club adds that it has always fulfilled its financial obligations towards the player and that the player received all of his salary payments up to and including April 2008. The club insists on the fact that the payment of the salaries for the months of January, February and March 2008 were transferred to the player's bank account.
37. The club mentions that the period following the surgery in May 2007, which was performed by one of the club's external doctors, passed without incident. The club had always taken care of the player and his health, providing him with all the necessary medical assistance and treatment.
38. On 5 September 2007, the player attended a hospital in I and the respiratory tests carried out detected a bronchospasm. The club adds that the player later visited the hospital again and a deep vein thrombosis was detected, as a result of which he was immediately admitted and prescribed a course of treatment.
39. The club alleges that all of this medical information was confirmed in the medical report prepared by the executive committee of the cardiovascular surgery society, dated 1 February 2008. The report in question, which was provided by the club F during the present investigation, mentions that the player had a deep vein thrombosis following an operation and that the final diagnosis was reached seven months later. The report also notes that this condition does not prevent the

patient from resuming sport and that it is not expected to affect the player's performance.

40. The club outlines that, independently of the medical tests, the player had already left the club F before Christmas 2007, on 23 or 24 December 2007, without the necessary authorisation from the club. Club F asserts that on 16 January 2008, it sent the player a letter inviting him to join the team in I by 19 January 2008 at the latest, with the intention to continue his treatment and to undergo a regular health check with the club's medical team. The club confirmed that the player did not report to the club on 19 January 2008.
41. On 22 January 2008, the club notified the player that it had exercised the unilateral option to extend the employment contract for the 2009/2010 season.
42. The club subsequently reported that it had taken the decision to send the player for a medical check-up at the Clinic in United States of America, one of the world's most renowned medical centres. Accordingly, the club adds that it had arranged an appointment for the player at the clinic on 29 January 2008. The club also notes that it sent the player's legal representative a fax on 25 January 2008, asking him to attend the relevant appointment.
43. The player did not attend the appointment and did not furnish the club with any reason for his failure to do so. In fact, the player allegedly stayed in his country of origin – in order to serve as a special adviser to the representative team of the Football Association during the Cup of Nations.
44. On 28 January 2008, the club management fined the player for the non-fulfilment of his contractual obligations. The club adds that the player was informed of this decision on 1 February 2008 at his legal domicile and that the fine amounted to USD 73'500.
45. The player informed FIFA that he considered this fine unacceptable, as his absences had always been authorised by the club.
46. In the statement it submitted to FIFA, the club refers to the club's disciplinary regulations (F Club Professional Football Team 2007-2008 Season – Disciplinary Guidelines), which provide that the player must undergo the therapies, treatment and programmes established by the club. The club also cites article 9.5 of its disciplinary regulations, which stipulates that injured players may not be absent during their injury period without the authorisation of the doctor of the club.
47. The club therefore asserts that the player was not entitled to leave the club for health-related reasons, due to the medical treatment under the supervision of the club's medical team.

48. As a result of the player's absence, the club F had to hire the player T on a loan basis from 15 January 2008 to 30 June 2009 for a total net amount of EUR 1'500'000. The club signed an employment contract with this player valid until 31 May 2009 for a total net salary of EUR 1'500'000.
49. With regard to the club's refusal to submit a copy of the employment contract, club F alleges that the player could easily have requested a copy from the T Football Federation. Equally, and according to the club, the player's legal representative had never produced a power of attorney in order to be provided with the relevant employment contract.
50. Consequently, and in view of the above, the club considers that the player unilaterally breached the employment contract signed with club F without just cause between December 2007 and January 2008. The club is requesting financial compensation from the player as outlined at the beginning of the present facts (cf. point I., 13.-16. above).

II. Considerations of the Dispute Resolution Chamber

1. First of all, the Dispute Resolution Chamber analysed whether it was competent to deal with the case at hand. In this respect, it took note that the present matter was submitted to FIFA on 4 February 2008. Consequently, the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (hereinafter: Procedural Rules) are applicable to the matter at hand (cf. art. 18 par. 2 and 3 of the Procedural Rules).
2. Subsequently, the members of the Chamber referred to art. 3 par. 1 of the Procedural Rules and confirmed that in accordance with art. 24 par. 1 in combination with art. 22 lit. b of the Regulations on the Status and Transfer of Players (edition 2008) the Dispute Resolution Chamber is competent to deal with the matter at stake, which concerns an employment-related dispute with an international dimension between a player and club F.
3. Furthermore, the Chamber analysed which regulations should be applicable as to the substance of the matter. In this respect, it confirmed that in accordance with art. 26 par. 1 and 2 of the Regulations on the Status and Transfer of Players (edition 2008), and considering that the present claim was lodged on 4 February 2008, the current version of the regulations (edition 2008; hereinafter: Regulations) is applicable to the matter at hand as to the substance.
4. Having established its competence and the applicable regulations, the Dispute Resolution Chamber examined the facts and documents submitted by the parties during the investigation of this case as well as their respective statements. The

members of the Chamber noted that after signing two preliminary agreements, on 22 July 2005 the parties signed the official employment contract of the T Football Federation, valid from 1 July 2005 to 31 May 2009.

5. The Chamber highlighted that the underlying issue in this dispute, considering the claim and the counter-claim by the parties, was to determine whether the contract had been unilaterally terminated without just cause and if so, which party was responsible for the early termination of the contractual relationship in question. The Chamber also underlined that subsequently, if it were found that the employment contract was terminated without just cause, it would be necessary to determine the financial and/or sporting consequences for the party that terminated the relevant employment contract.
6. Furthermore, the members of the Chamber noted that in January 2007, the player suffered an injury to his left knee during a training session with the club. It was also noted that on 23 May 2007, the player's left knee was operated on as a result of the above-mentioned injury. The Chamber also took cognisance of the fact that following the surgery and after suffering various pains, particularly in his left thigh, the player developed blood clots in his left thigh. The members of the Chamber remarked that after suffering these pains, the player was diagnosed with asthma and it was not until December 2007, following further medical tests, that the blood clots in his left leg were officially discovered and deep vein thrombosis was detected. The player was then immediately prescribed anticoagulants.
7. The Dispute Resolution Chamber then noted that following the latest mentioned diagnosis, in December 2007, the player travelled with the club's consent to continue his medical treatment, in the course of which it was discovered that the appropriate treatment following the surgery on 23 May 2007 would have been to prescribe anticoagulants. Equally, the deciding authority acknowledged that at the club's request, the player returned on 10 January 2008 and then travelled again to I, followed by club's representatives, on or around 12 January 2008 for further medical consultations.
8. The Chamber wished to point out here that neither of the parties disputed the facts of the case as described above (cf. point II., 6. and 7. above).
9. On the basis of the above-mentioned facts and considering that none of them had been disputed by either of the parties, the Dispute Resolution Chamber concluded that following the surgery on 23 May 2007, the player had not received the appropriate post-operative treatment, which had caused health problems and the formation of blood clots in the player's leg. It would appear from the different medical reports submitted by the parties that the appropriate treatment after the surgery would have been to prescribe anticoagulants.
10. The Chamber also underlined that on 16 January 2008, the club had requested the player to report to the club by 19 January 2008 at the latest with a view to continuing the medical treatment and undergoing further health checks.

Furthermore, the members of the Dispute Resolution Chamber noted that on 25 January 2008, the club had invited the player to travel to an appointment at the Clinic in the United States of America on 29 January 2008 with a view to undergoing a further in-depth medical examination.

11. With regard to the aforementioned club's letters of 16 and 25 January 2008, the Chamber took note that the player did not attend either of the two above-mentioned appointments.
12. The Chamber also observed that the player mentions that the club gave him its verbal consent to attend the Cup of Nations from 20 January 2008 to 10 February 2008 in the role of special adviser to the representative team of the G Football Association. The player also argues that the club was obliged to release him in accordance with the G Football Association's request presented to club F.
13. Consequently, with regard to the early termination of the employment contract at the centre of this dispute, considering the above-mentioned established facts, the members of the Dispute Resolution Chamber concluded firstly that incorrect post-operative treatment such as would appear to have been the case here, could not be considered to be the club's responsibility and therefore could not justify the player's termination of the employment contract with just cause. The responsibility, should it be established by a competent decision-making body, would lie with the medical establishment that performed the operation and prescribed the post-operative treatment. By the same token and to support this view, the members of the Dispute Resolution Chamber underlined that in order to attribute responsibility, it would be necessary to establish an appropriate causal relationship (a cause is appropriate when it naturally, in the ordinary course of events and according to empirical knowledge, produces the effect that has resulted in such a way that it would generally appear to have been contributed to by said cause) between the prejudice and the defendant's behaviour. In this case, the members of the Chamber concluded that the club's behaviour neither directly caused, nor was sufficient to cause, the formation of blood clots in the player's left leg and the deep vein thrombosis detected in the player. In fact, the club had undisputedly at all times put medical treatment at the player's disposal in order to properly cure his injury and provided him with the relevant internal and external medical staff. Eventually, in view of the course of action it had even organised a medical check-up at the Clinic in the United States of America which was scheduled at the end of January 2008, however, was not attended by the player.
14. Having thus cleared the club of any extra-contractual responsibility, the members of the Chamber focused on establishing whether within the framework of the contractual relationship in question, the employer, club F, had breached the duty of care towards the employee that is inherent in the working relationship between an employer and its employee. In this case, the members underlined once again that the club in question took all available measures to take care of the player's health and, in particular, allowed him to undergo surgery and various

medical tests in various establishments even abroad. Furthermore, the Dispute Resolution Chamber pointed out that the club's duty of care had been confirmed by both its desire to see the player on 19 January 2008 with a view to continuing his medical treatment and his undergoing regular health checks and the appointment the club made for the player at the Clinic in the United States of America on 29 January 2008 in order to undergo in-depth examinations.

15. In view of the above, the Dispute Resolution Chamber established that the club had properly fulfilled the duty of confidence and care towards the player that are required within the framework of a contractual employment relationship. As a consequence, the Chamber rejected the player's argument that the club unlawfully terminated the employment contract through failing in its duty of care, mainly due to the misdiagnosis and the incorrect medical treatment he received.
16. Furthermore and with regard to the player's allegation that the club breached the relevant employment contract by giving medical information to the media without his authorisation, the Chamber noted that in accordance with art. 12 par. 3 of the Procedural Rules, any party claiming a right on the basis of an alleged fact shall carry the burden of proof. Consequently, the Chamber pointed out that the player had been unable to provide any evidence concerning this assertion.
17. In continuation, the members of the decision-making body focused on the conduct of the player. First of all, the Chamber referred to the player's argument that he had been released by the club from 20 January 2008 to 10 February 2008 to attend the Cup of Nations as a special adviser to the representative team of the G Football Association. The player mentions that this absence was perfectly justified because the club itself had verbally consented to it and also because the club was obliged to release him in accordance with the relevant G Football Association's request.
18. In this respect, and in particular, the alleged verbal authorisation by the club to attend the Cup of Nations, the Chamber noted again that in accordance with art. 12 par. 3 of the Procedural Rules, the player had been unable to provide any evidence that the club had effectively authorised him to attend the Cup of Nations as an adviser to the Football Association, from 20 January 2008 to 10 February 2008.
19. With regard to the club's alleged obligation to release the player for said competition in accordance with the G Football Association's request, the members of the Chamber wished to underline that, given that the player was unable to play for his representative team at the competition in question due to his injury, the club F was not under any obligation to release the player in accordance with Annexe 1 of the Regulations for the period of the competition in question. Furthermore, the members of the Chamber remarked that Annexe 1 of the Regulations does not provide for the release of a player so that he can act as a consultant to his representative team. Indeed, the scope of application of the

annexe in question only relates to players who are required to actively take part in a match for their representative team in accordance with the coordinated international match calendar.

20. The members of the Chamber thus concluded that the player was not authorised to attend the Cup of Nations from 20 January 2008 to 10 February 2008 in order to act as an adviser to the representative team of the G Football Association because firstly, he had received no authorisation from the club and secondly, said absence did not fall within the scope of Annexe 1 of the Regulations.
21. Having resolved the issue relating to the Cup of Nations, the members noted that the player in question had not complied with the two letters from the club requesting him to report to the club by 19 January 2008 at the latest and to the Clinic on 29 January 2008. In this regard, the Chamber mentioned that the employer may issue specific instructions to employees as a corollary to the essential element of an employment contract, namely the relationship of subordination, provided that said instructions are in accordance with the club's needs and respect the player's rights. In this case, the members concluded that the player had not complied with the instructions issued by the club and that he should have done so in accordance with the terms of the employment contract, especially since the relevant instructions had been issued with a view to safeguarding and preserving the health of the player.
22. Consequently, and in light of the above, the members of the Dispute Resolution Chamber decided that in abandoning the club without authorisation and not complying with the club's instructions, eventually and in particular in failing to attend the second appointment on 29 January 2008, the player had terminated the employment contract without just cause from that date.
23. Consequently, having determined which party terminated the employment contract without just cause, the Dispute Resolution Chamber focused on the potential financial and/or sporting consequences for the player of said termination of contract without just cause.
24. This decision-making body considered all the facts of the case and deemed that the player's responsibility for the termination of the employment contract without just cause was mitigated and therefore diminished by several attenuating circumstances in the player's favour, as explained below.
25. First of all, the Chamber noted that when the player refused to sign the document concerning his deregistration proposed by the club on 14 January 2008 so that the club was no longer subject to the restrictions on the number of foreign players per team in accordance with the regulations of the T Football Federation, the club's attitude towards the player suddenly changed and, *inter alia*, it no longer allowed the player to continue his medical treatment as he had done up to that point.

26. Another mitigating factor borne in mind by the Chamber was that already on 22 January 2008, the club exercised the unilateral option to extend the employment contract for the 2009/2010 season, i.e. 16 months prior to the initial expiry date of the employment contract and, in particular, only 13 days before the club officially lodged its claim with FIFA. According to the Chamber's free consideration, this shows that the option in question was only exercised in order to claim greater financial compensation for breach of contract without just cause in connection with the player in these proceedings in accordance with art. 17 of the Regulations. In this respect and with regard to unilateral options to extend the duration of an employment contract, the Dispute Resolution Chamber outlined that in accordance with its hitherto jurisprudence, as a general rule and without compromising the validity of the initial duration of a contract, an unilateral option in favour of a club cannot be considered, since it limits the freedom of the player in an excessive manner and leads to an unjustified disadvantage of the player's right towards the club, i.e. the employer, in particular, if like in the case at hand, the remuneration after the extension payable to the player is not increased.
27. The Chamber also highlighted another fact which diminishes the player's responsibility in the present case. The Chamber noted that the club signed a loan agreement for the player T valid from 15 January 2008 to 30 June 2009. The Chamber also observed that the club requested the player to report for duty by 19 January 2008 at the latest. Consequently, the Dispute Resolution Chamber concluded that the reason for the engagement of the player T cannot be entirely attributed to the absence of the player because at the time of the signature of the loan agreement in question, there was no indication to the club F that the player would not report for duty by the imposed deadline.
28. Another attenuating circumstance to be considered in connection with the player's contractual liability is that following all the health problems caused by the injury he suffered in January 2007, he was in a psychological state that could be described as fragile and depressed for reasons not linked to his behaviour and for which he could not be held responsible. In this respect, the Chamber deemed it appropriate to point out that prior to the relevant health problems the player had always shown an adequate and untainted stance.
29. Furthermore, having determined which party terminated the employment contract without just cause and the degree of responsibility for said termination, the members of the Dispute Resolution Chamber focused on the potential financial and/or sporting consequences in this case.
30. With regard to the financial consequences of the termination of the employment contract, the Chamber referred to art. 17 par. 1 of the Regulations and recalled that the said provision provides for a non-exhaustive enumeration of criteria to be taken into consideration when calculating the amount of compensation payable. Therefore, another objective criteria may be taken into account at the discretion of the deciding authority.

31. On this basis, the members of the Chamber highlighted that all the financial obligations provided for in the contract had been fulfilled towards the player until the end of April 2008. This fact was not disputed by the player. Thus, the club F remunerated the player beyond the termination of the employment contract without just cause, that occurred on 29 January 2008. The Chamber deemed that it should consider this fact in determining the amount of compensation to be paid by the player.
32. On the other hand, the Chamber acknowledged that on 28 January 2008 the club management had already fined the player for the non-respect of his contractual obligations, i.e. presumably and primarily for the unauthorised absence as of 20 January 2008. The relevant fine amounted to USD 73'500. Also this objective element should, according to the Chamber, be duly considered.
33. Referring to the criteria mentioned in art. 17 par. 1 of the Regulations, the deciding authority noted that the time remaining on the contract that was breached following the cessation of the salary payments by the club and while not considering the additional 2009/2010 season for the reasons mentioned in point II., 26. above, is of 16 months. The remuneration due to the player under the said contract for the originally remaining time amounts to EUR 2'195'000. The player is yet to sign a new contract. Furthermore, the non-amortised part of the compensation paid to J amounts to EUR 2'212'766 (total duration of original employment contract 47 months [1 July 2005 to 31 May 2009]; time remaining 13 months [1 May 2008 to 31 May 2009]). In this regard, the Chamber considered that also the signing-on fee paid to the player in the amount of EUR 250'000 should be shortened on a pro rata temporis basis, which leads to an amount of EUR 69'149 to be considered for the calculation of the compensation due.
34. Equally, and while referring once again to art. 12 par. 3 of the Procedural Rules, the members of the Chamber considered that club F had not sufficiently specified respectively, was unable to present clear evidence for fees allegedly paid to agents, solidarity contribution paid in addition to the transfer compensation paid to J (solidarity mechanism is to be deducted from agreed transfer compensation according to art. 1 of Annexe 5 of the Regulations) and the alleged airfares and other expenses. Therefore, the relevant positions could not be considered. Also, the Chamber did not take into account the alleged rent of the house for the period following the player's departure.
35. In view of all of the above, the Chamber concluded that bearing in mind art. 17 par. 1 of the Regulations, among others, as well as the circumstances of the case, in particular the and attenuating circumstances which diminished the player's contractual responsibility, after having duly taken into account the specificities of the present case, compensation of EUR 2'281'915 payable by the player to the club F would appear fair and proportionate. Furthermore, the members of the Chamber decided not to impose sporting sanctions on the player due to the specific circumstances of this case.

36. Also, for the sake of good order, having determined that the player terminated the employment contract without just cause, the members of the Chamber decided to reject the player's counter-claim in full.
37. The Dispute Resolution Chamber hereby decides to order the player S to pay the sum of EUR 2'281'915 to the club F in compensation for unilateral termination of the employment contract without just cause on the part of the player.

III. Decision of the Dispute Resolution Chamber

1. The claim of the Claimant / Counter-Respondent, the club F, is partially accepted.
2. The Respondent / Counter-Claimant, the player S, is ordered to pay to the Claimant / Counter-Respondent, the club F, the amount of EUR 2'281'915 **within 30 days** as from the date of notification of this decision.
3. Any further claims lodged by the Claimant / Counter-Respondent, the club F, are rejected.
4. In the event that the above-mentioned amount is not paid within the stated deadline, an interest rate of 5% per year will apply as of expiring of the fixed time limit and the present matter shall be submitted upon the party's request to FIFA's Disciplinary Committee for its consideration and decision.
5. The Claimant / Counter-Respondent, the club F, is directed to inform the Respondent / Counter-Claimant, the player S, 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.
6. The counterclaim of the Respondent / Counter-Claimant, the player S, is rejected.

Note relating to the motivated decision (legal remedy):

According to art. 63 par. 1 of the FIFA Statutes, this decision may be appealed against before the Court of Arbitration for Sport (CAS). The statement of appeal must be sent to the CAS directly within 21 days of receipt of notification of this decision and shall contain all the elements in accordance with point 2 of the directives issued by the CAS, a copy of which we enclose hereto. Within another 10 days following the expiry of the time limit for filing the statement of appeal, the appellant shall file a brief stating the

facts and legal arguments giving rise to the appeal with the CAS (cf. point 4 of the directives).

The full address and contact numbers of the CAS are the following:

Court of Arbitration for Sport
Avenue de Beaumont 2
1012 Lausanne
Switzerland
Tel: +41 21 613 50 00
Fax: +41 21 613 50 01
e-mail: info@tas-cas.org
www.tas-cas.org

For the Dispute Resolution Chamber:

Markus Kattner
Deputy Secretary General

Encl. CAS directives

CAS 2009/A/1856 – Club X. v/ A.

CAS 2009/A/1857 – A. v/ Club X.

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Efraim **Barak**, Attorney-at-law, Tel Aviv, Israel

Arbitrators: Mr Michele **Bernasconi**, Attorney-at-law, Zurich, Switzerland
His Honour Judge James Robert **Reid** QC, West Liss, England

Ad hoc Clerk: Mr Patrick **Grandjean**, Attorney-at-law, Lausanne, Switzerland

in the arbitration between

Club X.

Represented by

and

A.

Represented by

* * * * *

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A. FORM AND PROCEDURE**I. PARTIES**

1. Club X. (hereinafter also referred to as "the Club") is a football club with its registered office in Country Z. It is a member of the Y. Football Federation (YFF), itself affiliated to the Fédération Internationale de Football Association ("FIFA") since 1923.
2. A. (hereinafter also referred to as the "Player") is a professional football player. He was born on 24 December 1980. He presently plays with the Italian club Club B.

II. BACKGROUND FACTS**II.1 THE CONTRACTS SIGNED WITH REGARD TO THE PLAYER'S TRANSFER TO CLUB X.**

3. Since the 2003/2004 football season, the Player was registered as a professional player for the Italian club Club C.
4. In July 2005, Club C. agreed to transfer the Player to Club X. for a sum of EUR 8,000,000, the payment of which is not disputed. According to the terms of the transfer agreement, *"The Transfer Price does not include the solidarity contribution, provided by Article 21 of the FIFA Regulations for the Status and Transfer of Players. Therefore, Club X. will pay the solidarity contribution to legitimate parties without making any deduction from the Transfer Price"*.
5. Club X. contends that, in relation with the Player's transfer, it incurred the following additional expenses:
 - Contributions related to the solidarity mechanism, in the total amount of EUR 390,000, the payment of which is not contested.
 - Agent's fees of EUR 400,000 paid to R.
6. On 19 July 2005, Club X. signed with the Player an employment contract. It was a fix-term agreement for four years, effective from 1 July 2005 until 30 June 2009. This handwritten document reads as follows where pertinent:

"The player will be paid as follows:

<i>1. year</i>	<i>10 x 185,000 EUROS</i>	<i>1,850,000 EUROS</i>
<i>2. year</i>	<i>10 x 190,000 EUROS</i>	<i>1,900,000 EUROS</i>
<i>3. year</i>	<i>10 x 195,000 EUROS</i>	<i>1,950,000 EUROS</i>
<i>4. year</i>	<i>10 x 200,000 EUROS</i>	<i>2,000,000 EUROS</i>

Player will receive 250,000 EUROS signing fee.

Club X. provides the Player with A4 Audi car, a furnished apartment, 5 tickets [...] per year (business class).

The Player has to obey the clubs rules, regulations and restrictions.

Unilateral option for Club X. if Club X. decides to extend the existing contract with the player for the period of 2009 – 2010 Club X. will pay the Player as salary 2,000,000 EUROS which is payable in ten equal instalments. This is unilaterally in club's option".

7. Subsequently, the Parties signed an undated contract, which fully confirmed the terms set out in the agreement dated 19 July 2005. This second document was typed and clarified some aspects of the Parties' respective obligations:

- the monthly wages were to be paid out on the 25th of each month;
- the Player was entitled to a fully furnished apartment with a rent that could not exceed USD 3,000;
- bonuses were to be paid to the Player in accordance with Club X.'s incentive-scheme;

- **"ARTICLE 5 – THE DUTIES OF THE FOOTBALL PLAYER**

During the period of the agreement, the football player will show every effort for the success of Club X., will act within the frame of Club X.'s principles and written regime (regulations, circular, etc.) and will show care for his health and private life";

- *"The football player must abide by all the statutes of Club X., will act according to the Club X. Sport Club's Technical Committee's directives and will complete all the work and requests of the Club X. Sports Club's Technical Committee.*

ARTICLE 8 –

The player has to obey the clubs rules, regulations and restrictions. Also the player has to attend the official, friendly and European Cup matches, training sessions and camps of Club X."

8. On 22 July 2005, the Parties signed another agreement, which is the standard contract form of the YFF and contains the description of their personal details. This document confirms the terms of the two previous contracts as regards the duration of the contractual relationship (save that the termination date is 31 May 2009), the amount of the Player's remuneration, the monthly instalments and the unilateral option for Club X. to extend the labour agreement. It is specified that the salary must be paid "*free of taxes for the Player*". Nonetheless, no mention is made regarding the payment of bonuses, the Player's obligations and the other benefits in kind.

9. The Player played as a midfielder.

II.2 THE EVOLUTION OF THE PLAYER'S HEALTH CONDITION

1) The Player's operation

10. In January 2007, the Player suffered an injury to his left knee during a friendly match. He contends that "*[while] playing in the game, [he] felt a pinch in [his] knee. At the end of the game, [he] could feel that [his] knee was sore*" (Player's witness statement

dated 26 October 2009, par. 13). Allegedly, he immediately reported his symptoms to Club X.'s staff.

11. In March 2007, as the Player's condition was not improving, Club X. arranged for a medical consultation at the hospital, where a magnetic imaging test was carried out. The Player was diagnosed as suffering from a cartilage problem, which required surgery.
12. It is disputed whether it was up to the Player to decide if he wanted to be operated immediately or only at the end of the 2006/2007 season. In any event, he kept playing for his team until the end of the said season, during which Club X. won the [league].
13. On 24 May 2007, the Player's operation took place. It is disputed to what extent the Player was actually informed about the surgical procedure and whether he was provided with the opportunity to object. Nonetheless, he signed the following consent form, dated 23 May 2007:

"Under the observation, authority and management of my physician, I, (...) give my authorization and consent to all the necessary and appropriate diagnostic interventions and medical treatments following my admission, to be provided by the physicians, nurses and other health personnel. I have been explained the nature of the recommended diagnostic intervention and medical treatment, the purpose and benefits, alternative treatment options and possible risk and complications. I have had the opportunity to ask questions and all of my have been answered to my satisfaction. I have read and fully understand the text above".

14. It is accepted by all the Parties that a mosaicplasty was performed on the Player.
15. At the hearing held on 14-15 April 2010 in Lausanne (see infra III.4), Dr T. confirmed that he performed the surgery on the Player and that physiotherapy started immediately after the operation with 4 to 6 hours of continuous passive motion per day. He affirmed that the Player was monitored on a daily basis by the Club's doctors and on a weekly basis by him during the six first weeks and thereafter monthly.
16. In October 2007, the Player eventually resumed playing in official games. He played for [his] national team at the four-nation tournament in November 2007 and played his last match for Club X. on 1 December 2007.

2) The postoperative period

17. According to Club X., the *"postoperative period was absolutely normal and uneventful"* (Club's appeal brief, par. 16). In the Player's witness statement of 26 October 2009, he asserted that during the week following the operation, he remained at home, needed two crutches and was in regular contact with Mr S., Club X.'s physiotherapist. After two weeks, he only needed one crutch and after a month, he could put weight on his left leg again.

18. In July 2007, the Player paid for a ten days stay in Dubai, United Arab Emirates, where he continued his rehabilitation with the help of Mr S. Then, he spent a few days in Country D. with his family.
19. Simultaneously, the Player and his agents were conducting negotiations with other clubs. On 11 July 2007, the German club E. formally confirmed to Club X. its interest for the Player's services and the fact that it was willing to pay a transfer fee of EUR 4,000,000. Despite the fact that Club X. turned this offer down, the Player's representatives kept insisting and asking the Club to accept the transfer, until the latter lodged a formal claim before FIFA requesting sanctions against the Player's agents as well as against the German club for "*their unfair and non-sportive initiatives*" (Club's letter to FIFA dated 25 July 2007).
20. In the week of 16-22 July 2007, the Player joined Club X.'s team in a training camp, which took place in Austria.
21. On the one hand, the Player submits that, from the moment he attended the training camp in Austria, he suffered from shortness of breath and general fatigue. According to the Player, he immediately reported his health problems to Club X.'s medical staff, which allegedly took no or no adequate steps to address his symptoms. Likewise, during July and August 2007, the Club supposedly did not react when the Player complained on several occasions about his breathing difficulties.
22. On the other hand, Club X. claims that the Player only informed it shortly before 5 September 2007 of the fact that he had "*started to feel 'fatigue, dyspnea and cough' symptoms of which – according to the Player – occurred after he had started to exercise again and which he already had experienced another time in his life about five years ago*" (Club's appeal brief, par. 17).
23. It is undisputed that, on 5 September 2007, the Player was referred by Club X. to the hospital, where a pulmonary diseases specialist conducted an echocardiography as well as a range of respiratory function tests. "*Pursuant to that examination a bronchospasm was detected and the reversibility test was positive. As consequence of the above, the Player was medicated with a bronchodilator drug*" (Club's appeal brief, par. 17). The treatment foreseen consisted in two puffs of Symbicort to be administered by inhalation twice daily.
24. According to the Player, he did not respond rapidly to the prescribed treatment. On 10 October 2007, he was referred back to the hospital. In this regard, the undated medical report of Club X.'s doctor, Dr A. (which is referred to by both Parties in support of their respective submissions) reads as follows, where relevant:

"In the check up respiration function tests, values have been observed to have increased. Therefore his treatment has been continued and a control appointment has been set up for 2 months later. As his respiration complaints recurred in the beginning of December, Symbicort treatment has been set as 4 puffs in the morning and 4 puffs in the evening with the recommendation of the Pulmonary Diseases Specialist".

25. In December 2007, as his health condition was not improving, the Player was referred back to the hospital. The medical report of Dr A. states the following:

"08.12.2007

Blood examination (blood test) and MRI examination has been done with General Surgery Consultation due to his complaints in the morning such as burning in left femur proximal medial. The General Surgery Specialist has considered Lymphangitis as a possibility and has started an antibiotics treatment.

12.12.2007

I requested Coloured Doppler US in order to evaluate left leg venous system due to distinction in left leg superficialis veins and edema causing godet (...) in left pretibial step (...). After detecting acute venous system embolism in this examination, Cardiovascular Surgery Specialist started treatment with 0.8 Clexan in the morning and evening.

14.12.2007

Additional blood tests have been done targeting the etiology of disease.

15.12.2007

After consulting with angiopathy specialist Prof. Dr. K., Kumadin 5mg. has been added to Clexan treatment in accordance with his opinions. It has been decided to set the treatment with INR follow-up.

17.12.2007

Considering that the microembolus could have been the reason of previous respiration distresses, we took Pulmonary Perfusion-Ventilation Scintigraphy.

18.12.2007

After the scintigraphy result being evaluated as highly probable pulmonary embolism, Pulmonary CT Angiography and Echocardiography examinations have been done.

19.12.2007

INR has been done and as a result 1.15, Kumadin treatment has been set as 5 mg one day and 7.5 mg. The following day. After INR became 2, it has been decided to stop Clexan and set Kumadin dose as it will hold INR between 2 and 3".

II.3 THE DEVELOPMENT OF THE CONTRACTUAL RELATIONSHIP BETWEEN THE PARTIES IN JANUARY 2008

1) The meeting of 12 January 2008 and the following days

26. On 20 December 2007, "mistrustful of the Club's doctors, the Player went with the Club's agreement" (Player's appeal brief, par. 97) to Italy, for a medical appointment with Dr G., a specialist in general surgery and sporting medicine. Afterwards, he visited his family in Turin, Italy, and then returned to Country Z. on 10 January 2008 to meet with Dr A. and Mr Y., the President of the Club.

27. It is undisputed that on 11 January 2008, the Player travelled back to Italy accompanied by Mr O., the Club's Vice-President, the brother of the Club's President and a surgeon from the hospital in order to meet with Dr G. as well as three other Italian doctors, "each of whom had examined the Player either prior to or [on 12 January 2008]" (Witness statement of Dr G., dated 25 September 2009, par. 20).
28. The meeting took place on 12 January 2008 and, on that occasion, the Player underwent further medical evaluations, which resulted in the following report, signed by Dr G. as well as the three other doctors:

"Severe venal thrombosis in the left inferior artery.

Today's examination with the echo-doppler showed an unchanged picture as regards the superficial femoral vein, some recanalisation of the popliteal artery, recanalisation of the minor saphenous vein compatible with the onset of lower venal thromboembolic disease.

Pulmonary embolisms are present, though these are likely to be recent in light of the clinical data, and they are diagnosed as realistically being only in the subacute phase. The patient commenced oral anticoagulant treatment on 15.12.2007.

In light of the results of the echo-doppler examination and the multi-disciplinary [i.e. general] checkup carried out today, it is recommended that the oral anticoagulant treatment is continued with a periodic PT/I.N.R. examination.

An elastic compress to the left pelvic region (class II compression) would be useful.

Non-competitive physical activity is recommended.

Treatment recommended:

Coumadin 5 1e1/2 c per day, PT/I.N.R. examination in 7 days."

29. The Parties' positions differ significantly in regard to what was discussed during the said meeting and to what was agreed upon by the persons who were there.
- On the one hand, the Player asserts that Club X.'s attitude was only focused on getting him back to Country Z. in order for him to resume training and playing, no matter what the Italian doctors said or advised. According to the Player, the discussion started to get animated as the Italian doctors explicitly told the Club's representatives that the failure to diagnose and treat the Player properly put the latter's life at stake and that, under no condition, he could train or play for the remaining period of the 2007/2008 season. The Player contends that despite being reluctant in the beginning of the meeting, the representatives of Club X. eventually authorized him a) not to play nor to train with Club X. for the remainder of the 2007/2008 season, b) to stay in Italy for medical treatment under the supervision of his Italian doctors and c) to attend as a "special advisor" the African Cup of Nations, which was being held [...] between 20 January to 10 February 2008.
 - On the other hand, Club X. alleges that it did not give its consent "to both the facts, namely that the Player for considerable period could further remain in [Italy] for

medical treatment and, secondly, that the Player could travel as special adviser to the African Cup of Nations" (Club's answer, par. 28). In addition and according to Club X., the persons attending the meeting agreed that a 3 months drug treatment was recommended and that "in the best of the conditions, the Player could start training in April, and [] could play in May, the earliest. In this meeting the participants reached a consensus for the Club's application to TFA for adjusting foreign player quota on the condition that the player will consent in writing [to de-register] and will be paid by the Club in compliance with his contract" (Letter of the Club to the Player's lawyers [...] dated 22 January 2008). The Player contests the existence of the above mentioned consensus.

30. However, it is undisputed that during or just after the meeting of 12 January 2008, the issue of the "de-registration" of the Player was discussed. As a matter of fact, under the YFF's rules, a club could only have a limited number of foreign players under registration to participate in the national league and respectively, also in the UEFA Champions League. Given his inability to play caused by his injury, the Player was asked by Club X. to allow himself to be de-registered until the last game of the season scheduled for 11 May 2008, in order to allow the Club to field another foreign player in his place.
31. On 14 January 2008, Club X. asked the Player to formally accept de-registration for the remainder of the 2007/2008 season. In this context, it confirmed to the Player that he would still be entitled to his salaries and other benefits and that his contract remained in full force. Unsure, the Player refused to comply as the possible consequences of such a de-registration were not clear to him.

2) From 16 to 20 January 2008

32. On 16 January 2008 and with reference to the medical report of Dr G. as well as the three other doctors dated 12 January 2008, Club X. summoned the Player (who was still in Italy) to attend the squad in Country Z. at the latest by 19 January 2008 in order to continue his medical treatment and rehabilitation under the supervision of the Club's medical staff. Club X. warned the Player that his case would be referred to FIFA if he did not comply with this instruction.
33. According to a notary's statement dated 19 January 2008, the Player did not show up at Club X.'s premises on the scheduled date. As a matter of fact, the Player chose to go to Ghana for the whole duration of the African Cup of Nations, i.e. from 20 January until 10 February 2008.

3) Since 20 January 2008

34. The Player was startled by the publication of an article on the UEFA website, according to which Club X. "froze" his contract due to serious concerns about his fitness. He attributed the comments made in the said article to Club X.
35. On 21 January 2008 and in reaction to this article, the Player's Counsels, sent a fax-letter to Club X. asking for explanations in regard to the effects of the "freezing" of the Player's contract. The Player's lawyers confirmed that the Player was an employee of

Club X. until 30 June 2009 and as such was entitled to his full salary as provided under the contract. Should the "freezing" of the contract mean that Club X. was unilaterally suspending the labour agreement or the payments of the Player's salary, it would constitute a unilateral breach of contract without just cause pursuant to the applicable FIFA Regulations. Furthermore, [the Player's Counsels] also criticised the fact that the content of the article "*suggest[s] that A. is suffering from a life threatening injury and that there is a significant risk that he may die as a result of playing football. These comments are entirely unacceptable and may potentially be defamatory (...). Club X.'s public disclosure of such confidential information not only displays a total lack of respect for A., but is also very damaging to A.'s career. As a consequence of such disclosure, it is likely that the opportunity for A. to find another club to continue with his professional career, will be significantly curtailed*". Finally, [the Player's Counsels] reaffirmed that the Player was aware of the fact that he was required to return to Country F. to receive medical treatment. Despite the fact that the Player intended to abide by the terms of the labour contract and taking into account the fact that he could not play, [the Player's Counsels were] of the opinion that an accommodation could be reached among the Parties in order to allow the Player to attend the African Cup of Nations due to commence [...] the coming week-end.

36. On 22 January 2008, Club X. answered [the Player's Counsels] that it was not involved in any manner with the content of the article published on the UEFA website and that it actually requested an immediate correction from the said sporting association. In this regard, it affirmed that it firmly condemned press speculation in respect to the Player's health and always made sure it safeguarded the Player's privacy. Furthermore, Club X. confirmed that it had never suspended the Player's labour contract or the payments of his wages. It also made reference to the meeting of 12 January 2008 and put emphasis on the fact that the main disagreement among the respective doctors of the Parties was whether the Player could immediately train and whether he was to be treated with coumadin. "*The Club, has however, respected the personal doctors' view for the player's comfort*". In addition, the Club declared that it had taken the necessary measures to exercise the contractual option to extend the term of the Player's contract for the 2009/2010 season and made the following request:

*"Now therefore in consideration of all above and on the eve of crucial national league and champions league matches, the player is requested to join the Club **immediately** (as per the Contract he is a party) to facilitate his treatment, and to maintain his fitness as otherwise he will be liable for the consequences of his breach. His return will also eliminate the doubts in the public related to his well being and will be a moral boost to him and his family, which is, as you would appreciate, more important than attending match audience in Ghana. On the other hand, the player has not taken part in [his] national team, and there is not any sportive just basis for his non attendance in his Club [...] as the second half of the national league has already started and there are a few days to the first knockout in the UCL".*

37. On 23 January 2008, given Club X.'s answer of 22 January 2008 and taking into account the Club's commitment to pay the salaries until June 2009, [the Player's Counsels] confirmed to Club X. that the Player did not object to his de-registration and was

hopeful of an amicable resolution with regard to his attendance at the African Cup of Nations in Ghana. With reference to the option exercised by the Club, the Player requested from Club X. a copy of the labour contract before making a decision.

38. On 24 January 2008, Club X. informed [the Player's Counsels] that the Club inferred from the last letter that the Player was opposed to the exercise of the option. *"Under the circumstances, Club X. is no more interested in the adjustment of the foreign quota and reiterates its invitation to A. to resume duty and join the Club at the latter's premises as the Club further reminds the player that this is his contractual obligation. We also refer to the fact that his missing cannot be justified by FIFA rules and regulations as he has not been listed in the squad of [his] national team. Considering that the player has been absent for almost a month without any permission by the Club, any further delay may cause further legal liability of the player as the Club shall seek remedy if the player insists in his position."*
39. On 25 January 2008 and in the view of the circumstances, [the Player's Counsels] informed Club X. that the Player was opposed to his de-registration. Moreover, the Player's representative discussed various issues such as the option to unilaterally extend the labour agreement, the Player's attendance in Ghana, the damage the latter suffered because of the Club's mistreatment and misdiagnosis, the Player's concern to fully recover from his injury in order to resume his career, the distress caused by the fact that highly confidential details regarding his medical history were made public and the Player's feeling that *"he has not been treated fairly by Club X. and his trust and confidence in the Club has been significantly damaged."*
40. On 25 January 2008, Club X. sent the following fax-letter to the Player's lawyers:

"First, it was [...] one of the leading health institution in Country Z. which made the diagnosis but not Club X. SK. In addition, the Player, himself applied to this institution. Further, the said institution is not an affiliate of Club X. Besides, your claim about "incorrect diagnosis" is disputable. [The hospital] is insistent in its diagnosis. If the player wishes to claim, it should be addressed to [the hospital], but not to the Club. We therefore, cannot understand why the Player's confidence in the Club has been damaged. We, however, understand that the Player is unfairly creating reasons to justify his position, which is unacceptable for us.

It appears that there is a discrepancy between the personal doctors of the Player and [the hospital] related to diagnosis of his disease and the treatment. We therefore took an appointment for the player from Mayo Clinic of the USA, the most respective and renown diagnosis center worldwide, and the Player is hereby requested to attend the appointment on Tuesday, 29, January 2008 at 14:00 hours.; all flight and accommodation details have been fixed and costs shall be born by Club X. Dr. D. (...) will be available on the above mentioned date to escort the Player.

We reiterate that any public disclosure or media appearance related to the Player can never be attributable to the Club, as the Club is very sensitive to keep confidentiality of club affairs.

We further note that the Club respects its obligations and with this understanding

has deposited the Player's monthly salary with his bank account despite the Player's unjustified absence, and severe unjustified allegations about the Club.

We further remind the Player that his unpermitted absence constitutes not only a breach of his Contract but also that of FIFA regulations. As the Player rests on the purported call by [his National] Federation for his absence, Club X. considers to refer the matter at hand to FIFA, including, inter alia, [his National] Federation as a part of the Player's breach.

The Player will also be sanctioned for his several offences of the Disciplinary Regulations of the Club. As long as his absence lasts, he will be further sanctioned as per the provisions of the Disciplinary Regulations.

We also consider to initiate action against the Player for his breach of the Contract.

This is our final communication, as it appears that we cannot amicably come to a common understanding through "private" correspondence. However, I would like to thank you for your best personal efforts for an amicable solution.

We therefore ask the Player to attend the appointment in Mayo Clinic and join the Club immediately."

41. On 28 January 2008, Club X.'s internal disciplinary body imposed upon the Player a fine of USD 73,500 for non-compliance with several provisions of its internal regulations. It is undisputed that the said disciplinary decision was duly notified to the Player on 1 February 2008.
42. On 1 February 2008, [the Player's Counsels] informed Club X. that the Player held the Club responsible for his misdiagnosis and mistreatment as well as for unfair conduct towards him. He considered that he could successfully claim compensation against Club X. for several million Euros but was willing not to pursue any claim if the Club would accept the following offer within five days:
 - (a) *pay A. the sum of € 2 m (amounting to approximately the value of the final year of his salary) in respect of the various breaches by the Club of the Contract, the Rules, and/or any other relevant legislation; and*
 - (b) *agree in writing that A. will be free to leave the Club without payment of transfer compensation at the end of the 2007/08 season; and thereafter*
 - (c) *confirm to the [YFF] that it does not, and will not, object to the release of A.'s International Transfer Certificate, when requested".*

II.4 THE PROCEEDINGS BEFORE THE FIFA DISPUTE RESOLUTION CHAMBER

43. On 31 January 2008, Club X. complained before FIFA of the situation and requested its assistance:
 - *to caution the Player and his agents, and force the Player to respect his contractual obligations and return to join the Club*
 - *to impose sportive sanctions for his breach of contractual obligations*

- *to impose sportive sanctions upon the Player's agents for their unsportive and unfair allegations against Club X.*
 - *to caution the [National] Federation [of A.], as it is apparently encouraging the player to leave the premises of Club X. in order to act as a special advisor to [his] national team, which is unacceptable for Club X."*
44. On 4 February 2008, Club X. deemed the content of [the Player's Counsels]' letter of 1 February 2008 false, disappointing and damaging for its reputation and submitted it to FIFA for its consideration. Again, the Club reiterated its request for FIFA's assistance *"in order that the player should respect his contractual obligations which include, at the top, his presence at the premises of the Club"*.
 45. On 20 February 2008, the Player was invited by FIFA to present his position regarding Club X.'s allegations according to which he was not respecting his contractual obligations.
 46. On 7 March 2008, the Player told FIFA that Club X.'s claim came as a surprise to him as it is because of the Club's negligence and mistreatment that he was not in the position to fulfil his obligations under the labour agreement. Furthermore, he was of the opinion that the Club filed its claim prematurely as the Player had already made attempts to resolve the dispute privately with Club X. and remained willing to find a settlement without recourse to a legal action before FIFA or any other competent court.
 47. On 18 March 2008, FIFA forwarded the Player's letter dated 7 March 2008 to Club X. and asked for its position regarding the possibility of an amicable resolution of the matter.
 48. The same day, the Player informed FIFA that he had received from Club X. the confirmation that it was not willing to discuss any kind of settlement. In this context, he announced that he would file a formal answer to the Club's claim dated 31 January 2008 as well as his own claim against Club X. *"for its severe mistreatment of him and its unilateral breach of contract without just cause during the Protected Period"*.
 49. On 28 March 2008, Club X. finally responded that it was not opposed to finding an amicable settlement of the dispute, provided only that the discussions were conducted by FIFA. Furthermore, it sought a delay of 14 days to submit an additional claim against the Player with regard to his persistent and unjustified absence, which must be considered as a serious breach of his employment contract during the "Protected Period".
 50. On 2 April 2008, the Player declared to FIFA and to Club X. that he was willing to offer to the Club one final opportunity to settle amicably the case. He drew the attention of Club X. that he had a very strong case, as the Club's multiple failures were confirmed *"by the written reports of the Club's doctor, Dr A., which the Player has a copy of. Moreover, the Club's failures have also been confirmed by written reports from two independent medical practitioners (...) [who] have examined and treated A. since the Club's failure, and are in possession of [his] full and official medical history, and the Club's medical report"*.

51. On 15 April 2008, the Player filed his response and counterclaim with the FIFA Dispute Resolution Chamber (hereinafter referred to as the "DRC"). He alleged that he suffered significant and potentially irreparable harm because of the Club's conduct, which amounted to a unilateral breach of contract during the "Protected Period". The Player asked the DRC a) to reject Club X.'s claim, b) to order the Club to pay in his favour a compensation of EUR 2,780,000 as well as any other amount as the DRC deemed appropriate for the damage caused to him as a consequence of the Club's serious disrespect of the principle of good faith within the specificity of sport and c) to ban the Club from registering any new player, either nationally or internationally, for a period of two transfer windows. In his submissions, the Player explained that he had so far not terminated the contract because he had remained hopeful that Club X. would attempt to settle the case. Nevertheless, he was of the opinion that he would have had and continued to have just cause to terminate the contractual relationship with the Club. *"However, since it is now apparent that the Club is intent on causing the Player more financial harm through its futile defence of the Player's Counterclaim, the Player has little choice but to treat the Contract as terminated as at the end of the Season."*
52. On 21 April 2008, Club X. formally initiated proceedings with the DRC to order the Player to pay in its favour an amount of EUR 12,000,000 and to sanction the Player with a restriction of six months on his eligibility to participate in official matches.
53. On 11 June 2010, FIFA wrote to the Parties as follows, where relevant:
- "In this respect and in view of the statements made by both the [...] club and the player himself, we have to presume that the labour relationship between Club X. and the player A. is seriously disrupted and that both Club X. and the player are not interested in maintaining the relevant labour relationship.*
- In view of this situation, we advise the parties involved in this matter to consider their relationship as terminated and to focus on the financial aspects of the dispute."*
54. By a decision of 9 January 2009 (hereinafter the "Appealed Decision"), the DRC concluded that Club X. was entitled to the payment of EUR 2,281,915. It found that the Player was fully responsible for the breach of the contract as he failed to report to Club X. by 19 January 2008 (as requested by the Club on 16 January 2008) and to travel to an appointment at the Mayo Clinic (as required by the Club on 25 January 2008). Under such circumstances, it declared that the Player had terminated the employment contract unilaterally and without just cause on 29 January 2008 (i.e. the date of the appointment arranged at the Mayo Clinic). The DRC considered that the incorrect post-operative treatment could not be Club X.'s responsibility and therefore could not justify the Player's termination of the employment contract with just cause. According to the DRC, *"the club's behaviour neither directly caused, nor was sufficient to cause, the formation of blood clots in the player's left leg and the deep vein thrombosis detected in the player. In fact, the club had undisputedly at all times put medical treatment at the player's disposal in order to properly cure his injury and provided him with the relevant internal and external medical staff"* (par.13, page 11). *"(...) the club had properly fulfilled the duty of confidence and care towards the player that are required within the framework of a contractual employment relationship"* (par. 15, page 11). Furthermore,

the DRC held that the Player did not evidence the fact that Club X. authorized him to attend the African Cup of Nations as an adviser. In this regard, given that the Player was unable to play at the competition in question due to his injury, the DRC confirmed that Club X. was not under any obligation to release him in accordance with the applicable FIFA Regulations. It was of the opinion that the consequences of the breach of the employment contract by the Player were to be mitigated given a) the sudden change of attitude of the Club towards the Player in mid-January 2008, b) the fact that the Club exercised the unilateral option to extend the employment contract exclusively in order to claim greater financial compensation, c) the Club had replaced the Player with Mr M. before it was certain that the Player would not report for duty and d) "*following all the health problems caused by the injury he suffered in January 2007, [the Player] was in a psychological state that could be described as fragile and depressed for reasons not linked to his behaviour and for which he could not be held responsible*" (par. 28, page 14).

55. As a result, on 9 January 2009, the DRC decided the following:

1. *The claim of the Claimant / Counter-Respondent, Club X., is partially accepted.*
2. *The Respondent / Counter-Claimant, the player A., is ordered to pay to the Claimant / Counter-Respondent, Club X., the amount of EUR 2'281'915 within 30 days as from the date of notification of this decision.*
3. *Any further claims lodged by the Claimant / Counter-Respondent, Club X., are rejected.*
4. *In the event that the above-mentioned amount is not paid within the stated deadline, an interest rate of 5% per year will apply as of expiring of the fixed time limit and the present matter shall be submitted upon the party's request to FIFA's Disciplinary Committee for its consideration and decision.*
5. *The Claimant / Counter-Respondent, Club X., is directed to inform the Respondent / Counter-Claimant, the player A., 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.*
6. *The counterclaim of the Respondent / Counter-Claimant, the player A., is rejected."*

56. On 5 May 2009, the Parties were notified of the Appealed Decision.

II.5 THE PLAYER'S SITUATION SINCE JANUARY 2008

57. Club X. submits that, given the Player's injury and inability to play, it had to hire – on a loan basis – the services of Mr M. for the period running between 15 January 2008 until 30 June 2009 for an amount of EUR 1,500,000.
58. It is undisputed that the Player was last seen at Club X. on 11 January 2008. He has never returned since. It is also not challenged that the Player came to Country Z.

sometime in March 2008 to collect his salaries, which were paid by the Club until April 2008.

59. At the end of April 2008, the Player underwent further surgery performed by Dr M., an orthopaedic surgeon. He did not inform Club X. of this operation.
60. Sometime between April and August 2008, the Player stated on his official website that "*Following [his] recovery in Switzerland and [Italy], [he] travelled to B. where [his] personal trainer lives and works with the local club. While [he] was working on [his] fitness and condition, [Club B.] agreed for [him] to train with the club to help [him] regain match fitness. After training with them and playing several friendly matches [he] can announce that [he is] now match fit. (...)*".
61. In November 2009, the Player signed a one-year employment contract with Club B., under which he is to be paid around EUR 200,000 net per year. He suffered a hamstring injury to his right leg in the beginning of December 2009 but was fit to play again a month later. To date, Club B. has never fielded him in official games, supposedly because the Player's skills and talent did not meet the head coach's expectations.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

III.1 THE APPEAL OF CLUB X. - APPEALS PROCEDURE CAS 2009/A/1856

62. On 25 May 2009, Club X. filed a statement of appeal with the Court of Arbitration for Sport (hereinafter referred to as "CAS").
63. On 26 September 2009, Club X. filed its appeal brief. This document contains a statement of the facts and legal arguments accompanied by supporting documents. It challenged the above-mentioned Appealed Decision of the DRC, submitting the following request for relief:

"(...) the Appellant respectfully requests the Court of Arbitration for Sports (CAS) as follows:

- I. To fully accept the present Appeal, and, consequently, to partially update the Decision of the FIFA Dispute Resolution Chamber passed on 9 January 2009, condemning the Respondent, to pay to the Appellant the amount of Euro 12,131,178.00 (...) plus legal interest thereof since the day in which the Respondent is found in breach of contract or the highest amount that should be considered as more fair and due by the CAS Panel plus legal interest thereon since the day in which the Respondent is found in breach of contract as well as the amount of Euro 701,190 (...) plus legal interest from the date in which the CAS Panel will pass its award in the pertinent matter.*
- II. For the effect of the above, to state that the Respondent shall be also condemned to pay any and all costs of the present proceedings including, without limitation, attorney's fee as well as any eventual further costs and expenses for witnesses and experts."*

64. On 9 December 2009, the Player filed his answer, whereby he invited CAS "*to dismiss the Club's Appeal, to allow his Appeal, to order the Club to pay him compensation, and to order the Club to pay his costs of the Appeal and below.*"

III.2 THE PLAYER'S APPEAL - APPEALS PROCEDURE CAS 2009/A/1857

65. On 25 May 2009, A. filed a statement of appeal with the CAS.
66. On 29 October 2009, A. filed his appeal brief. This document contains a statement of the facts and legal arguments accompanied by supporting documents. He challenged the Appealed Decision, submitting the following request for relief:

"The Player respectfully asks CAS:

- (a) To set aside the Decision of the DRC;*
- (b) To rule that the Player is not liable to the Club because he did not terminate his Playing Contract without just cause, but rather with just cause;*
- (c) Alternatively, to rule that if the Player did terminate without just cause, the quantum of compensation recoverable by the Club in the particular circumstances of this case is zero;*
- (d) To rule that the Club is liable to the Player because the Club acted in breach of his Playing Contract and of duty in tort, and terminated his Playing Contract without just cause and acted in breach of it and of duty;*
- (e) To award the Player compensation against the Club in an amount to be decided by the CAS; and*
- (f) To order that the Club pays the Player's costs of this Appeal and before the DRC."*

67. On 10 December 2009, Club X. filed its answer, with a similar request for relief as the one filed in its appeal brief lodged in the proceedings CAS 2009/A/1856.

III.3 THE PARTIES' SUBMISSIONS

1) Club X.

68. Club X.'s submissions, in essence, may be summarized as follows:
- Unlike the Player, who tried to negotiate his transfer with other clubs at the end of the 2005/2006 season and again at the end of the 2006/2007 season, Club X. has always been loyal to the Player and supportive of his condition and needs.
 - A. was one of the most valuable and popular players at the Club and an essential key of the team's success. Between 1 July 2005 and 1 December 2007 (i.e. the last official game played by A. with Club X.), the Player was fielded in 84 matches. It was in the Club's interest to provide him with the best medical treatment in order to

ensure his recovery as early as possible. The Player has never been mistreated by the Club.

- Before he underwent surgery, the Player was properly informed about the procedure by Dr T. himself.
- As it results from authoritative international medical guidelines, deep vein thrombosis and pulmonary embolism prophylaxis was not indicated in the particular case of the Player. Physiotherapy started immediately after the surgery. The Player was monitored by the Club's doctors as well as external experts daily and he was referred to competent specialists to diagnose his medical condition competently at all times. *"Within such period the [Player] never raised any complaint concerning the progress of healing, respectively, concerning his general state of health to any members of the [Club's] medical staff"* (Club's answer, par. 21).
- The symptoms of deep vein thrombosis as well as pulmonary embolism only occurred 6 months after the operation and must be considered as very unexpected in view of the type of surgery as well as of the time of occurrence. Furthermore, it remains uncertain what exactly caused the Player's medical symptoms. Finally, the said symptoms were discovered thanks to Dr A.'s expertise and diligence.
- In accordance with general legal principles, doctors do not have an obligation of result, involving a guarantee of the outcome, but have an obligation to do all in their power to achieve a result. In the case at hand, the Club's medical staff as well as the external specialists have done everything reasonably possible to ensure the Player's recovery. In this context, Club X. made sure that the Player received at all times the appropriate treatment either by the Club's medical staff or by external qualified specialists. The Club provided the Player with the most sophisticated and advanced medical treatment and accepted to meet the Player's personal doctors in Italy in order to respect their views for the Player's comfort. The Club even made arrangements with the Mayo Clinic in Arizona, USA, one of the most renowned medical centres in the world to sort out the discrepancy between the position of the Player's personal doctors and the specialists of [the] hospital regarding the diagnosis and treatment of his health condition.
- Club X. respected the standard of care that can be required of an employer for the physical welfare of its employee. The Club cannot be expected to take responsibility for potential mistreatment of external specialists. Furthermore, the Player, an experienced man and well-paid football player, was not as helpless as he wants the CAS to believe.
- At no time the Player was given permission to stay in Italy or go to Ghana in January 2008. Given the fact that the Player failed to attend the squad on 19 January 2008, missed the appointment arranged at the Mayo Clinic on 29 January 2008, failed to comply with Club X.'s internal regulations, did not return to the Club even after attending the African Cup of Nations, the Player breached the employment agreement without just cause and is therefore liable to pay compensation to Club X.

- Under the specific circumstances of the case, the unilateral option was rightfully exercised by Club X. As a matter of fact, the said option was included in three successive contracts signed by the Player, who therefore accepted it without any reservation. Furthermore, the said option was exercised on or around the 22 January 2008, i.e. at a moment when the Club could not imagine that its professional relationship with the Player would come to a premature end. Had the Player come back to the Club (as he was required to), he would have received EUR 2,000,000 for another year, despite his ability to play or not. In that sense, the said option was exercised mainly in the Player's interest.
- With regard to the absence of just cause, the following contradictions can be observed:
 - In January 2008 and according to his own statement, the Player considered that his life was at risk and his family extremely worried. However, he chose to spend three weeks in Ghana instead of a) reassuming his contractual duties with Club X. in order to receive medical treatment and b) attending an appointment at one of the best clinics in the world (Mayo Clinic).
 - On 21 January 2008, the Player confirmed that he considered the labour agreement as still valid and that he was willing to "*abide by the terms of the contract*". On 23 January 2008, he confirmed that he was expecting to continue to be paid by the Club "*for the duration of the term of the Contract, which we understand is June 2009*". In such a context and considering that the Player's "just cause" is exclusively based on the alleged medical mistreatment, which occurred before December 2007, the Player cannot reasonably claim that he was entitled to terminate the contract "with just cause".
 - "*[The Player] never undertook to communicate to the Club that he would consider the employment relationships as terminated or approached FIFA*" (Club's answer page 67).
 - "*On such grounds and even assuming that the Player at any time would have had just cause to terminate the employment relationships, the [Player] certainly waived his right to do so*" (Club's answer page 68, par. 8).
- The breach of contract occurred during the so-called "Protected Period", as defined by the applicable FIFA Regulations.
- Club X. refutes and describes as ungrounded all the mitigating factors considered by the DRC in the favour of the Player (Club's appeal brief, page 38).
- As to compensation, the Player has no financial claim against Club X. Even assuming the contrary, the Player did not fulfil his obligation to mitigate damages as he was fit to play and did not make any effort to sign a new contract despite several clubs being interested.
- Based on article 17 of the applicable FIFA Regulations, the Club is entitled to a compensation amounting EUR 12,131,178 (EUR 780,000 as remuneration for the 4

remaining months of the 2007/2008 season + EUR 2,000,000 as remuneration for the 2008/2009 season + EUR 2,000,000 as remuneration for the 2009/2010 season + EUR 85,106.38 non-amortized signing fee + EUR 58,482.92 in relation with the fully furnished flat + EUR 8,400 in relation with the car provided to the Player + EUR 27,664 of flight tickets + EUR 4,171,525.43 of non amortized transfer fee, player's agent commission and solidarity contribution + EUR 3,000,000 in relation with the specificity of sport).

- In addition, the Player *"shall return the amount of EUR 650'000 (...) to the Club which he received as unfair enrichment due to the [Club's] salary transfers for the months of February 2008 until April 2008 as well as one third of the respective salary for January 2008 (€ 195,000.00 x 3 + € 195,000.00 : 3) since the Player in all cases from 19 January 2008 failed to render his services to the Club and, therefore, was not entitled to receive any salary no more. Furthermore, the [...] Club is entitled to receive the amount of US Dollar 73,500.00/- (...) corresponding to Euro 51,190.10 (...) on 31 August 2009 pursuant to the abovementioned fine imposed on the [Player] on 1 February 2008"* (Club's appeal brief, page 47).
- The witness statements filed in support to the Player's submissions lodged before the CAS are not credible as they were produced a) by the Player's close friends and consultants b) long after the Player was fit to play again. In their statements, Drs G. and M. affirmed that the Player's career was over. Such allegations are inconsistent with the fact that, since his operation a) the Player has played in 6 matches of the World Cup qualification, b) is presently under contract with Club B. and c) has therefore passed the required medical tests, which are mandatory in Italy.
- The Player's appeal is lacking of any factual and legal arguments but rather is construed *"on speculations, presumptions and ridiculous allegations rather than on proven facts"* (Club's answer, page 15). In particular, the Club contests the Player's allegations according to which it tried to leave a paper trail in order to protect its interests. On the contrary, Club X. had persistently taken all possible measures to keep the Player in the team and requested many times his return to Country Z. In this regard, Club X. did not complain about a "breach of contract" when it first required FIFA's assistance. It only asked for FIFA's support to assure that the Player would respect his contractual obligations and such request was obviously not directed to receive any compensation.

2) A.

69. The Player's submissions can be summarized as follows:

- *"The Player has been very badly treated and used by the Club. The Club and the doctors engaged by it made fundamental and elementary mistakes in failing to treat the Player properly and/or in failing to diagnose properly and quickly enough the serious medical condition that followed a knee operation that the Club caused him to have. In the circumstances, these failures put the Player's life at risk, and may well lead to the end of his career as a professional footballer"* (Player's appeal brief, par. 1).

- "(...) *the Club's failure – and in particular the basic medical failures of the Club – undoubtedly gave rise to the Player having "just cause" to treat the Playing Contract as terminated under Article 14 of the 2005 FIFA Regulations*" (Player's appeal brief, par. 3). In May 2007, the Club performed an operation of some considerable risk on the Player's left leg without his consent. He was only informed of the fact that he was to have an arthroscopy, i.e. a relatively straightforward procedure, and had never consented to a mosaicplasty, a new and largely untested procedure, much more invasive than an arthroscopy. Club X. failed to ensure that the Player was provided with appropriate prophylaxis before and after the surgery, contrary to the recommended practice of generally accepted medical opinions. This led to the Player developing a thrombosis in the deep veins in his left leg. Despite the fact that he had consistently presented to the Club alarming symptoms from July to December 2007, Club X. failed to take the adequate and obvious measures and therefore caused extreme damages to the Player. *"In fact the Club misdiagnosed and mistreated [the Player] three times – twice with asthma, and once with lymphangitis – before it finally and fortuitously made the correct diagnosis"* (Player's appeal brief, par. 8 lit. c). It was only approximately six months after the Club had ignored the Player's symptoms and had misdiagnosed and mistreated him three times, *"that the Club did what it should have done from the beginning: namely referred the Player to have a Doppler scan to rule out DVT and PE"* (Player's appeal brief, par. 70). In addition, the Club's conduct after 12 January 2008 also constituted such just cause.
- Club X.'s duty of care for the Player's welfare was especially significant since the latter was in a foreign country, did not speak the language and, as provided by clause 9 of the Club's Disciplinary Procedures, was required to defer to the Club's medical staff for any medical issues.
- A football club, which employs a doctor and/or a range of medical staff, is in charge of his player and must assume total responsibility for the care of the player as soon as he returns from the hospital. It is the club's responsibility *"(a) to select and engage any other doctors involved; (b) consult with those other doctors regarding the medical procedure; (c) keep the Player informed as to the nature of the procedure; (d) take steps to actively review the Player's condition vis-à-vis such external treatment; (e) take steps to ensure the Player is properly treated and cared for when he returns from hospital"* (Player's appeal brief, par. 33). Club X.'s responsibility is even greater in view of its close links with the [...] hospital, which appears to be one of the Club's commercial sponsors.
- Understandably, the Player did not respond immediately to Club X.'s "de-registration" request as he was concerned about the consequences of the "freezing" of his contract for his career. Foremost, he needed to get legal advice. When Club X. realised that the Player was not about to comply without delay with its demand, it instantly changed its attitude towards the Player. Despite the fact that Club X. knew that the Player could not train for the remainder of the season, the Club issued a formal instruction to him to return in Country Z. This was in complete breach of the agreement initially reached on 12 January 2008 to allow the Player to continue his medical treatment in Italy and to attend the African Cup of Nations. In fact the Club began to lay a paper trail, trying to evidence the Player's purported unilateral

breach of contract as Club X. became aware of the fact that the Player might successfully bring legal action against it for its failure to treat and diagnose his condition. Club X.'s letters of January 2008 as well as the notary's statement dated 19 January 2008 served the same purpose: to deflect attention from its own culpability and to build a case allowing the Club to claim compensation for unilateral breach of the contract by the Player.

- With regard to the African Cup of Nations, Club X. gave to the Player its verbal consent to attend the said competition. Furthermore and based on the official request for his release addressed by the [Player's National] Football Association to Club X. on 13 December 2007, the Player believed that his presence at this international event was mandatory.
- The Player's not attending the Mayo Clinic and his actions during and after the African Cup of Nations, did not, under the circumstances, amount to a breach of contract or a sufficiently serious breach to allow the Club to treat the contract as terminated. Under Swiss law, the Player's actions do not constitute a breach of contract. Club X. cannot find any support in its internal "*Disciplinary Guidelines*", which cannot impose any valid obligations under Swiss law and which did not form part of the Player's contract with the Club.
- The medical reports on which the Club relies were issued long after the relevant facts and without consultation with the Player. Those documents can only be inaccurate and unreliable.
- Under Swiss law and based on the so-called "*positive interest*" principle according to which the injured party shall be placed in the position that he would have had if the contract was performed properly, the Player is entitled to be paid an amount of EUR 2,195 million plus bonuses corresponding to his salaries for the remainder of the contract. In addition, he should also receive a compensation for the future earnings he lost because of the Club's conduct. In view of the Player's age, quality, previous earnings and commercial revenues and based on Mr T.'s witness statement, the Player should be awarded at least EUR 10,75 million.
- "*If the [Appealed Decision] is correct, a football player can effectively be forced by the threat of a massive personal monetary liability to remain at a football club against his will, notwithstanding that he has lost all trust and confidence in the football club's ability and inclination to safeguard his health*" (Player's appeal brief, par. 4). "*The Club's actions (...) were of such a magnitude, and continued over such a prolonged period, that they undoubtedly conspired to eradicate any trust and confidence the Player may once have had in the Club's ability and inclination to safeguard his health and act in his best interests*" (Player's appeal brief, par. 169)
- "*If the [Appealed Decision] is correct, it effectively means that huge financial liability can be imposed on a player notwithstanding that the football club in question has suffered no actual loss, because the effect of the Player's medical condition during the remainder of the term of his Playing Contract has been to make him unsellable to another club*" (Player's appeal brief, par. 4). As a matter of fact, and given his health problems, the Player would have been unable to play for the Club for the remainder of their contractual relationship. Had the Player returned to the Club, Club X. would have actually suffered further loss since it would have

had to pay the Player's salary and bonuses until the term of the labour agreement, without being able to benefit from the Player's services.

- The contract was not validly extended for a year, as unilateral options in playing contracts are unlawful.
- The Player does not contest the content of his website. By this mean, he was trying to convey a positive public message regarding his medical condition in order to find a new club willing to give him a chance to earn a living again. However, the truth was that his medical condition was not good.

III.4 THE HEARING

70. A hearing was held on 14 and 15 April 2010 at the CAS premises in Lausanne. All the members of the Panel were present. The Parties did not raise any objection as to the constitution and composition of the Panel.
71. The following persons attended the hearing:
- For Club X., its Vice-President, assisted by its attorneys.
 - A. was present and was accompanied by his attorneys, who were assisted by an interpreter.
72. The Panel heard evidence from the following persons:
- Dr T., specialist in orthopedic traumatology and sport injuries, doctor at the [...] hospital, in Country Z.
 - Dr M., specialist in vascular surgery and professor of surgery at Insubriae University in Milan, Italy.
 - Dr G., specialist in general surgery and in sporting medicine, doctor at the Sant'Orsola FBF hospital, in Brescia, Italy.
 - Mr T., a FIFA licensed players' agent.
 - Mr P., a football consultant and friend of the Player.
 - Mr O., Vice-President of Club X., was heard via teleconference, with the agreement of the Panel and pursuant to article R44.2 par. 4 of the Code of Sports-related Arbitration (hereinafter referred to as the "CAS Code").
73. Each person heard by the Panel was invited by its President to tell the truth subject to the consequences provided by the law and was examined and cross-examined by the Parties, as well as questioned by the Panel. The Parties had then ample opportunity to present their cases, submit their arguments and answer to the questions posed by the Panel. After the Parties' final submissions, the Panel closed the hearing and reserved its final award. The Panel heard carefully and took into account in its discussion and subsequent deliberation all the evidence and the arguments presented by the Parties even if they have not been summarized in the present award. Upon closure, the Parties expressly stated that they did not have any objection in respect of their right to be heard and to be treated equally in these arbitration proceedings.

IV. DISCUSSION

IV.1 CAS JURISDICTION

74. The jurisdiction of CAS, which is not disputed, derives from articles 62 ff. of the FIFA Statutes and article R47 of the CAS Code. It is further confirmed by the order of procedure duly signed by the parties.
75. It follows that CAS has jurisdiction to decide on the present dispute.
76. Under article R57 of the CAS Code, the Panel has the full power to review the facts and the law.

IV.2 APPLICABLE LAW

77. Article R58 of the CAS Code provides the following:

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

78. Pursuant article 62 par. 2 of the FIFA Statutes, "[t]he 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".
79. Regarding the issue at stake, the Parties have not agreed on the application of any specific national law. As a result, subject to the primacy of applicable FIFA's Regulations, Swiss law shall apply complementarily.
80. The relevant contracts at the basis of the present case were signed after 1 July 2005, which is the date when the revised FIFA Regulations for the Status and Transfer of Players (i.e. the edition 2005) came into force. It must be noted that, according to article 29 par. 2 of the said revised FIFA Regulations, "Article 1 paragraph 3 a); article 5 paragraphs 3 and 4; article 17 paragraph 3; article 18bis; article 22 e) and f); Annexe 1 article 1 paragraph 4 d) and e); Annexe 1 article 3 paragraph 2; Annexe 3 article 1 paragraphs 2, 3 and 4 and Annexe 3 article 2 paragraph 2 were supplemented or amended by the FIFA Executive Committee on 29 October 2007. These amendments come into force on 1 January 2008."
81. The case at hand was submitted to the DRC after 1 January 2008. Pursuant to article 26 par. 1 and 2 of the FIFA Regulations for the Status and Transfer of Players, edition 2008, the case shall be assessed according to these amended provisions (hereinafter referred to as the "FIFA Regulations").

IV.3 ADMISSIBILITY

82. The appeals were filed within the deadline provided by the FIFA Statutes and stated in the Appealed Decision. They complied with all other requirements of article R48 of the CAS Code, including the payment of the CAS Court office fees.
83. It follows that the appeals are admissible.

IV.4 JOINDER

84. The appeals procedures CAS 2009/A/1856 and CAS 2009/A/1857 shall be conducted jointly as (a) both appeals raise the same issues and are directed against the same decision, (b) the Parties are the same in both procedures, (c) the same Panel of arbitrators is in charge of both cases and (d) all the parties have expressly agreed to the joinder, confirmed by signing the order of procedure. Therefore, the Panel will render one common award.

IV.5 NEW DOCUMENTS

85. At the hearing, Mr T., Club X.'s witness, offered to substantiate his statement with the Player's medical file at the [...] hospital.
86. Pursuant to article R44.1 par. 2, second sentence of the CAS Code "*After the exchange of the written submissions, the parties shall not be authorized to produce further written evidence, except by mutual agreement or if the Panel so permits on the basis of exceptional circumstances.*"
87. The Parties mutually agreed that only the "*consent form*" allegedly signed by the Player on 23 May 2007 could be admitted into evidence.
88. It was therefore decided by the Panel to allow only the submission of this document. The request to submit all the other documents contained in the medical file was denied.

B MERITS

I. THE ISSUES

89. It is undisputed that the contractual relationship between the Parties was prematurely terminated without any mutual agreement. Both the Club and the Player are of the view that the other party broke the contract and both claim to be entitled to compensation by the other party.
90. In the view of the above, the main issues to be resolved by the Panel are:
 - a) Who breached the employment contract?
 - b) When was the contractual relationship terminated?
 - c) Is the injured party entitled to any compensation?

II. WHO BREACHED THE EMPLOYMENT CONTRACT?

91. In order to determine who has unilaterally breached the contract, the Panel must evaluate the following aspects:
- (i) Was it legitimate for Club X. to request from the Player (a) to immediately return to Country Z. in order to continue his medical treatment and rehabilitation under the supervision of the Club's medical staff; (b) not to take part as a "*special advisor*" in the African Cup of Nations, held in Ghana and (c) to attend a medical appointment made by the Club at the Mayo Clinic in Arizona, USA?
 - (ii) Had the Player a valid reason not to appear at the work place?

II.1 WERE CLUB X.'S REQUESTS OF JANUARY 2008 LEGITIMATE?

1) In general

92. It is undisputed that there was an employer-employee relationship between Club X. and the Player.
93. According to Swiss law, the individual employment contract is a contract whereby the worker has the obligation to perform work in the employer's service for either a fixed or indefinite period of time, during which the employer owes him a wage (article 319 par. 1 of the Swiss Code of Obligations – "CO").
94. An employment relationship is characterized by the fact that a person will carry out work in return for a salary from the other. On one side, the employee must personally perform the work contractually undertaken, unless otherwise agreed upon, or unless circumstances indicate otherwise (article 321 CO). On the other side, the employer provides the work and is in a position of authority with regard to the worker. He has the legal right of supervising and controlling the employee by prescribing to him what work he has to do as well as the manner in which it has to be done (ATF 125 III 78 consid. 4 p. 81; 121 I 259 consid. 3a p. 262; 112 II 41 consid. 1a/aa et bb p. 46/47; Rémy Wyler, *Droit du travail*, 2^{ème} édition, Berne 2008, p. 58). In exchange for the services of the employee, the employer pays him the agreed wages.
95. The employee must carefully perform the work assigned to him and loyally safeguard the employer's legitimate interests (article 321 a par. 1 CO). The labour agreement distinguishes itself in that the employee is subordinate to the will of the employer. The employee must in good faith observe the general directives and the specific instructions established by the employer in relation with the execution of the work and the conduct of workers (article 321 d par. 2 CO).
96. The employer may issue general orders or give special instructions concerning the carrying out of the work and the conduct of the employee (article 321 d par. 1 CO). However, the scope of the employer's right to give instructions is not unlimited as it is restricted by mandatory regulations and must be compatible with the terms of the original contract. Furthermore, the instructions given must be consistent with the employer's needs and the nature of the employee's activities.

97. Among the mandatory provisions limiting the employer's right to give instructions, there is article 328 CO which requires the employer to respect the personal integrity of his employees and to take the necessary measures to protect their rights. Not only must the employer refrain from any conduct that may violate the employees' individuality but he also has a duty to prevent his employees from being exposed to such violations. In particular, the employees' welfare, physical and mental health, moral integrity, social consideration, individual rights and privacy must be protected (Marie-Gisèle Danthe, *Les limites de l'article 328 CO au droit de donner des directives et de contrôler l'activité du travailleur*, in *Panorama du droit du travail*, Berne 2009, p. 168). Hence, the employer's instructions cannot be vexatious, quibbling or irrational and must be objectively justified (Jean-Bernard Waeber, Christiane Brunner, Jean-Michel Bühler et Christian Bruchez, *Commentaire du contrat de travail*, 3ème édition, Lausanne 2004, N3 ad. art. 328 CO).
98. On a case by case basis, the employer's legitimate interest in monitoring and supervising its employees' activities has to be weighed against the personal integrity and freedom of the employees. Then only, it will be possible to decide whether the employer's instructions are justified or not (ATF 130 II 425, consid. 6.1 p. 444).
99. The employer's instructions may be general or limited to specific employees and to their specific field of activities. They may be oral or in the form of manuals or written guidelines. In any event, for the instructions to be binding, they must be clearly communicated to the employee, who must be enabled to examine them without difficulty (Rémy Wyler, *op. cit.*, p. 133; Marie-Gisèle Danthe, *op. cit.* 164).
100. All these general principals and observations are applicable to employment relations also in other jurisdictions, and are normally applicable also to the contractual relations between football players and the clubs, unless other rules, in particular FIFA rules, lead to a different legal handling.

2) *In particular*

101. The following line of events is undisputed: Between October and 1 December 2007, the Player was fielded in at least 8 official games. Between 8 and 19 December 2007, he was referred several times to the [...] hospital, where various tests were carried out in order to address his symptoms. On 20 December 2007, the Player, after getting Club X.'s permission, flew to Italy, for an appointment with Dr G. He left Italy for Country Z. on 11 January 2008 but came back the following day, accompanied by Mr O., the brother of the Club's President and a surgeon from the [...] hospital. All of them attended a meeting in the presence of [Dr G. as well as the three other Italian doctors]. During that meeting, acute controversy arose between the Parties' experts as to the Player's diagnosis and treatment and as to his ability to train or play. It is also not contested that the Club's representatives showed up at the meeting with the intention to bring the Player back to Country Z. for further medical treatment.
102. In any event, it appears that, at the end of the day, on 12 January 2008, the Parties seemed to have reached at least a common understanding with regard to the fact that the Player should undergo coumadin treatment for at least three months and to the fact that

he should not take part in official games until the end of the 2007/2008 season. Under the evidence established by the Parties, there is no evidence of any other treatment prescribed to the Player for this period of time by his Italian doctors, and there was no further dispute whatsoever between the parties as to the treatment needed by the Player until the end of the 2007/2008 season. It therefore results from the various witness statements that the tension between the Parties actually resolved. This apparent reconciliation finds support in the fact that a) on the one hand, the Player understood that he was authorised to attend the African Cup of Nations and to stay in Italy for medical treatment and b) on the other hand, Club X. believed that the Player accepted being "de-registered" until summer 2008. At the same time, this apparent reconciliation may well explain also these understandings by the parties.

103. On 16, 22, 24, 25 January 2008, Club X. summoned the Player to come back to Country Z. It is not contested that the said instructions were notified to him and/or his representatives. In addition, on 1 February 2008, he received the decision of the Club's disciplinary body (dated 28 January 2008) in relation with his non-compliance with the Club's regulations.
104. Despite Club X.'s unambiguous instructions to return, the Player left to attend the African Cup of Nations, [...] and never returned to the Club thereafter.
105. It is therefore of high importance for the Panel to determine whether the Player was a) authorized to attend the African Cup of Nations, and/or b) authorized to remain in Italy and c) if the answers to (a) and (b) are negative, if Club X.'s instructions to come back to Country Z. were senseless and illegitimate.

a) The alleged authorisation given by Club X. to the Player to attend the African Cup of Nations in Ghana

106. The African Cup of Nations was held in Ghana, between 20 January and 10 February 2008. It is not disputed that given the Player's injury and inability to play, Club X. was not under any obligation to release him under the applicable FIFA Regulations.
107. The Player did not file any written permission of Club X. with respect to his absence and his travelling to Ghana. The Player submits that the authorisation to leave was granted orally by the Club during the meeting of 12 January 2008.
108. Dr G. and Mr P. have confirmed the version of the facts presented by the Player. Whether they have fully understood what the consent exactly related to is uncertain as the discussions during the said meeting were held in English. It must be noted that Dr G. does not speak this language. In order for the people attending the meeting to understand each other, the conversation had to be translated by the Player himself, whose command of English is basic, as the Panel has been able to judge by his testimony at the hearing in Lausanne, where the Player was assisted by an interpreter, or by Mr P. It is also not clear whether the eventual authorisation to leave for Ghana was possibly conditional upon the Player's acceptance to be "de-registered". The Panel also observes that [the other Italian doctors] were also attending the meeting but did not testify.

109. In his various statements, Mr O. confirmed that he has never authorised the Player to stay in Italy for further treatment or to travel to Ghana from 20 January 2008 until 10 February 2008. In addition, Club X. contends that if there had been a valid authorisation, it had been revoked on 16 January 2008 already. Furthermore, as indicated by the Club, the Player's representatives have never tried to rely on such an alleged oral consent in their letters of 21 and 23 January 2008. In this correspondence, the Player's lawyers were merely hopeful that an accommodation could be reached among the Parties in order to allow the Player to attend the African Cup of Nations. Likewise, the Player's representatives did not make any reference to the alleged agreement in their e-mail of 24 January or letter of 25 January 2008. If indeed such an authorization was clearly granted to the Player, the Panel would expect that this fact would have been disclosed by the Player to his lawyers and that, as a consequence, such an important fact would have been mentioned in the course of this correspondence, which is not the case.
110. However, in view of the circumstances, the question whether the Club agreed to the Player's attendance at the African Cup of Nations, at the end of the day and given the relevant time-line of the events, became irrelevant as the answer to this question does not help determine who breached the employment contract. As a matter of fact, the said championship ended on 10 February 2008. At that moment, neither Club X. nor the Player considered the contract as terminated. On the contrary, on 22 January 2008, the Club was "*firmly motivated to keep, at all costs, the Player in its team*" (Club's appeal brief, par. 31) and on 31 January 2008 it asked FIFA to "*caution the Player (...) to respect his contractual obligations and return to join the Club*". Furthermore, it is only in April 2008 that it formally asked FIFA to hold the Player responsible for the unilateral termination of the contract without just cause. It can be noted here that the Club actually paid for the Player's salaries until April 2008. Likewise, on 21 and 23 January 2008, the Player's lawyers confirmed to Club X. that the labour contract remained in full force. On 1 February 2008, he made a settlement proposal to the Club and did nothing until he received FIFA's letter dated 20 February 2008. The Player came to Country Z. to collect his salary, the instalment of March 2008 included.

b) The alleged authorisation given by Club X. to the Player to remain in Italy

111. Whether the Player was authorised by Club X. to remain in Italy for medical treatment is disputed.
112. From the evidence produced, it appears that the Player was last seen at Club X.'s premises, [...], on 11 January 2008. Even after the end of the African Cup of Nations (i.e. 10 February 2008), the Player did not return to his employer. He has never made clear when exactly he intended to play again for the Club.
113. If one should consider that on 12 January 2008, the Player was authorised to stay in Italy to receive treatment, it does not mean that Club X. left it to the discretion of the Player to determine the length of his stay and, consequently, the date of his return. The Panel is of the opinion that the Player did not provide sufficient proof to declare that he had the authority to return at his free will. In this regard, the Panel finds it hard to believe that Club X. would have granted to one of its best and most popular players an

unrestricted right of leave "its jurisdiction" and accepted to pay him a monthly wage of approximately EUR 200,000 net per month.

114. Furthermore, the Player has not explained why it was vital and essential that his treatment had to be conducted in Italy. In particular, he did not provide any credible explanation as to why only his Italian doctors were competent enough to look after him. On the contrary, on the report issued on 12 January 2008 by the Italian medical staff, the treatment recommended is quite simple and straightforward:

"An elastic compress to the left pelvic region (class II compression) would be useful.

Non-competitive physical activity is recommended.

Treatment recommended:

Coumadin 5 1e1/2 c per day, PT/I.N.R. examination in 7 days."

115. After seven days, the Player's condition was obviously good enough for him to travel to Ghana and stay there for three weeks, without being supervised by his Italian doctors.
116. The Player's position is that after what happened to him, he had no more trust in the medical staff of Club X. and of the [...] hospital. He alleges that if he returned to his employer, he would have been obliged to comply with the therapy and treatment determined by the Club doctors, as provided by article 9.4 of the Club's internal disciplinary guidelines. However, this allegation is inconsistent with the following facts:
- a) In his submissions filed before CAS, the Player has contested the validity of Club X.'s internal regulations.
 - b) He has never tried to negotiate with the Club the possibility for him to seek independent medical treatment in Country Z., i.e. to be followed by the doctor of his choice in that country.
 - c) If he "*did not want to return to the Club for medical treatment*" and "*was scared for his life if he was to put his medical care once again into the hands of the people at or chosen by the Club*" (Player's answer, par. 69), why did he not terminate the contract at that moment on 12 January, or on 16 January, when he was clearly instructed to return to Country Z., or, at the latest – if he was under the assumption that he was authorized to go to the African Cup tournament – at the end of this tournament on 10 February?
117. In other words, the Panel is of the opinion that there is no reason to believe that, in the best case scenario, the Player was entitled to be absent for a period longer than a few days. In any way, the Player has never established how long his treatment in Italy lasted or was supposed to last. Based on his personal website, it appears that, apart from B., he went also to Switzerland and to Turin to be treated. Furthermore, at the hearing, he confirmed that he underwent another surgery in Belgium, sometime in April 2008.

c) Were the instructions given by Club X. to the Player illegitimate and senseless?

118. A professional football player has specific obligations due to the nature of his activity. He may be required to attend all the training sessions and camps organized by his coach or the club. He must play in the games he is selected for and participate in all the subsidiary activities of the club, such as theory classes, players' reunions, pre-game preparations, promotional activities. He must abide by the instructions of the club and of his coach and respect their choices with regard to the training sessions, game tactics and strategies. He also must follow the advice given by the club's medical staff in order to maintain or increase his sporting performances. The club cannot force the player to follow a specific treatment but is entitled to be informed of the eventual duration of his incapacity to work and can request from the player to be correctly treated in order to avoid unnecessary non-appearance (Piermarco Zen-Ruffinen, *Droit du Sport*, 2002, p. 190-191).

All those obligations of course remain in force also during periods of incapacity in which the Player is still considered to be a member of the team and is expected to attend all the activities of the Club, subject to his medical condition and to the instructions of the medical staff of the club.

119. Club X.'s 2007-2008 Disciplinary Guidelines apply to all football players of the Club (see article 2). They define the players' everyday routine, the care they have to take with the sporting facilities, the camps and travelling policy, the use of mobile phones, the rules to be observed during the games, with the press and in case of leave. With respect to the players' health, the following can be read, where relevant:

“9.1 Footballers are obliged to notify their all kinds of illnesses and injuries to the technical staff, club doctor or the physiotherapist immediately.

9.2 Footballers may by no means receive treatment, use medicine or similar substances outside the team doctor's knowledge. In case of any illness, emergency medical or surgical intervention, if the footballer is in an extraordinary condition such as a condition that requires hospitalization, then the club doctor must be notified about the incident/condition immediately.

(...)

9.4 Footballers are obliged to comply with the therapy, treatment and work out program determined by the club doctor and/or physiotherapist and to fulfill the determinations made hereof intactly.

9.5 Footballers, who are not able to attend the trainings of the team due to health, injury excuses do not have the right to take a leave of absence during this period and they have to be present at the facilities everyday between 09:00-17:00 to continue their treatments and rests here. A footballer may take a leave of absence, only when the club doctor decides that there is no need for him to be treated/to continue his treatment. If and when a treatment is required at the end of the season or during the mid-season breaks (summer/winter), the footballer has to postpone his holiday and continue his treatment. All the footballers must have travel, reinsurance insurance.

(...)

9.7 Examinations, checks and treatments in abroad, shall be performed upon the report of the medical staff and the decision of the administrative board."

120. The Player's Counsel contend that the internal regulations are not binding because there are "*only guidelines*" (Player's appeal brief, par. 181) and were not known to the Player before the claims before FIFA were lodged. At the hearing held in Lausanne and without any substantiated explanation, his representatives affirmed that Swiss law allegedly prescribes that such rules cannot be binding when they are only referred to in the signed individual labour agreement. In particular, they did not explain how such requirement is compatible with the fact that under Swiss law, no special form is required for an individual employment contract, unless it is otherwise provided (article 320 par. 1 CO).
121. The Panel observes that the first contract signed by the Parties in July 2005 expressly states the fact that the Player undertakes to "*obey the clubs rules, regulations and restrictions.*" The second contract signed by the Parties contains a specific provision entitled "*Article 5 The duties of the football Player*", which mainly refers to the obligation of the Player to "*act within the frame of Club X.'s principle and written regime (regulations, circular etc)*". The same document mentions the Club's internal regulations in two other provisions (Articles 7 and 8). Furthermore and at the hearing, the Player confirmed to the Panel that he was aware of the existence of the Club's Guidelines. He even spontaneously mentioned the possibility of being sanctioned in case of infringement of the said internal provisions.
122. Whether the internal regulations are applicable under Swiss law or not does not change the fact that the said rules apply to all the players of the Club and provide that in case of inability to play or train for health reason, there is an obligation to be present at the Club's facility. In other words, when Club X. summoned the Player to come back, it took a decision which was consistent with its own guidelines and it applied a regime which is imposed on all of its employees. Therefore, the Panel has no reason to believe that by the instruction given to the Player to return to the Club aimed mainly to harm his interests, to harass him or cause him to suffer emotional distress. This is even truer in light of the fact that the request was made after it was agreed that the Player was to continue the prescription of the medical treatment decided by his Italian doctors and agreed by the Club's medical staff, a treatment that could have been easily performed in Country Z.
123. Furthermore, in order to obtain the Player's services, Club X. agreed to pay a significant transfer fee and salary. Until 12 January 2008, it was convinced that the Player could be selected for official games. After this meeting, it was accepted by all the Parties that it was recommended for the Player to be engaged in "*non-competitive physical activity*" (medical report of 12 January 2008).
124. After 12 January 2008 and despite the fact the burden of proof lies with the Player (ATF 125 III 70; Wyler, op.cit, p. 224), the latter has never provided his employer with a subsequent medical certificate confirming his inability to play or to attend training sessions.

125. On 16, 22 and 24 January 2008, Club X. summoned the Player to join the Club without delay. The Player has never answered these requests but mainly focused the discussion on other issues such as the option to unilaterally extend the labour agreement, the Player's attendance in Ghana, the damage the latter suffered because of the Club's mistreatment and misdiagnosis, the Player's concern to fully recover from his injury in order to resume his career, the distress caused by the fact that highly confidential details regarding his medical history were made public and the Player's feeling that he had not been treated fairly by the Club.
126. In such a context, the request made on 25 January 2008 by the Club to the Player to attend a medical examination at the Mayo Clinic in Arizona, USA, can hardly be considered as unjustified. The examinations achieved under the responsibility of this world-renown medical institution would have given a neutral and independent picture of the actual health condition of the Player and would have helped sort out the discrepancy between the position of the Player's personal doctors and the specialists of the [...] hospital regarding the Player's diagnosis and treatment.
127. In addition, it is undisputed that the Player was one of the best members of the Club's team. Between 1 July 2005 and 1 December 2007 (i.e. the Player's last official game with Club X.), the Player was selected for 84 matches. His qualities were recognised and highly rated. He also enjoyed considerable national and international popularity. In this regard and despite the fact that he could not play, [his National] Football Association requested his attendance at the African Cup of Nations as his presence would be motivating and inspirational for the rest of the [...] squad and for its fans. At least for the same reasons as the [Player's National] Association, Club X. had an evident interest to be able to benefit of the Player's presence.
128. Considering the fact that, after 12 January 2008, the Player's condition was good enough to receive some kind of mild training, to travel to Ghana for three weeks and, in the absence of any medical certificate supporting a sick leave, taking into account the substantial amount of money at stake, the Club had an obvious interest to have the Player back in Country Z. The Panel is therefore of the opinion that the multiple instructions given to the Player to join the Club's facilities were legitimate, justified and made perfect sense. They were compatible with the specific duties of a professional football player and did not overstep in any manner the limits set by article 328 CO.

II.2 HAD THE PLAYER A VALID REASON NOT TO APPEAR AT THE WORK PLACE ?

129. After a careful analysis of the facts and evidence submitted to it by the Parties, the Panel must conclude that the Player was to come back to Club X. at the latest by 10 February 2008. The Player failed to prove that he requested and obtained permission to extend his absence indefinitely and that the instructions given to him by the Club were illegitimate or senseless. He also failed to provide a medical certificate stating that he was totally or partially unfit to work.

130. The Player's position is that Club X.'s basic medical treatment failure gave rise to the Player having "just cause" to treat the labour contract as terminated. In addition, he alleges that those failures constitute a breach of the terms of the contract or of the Club's duty of care and fairness towards its employee.

1) In general

131. Before reverting to the applicable FIFA rules and regulations, the Panel wishes to make the following general remarks. The duration of an employment contract is set by agreement of the parties. It is indefinite, except where a fixed term has been agreed by the parties or is dictated by the nature of the work. Fixed-term contracts terminate without requiring notice upon the expiry of the agreed period (article 334 par. 1 CO).
132. Fixed-term contracts cannot come to an end before the expiration of the agreed period unless there is a just cause for termination of the employment relationship or if the employer becomes insolvent (ATF 110 II 167; Rémy Wyler, op. cit. p. 436). In the presence of a just cause, the employer or the employee may at any time terminate with immediate effect the contract (article 337 par. 1 CO). Such a just cause exists whenever the terminating party can in good faith not be expected to continue the employment relationship (article 337 par. 2 CO). In other words, the event that leads to the immediate termination must so significantly shatter the trust between the parties that a reasonable person could not be expected to continue to work with the other party who is responsible for the just cause (ATF 130 III 28; ATF 116 II 145; ATF 116 II 142; ATF 112 II 41).
133. The party willing or planning to put an immediate end to the employment agreement on the grounds of a just cause has only a short period of reflection, after which it must be assumed that the said party chose to continue the contractual relationship until the expiry of the agreed period. A period of reflection of two to three business days is a maximum. An extension of a few days is tolerated only under exceptional circumstances (ATF 130 III 28 consid. 4.4; 123 III 86 consid. 2a; decision of the Swiss Federal Court of 24 August 2004, 4C.348/2003, consid. 3.2; Wyler, op. cit. p. 502; Gabriel Aubert, *Du contrat individuel de travail*, in *Commentaire Romand, Code des obligations I*, Bâle, 2003, ad art. 337, N. 11, p. 1783).
134. It has to be noted that according to Swiss law, except for certain cases which do not apply in this case, a termination without notice brings an employment contract to an end with immediate effect, even if the termination was in the absence of a valid reason (Rehbinder/Portmann, *Bâsler-Kommentar, OR I*, 3rd ed., Basel, N. 5, ad art. 337 CO; CAS 2003/0/453, par. 46, page 9).
135. If an employer dismisses an employee in the absence of a just cause, the latter shall have a claim for compensation of what he would have earned if the employment relationship had been terminated by observing the notice period or until the expiration of the fixed agreement period (article 337 c par. 1 CO).
136. If an employee, without a valid reason, does not appear at the work place, or if he leaves it without notice, the employer has a just cause to terminate with immediate effect the contract. Such an unjustified failure to appear at or the leaving of the working place can

also fall under article 337 d CO, according to which the employer shall have a claim for compensation equal to one quarter of the salary for one month. Moreover, he shall be entitled to compensation for additional damages (article 337d par. 1 CO). There is an unjustified non-appearance at or leaving of the working place when the employee is absent for several days and the employer can reasonably assume that it is not in the employee's intention to return and that his decision is final. This is particularly true if the employee is summoned to return to work or to justify his non-appearance (for instance by means of a medical certificate) and does not comply or is unable to provide a just cause (ATF 108 II 301, consid. 3 b; decision of the Swiss Federal Court of 21 December 2006, 4C.339/2006, consid. 2.1; Wyler, op. cit., p. 499; Aubert, op. cit., ad art. 337d, N. 2, p. 1791).

2) In particular

137. The Panel has to examine whether a) the Player terminated the contract with immediate effect and b) whether Club X. was somehow in breach of the terms of the labour agreement in such a manner that the Player was entitled not to perform his side of the contract anymore.

a) Did the Player terminate the labour agreement with immediate effect?

138. The Player's last medical consultation in Country Z. was on 19 December 2007. On 20 December 2007, he went to Italy, for a first medical appointment with Dr G. On 12 January 2008, a second medical examination was carried out on him in Italy, by four Italian practitioners, who told the Club's representatives that the failure to diagnose and treat the Player properly put his life at stake. At that moment, the *"Italian doctors explained to [the Player] that [he] was very lucky to still be alive and the [Country Z.] doctor took exception to this statement. The [Country Z.] doctor and the Club maintained that it was fine for [the Player] to resume training and return to the Club to continue playing in [Country Z.], and that [he could] have any necessary treatment while [he] was there. [He] was extremely distressed by this prospect"* (Player's witness statement dated 26 October 2009, par. 51). *"[His] decision not to return to [Country Z.] on 19 January 2008 was hardly unjustified. This was a few weeks after [he had] been diagnosed with a potentially life and career threatening condition and after that [he] had learned that [he] had developed that condition as a result of the Club's consistent failures. The Club ordered [him] to return to it for further treatment on 16 January 2008, just 4 days after a meeting in which [he] told the Club that [he] no longer wanted to be treated by it nor anyone chosen by it"* (Player's witness statement dated 8 December 2009, par. 16).
139. Since 12 January 2008, the Player refused to come back to his employer, despite the latter's legitimate requests. On 21, 23, 25 January 2008 and several times thereafter, the Player insisted on the fact that the contractual relationship between the Parties was still in force.
140. Under the above circumstances, it appears that the very restrictive period of reflection (i.e. 2 to 3 days) to immediately put an end to the contract started to run at the latest on 12 January 2008 and elapsed well-before the 22, 23 or 25 January 2008, i.e. when the

Player's representatives expressly confirmed that the labour agreement was still valid. At that moment, the Player had waived his right to terminate with immediate effect the contract and chose to remain bound by the said contract.

b) Was Club X. somehow in breach of the terms of the labour agreement in such a manner that the Player was entitled not to perform his side of the contract?

141. It is undisputed that Club X. has always paid the Player's salary in a timely manner, until April 2008.
142. In view of the above, the Player does not explain on what legal basis he could refuse to comply with the Club's requests to return to Country Z. and to engage in the recommended "*non-competitive physical activity*" (see medical report of 12 January 2008). The Panel finds the Player's conduct difficult to accept as, on the one hand, he renounced to terminate with immediate effect the contract because of the Club's alleged mistreatment and continued to accept and collect his salaries but, on the other hand, refused to perform his side of the contract precisely because of the said alleged mistreatment. The Player's position is particularly inconsistent as, on 21 January 2008, he claimed that he was entitled to his full salary and would consider a non-payment of his wages as a unilateral breach of contract without just cause on the part of the Club. Nonetheless, he alleged that he was not in the position to fulfil his obligations under the labour agreement because of the Club's negligence and mistreatment, which occurred long before (letter of [the Player's Counsels] to FIFA dated 7 March 2008). This allegation was made in the absence of any medical certificate attesting his actual condition and shape. Furthermore, the Player has never kept the Club updated on his situation, his actual intentions, the circumstances under which he would agree to return to the Club and how long his treatment in Italy actually lasted. Once the alleged harm was done (i.e. Club X. allegedly breached its duty of care and fairness towards its employee) and once it was accepted (as the Player chose to continue the contractual relationship), how could the Player legitimately refuse to perform his contractual obligations on the basis of alleged mistreatment committed by the Club, which occurred long before?
143. Under such circumstances, the Panel must come to the conclusion that the Player's explanations for not returning to Country Z. are inadequate, as he has failed to identify any breach of contract by the Club, at least from the moment he decided not to terminate the contract with immediate effect. Based on the foregoing, the Panel finds that the party in breach without just cause is the Player.
144. Despite the above, the Panel will nevertheless examine whether Club X. can be held liable for the alleged medical malpractice.

b.1) Medical malpractice

145. Based on article 328 CO which requires the employer to respect the personal integrity of his employees and to take the necessary measures to protect their rights, the Player contends that the Club "*had a primary obligation to take measures that were reasonably necessary in order to protect the Player's life, health and personal integrity*" (Player's appeal brief, par. 186) and failed to do so.

b.1.1) In general

146. In order for a patient to succeed in a medical malpractice claim, certain requirements have to be met. A first necessary condition to hold a doctor liable is that the doctor is at fault, i.e. he failed to act according to the required standard of care, or that he failed to respect individual patients' rights (i.e. failure to inform the patient properly concerning the risks related to the particular treatment). The burden of proof rests upon the patient (ATF 133 III 121 consid. 3.1, p. 124; ATF 120 Ib 411 consid. 4 in fine p. 414; ATF 115 Ib 175 consid. 2b p. 181). Once the fault is established, the patient must demonstrate the damage suffered. Furthermore, as a third essential requirement, the patient also has to establish the causal link between the doctor's breach of duty and the damage suffered (ATF 133 III 462; ATF 128 III 180).

b.1.2) The consent

147. The Player claims that he only consented to an arthroscopy but never to a mosaicplasty. At the hearing, Dr T. told the Panel that he personally explained to the Player that his condition needed two sorts of intervention: on the one hand, a medial meniscectomy and, on the other hand (in regard to the cartilage lesion repair), microfracture or mosaicplasty depending on the medical necessity. According to Dr T., the Player was fully aware of the objectives, the chances of success and the possible inconveniences related to the proposed treatment as well as of the risks and benefits of the various options available, and gave his written consent to the medical intervention performed on his left knee. As a matter of fact, on 23 May 2007, the Player signed a document whereby he gave his authorization "*to all the necessary and appropriate diagnostic interventions and medical treatments following my admission, to be provided by the physicians, nurses and other health personnel*". In this document he confirmed that he had been explained "*the nature of the recommended diagnostic intervention and medical treatment, the purpose and benefits, alternative treatment options and possible risk and complications*."
148. With such a declaration, the Panel has no difficulty to believe that the duty of the physician to inform the patient was fully respected.
149. In addition, should the Player not have been properly informed, his consent can be implied if he does not give credible personal reasons that he would have refused the mosaicplasty if he had known that such medical procedure would have been conducted on him (ATF 133 III 121 consid. 4.1 p. 128). Objectively, one must consider whether a reasonable patient, placed in the same situation as the Player, would have accepted the operation. The answer is clearly positive. The Player came to the hospital to be operated as he was suffering and could not play. It is undisputed that a surgical intervention was inevitable and that the Player was willing to undergo such an operation. At the hearing, he confirmed to the Panel that until he went to the hospital, he ignored everything about arthroscopy. In these circumstances, he does not explain why he would exclusively accept arthroscopy (a medical treatment unknown to the Player) and categorically refuse a mosaicplasty (another medical treatment unknown to the Player). Under such circumstances, the Panel finds that if he had been properly informed of the exact course

of the operation, the Player, as a reasonable person, would have not refused the mosaicplasty.

b.1.3) The deviation of the standard of care – in general

150. A physician is under the obligation to use reasonable care and skills but he is not required to achieve a specific result (result obligation) since the outcome of a treatment is uncertain and not only depends on the skilled exercise by the medical practitioner but also on the physical state and reactions of the patient. The requirements relating to duty of care cannot be determined in the abstract but on a case by case basis, depending on the particular circumstances of each situation. In this regard, must be taken into account the type of intervention or treatment and the associated risks, the physician's room for manoeuvre as well as the time available and the training and skills that can be objectively required. His responsibility is not limited to serious breaches of the rules of medical art. He must treat the patient appropriately and is liable for medical malpractice (ATF 120 Ib 411 consid. 4a, p. 413; ATF 116 II 519 consid. 3a; ATF 115 Ib 175 consid. 2b; ATF 113 II 429 consid. 3a, p. 432/433). There is medical malpractice when the doctor fails to exercise reasonable care and skills in accordance with the rules of medical art and science, i.e. the principles established by medical science generally recognized and accepted, commonly used and applied by practitioners (ATF 120 Ib 411 consid. 4a, p. 413; ATF 120 II 248 consid. 2c, p. 250; ATF 108 II 59 consid. 1; ATF 64 II 200 consid. 4a, p. 205).
151. In a general sense, civil responsibility or liability denotes the obligation imposed on a person to repair the tort caused to another party in violation of his legal or contractual obligations. In this regard, it is important to keep in mind that the activity of a physician contains elements of risks and dangers and involves a certain margin of appreciation between different possibilities of diagnosis or therapy. The choices he makes require his full attention. The doctor's civil liability does not necessarily arise when he has not found the solution that was objectively the best, when assessed retrospectively. There is deviation from the professional standard when a diagnosis, therapy or any other medical procedure, is not in accordance with the state of medical science. The practitioner's liability arises when he did not carry out diagnostic treatments and preventive procedures with due diligence or did not devote the necessary time to the examination of the patient (ATF 120 Ib 411 consid. 4a, p. 413; decision of the Swiss Federal Court of 11 January 2005, 4C.345/2003, consid 3.1).

b.1.4) The deviation of the standard of care – the alleged failure to institute adequate prophylaxis

152. The quality of the surgical act performed by Dr T. on the Player has not been criticized in any manner. In the present case, is disputed whether during the pre-operative, as well as the early post-operative period, the Player should have received some type of pharmaceutical prophylaxis in order to decrease the risks of incidence of deep venous thrombosis (hereafter referred to as “DVT”) and/or fatal pulmonary embolism (hereafter referred to as “PE”).

153. Dr G. *"cannot think of a single practitioner who would not be aware that anticoagulation is absolutely recommended in case of orthopaedic surgery to the leg in order to minimise the risk of DVT"* (Dr G.'s witness statement, dated 25 September 2009, par. 29). For Dr M. and considering that the Player underwent both an arthroscopy and a mosaicplasty, the surgery carried out on the Player put him *"at, at least, a moderate risk of developing DVT"* (Dr M.'s witness statement, dated 25 September 2009, par. 19). On the basis of the guidelines of the American Heart Association filed by Dr M. in support to his witness statement dated 25 September 2009, there is such a moderate risk factors in the presence of the following criteria: extensive surgery, previous venous thromboembolism, marked immobility, major orthopaedic surgery, hip surgery, major knee surgery, fracture of pelvis, femur, or tibia, surgery for malignant disease, postoperative sepsis, major medical illness, heart failure, inflammatory bowel disease, sepsis, myocardial infarction. Consequently, Dr M. affirmed that the Player fell *"into the category of patients who must be provided with the appropriate system of prophylaxis in order to prevent any thrombus developing following surgery"* (Dr M.'s witness statement, dated 25 September 2009, par. 19). According to this practitioner, who filed a certain number of scientific papers, the fact that the Player was not treated with heparin or any other anticoagulant drug before, during or after his operation is inexplicable and inexcusable and is not in accordance with the guidelines of most recognized medical opinion in the world, such as the American Heart Association (Dr M.'s witness statement, dated 25 September 2009, par. 24 and par. 25).
154. Dr T. considered that the most appropriate prophylactic measure for the Player was the use of mechanical methods and not of pharmacological agents. His position is supplemented by reference to several scientific articles published by the American College of Chest Physicians (ACCP), the American Academy of Orthopaedic Surgeons, the Surgical Care improvement Project and the Cochrane database. In essence and according to those guidelines, pharmaceutical prophylaxis is not recommended after arthroscopic surgery and isolated lower extremity injuries. After pre-operational clinical examination, Dr T. came to the conclusion that the Player did not present three or more risk factors, in the absence of which *"clinicians should not routinely use thromboprophylaxis other than early mobilization"* (Dr T.'s witness statement dated 3 December 2009, p. 4). According to Dr T., antithrombotic drugs present many disadvantages, such as, among others, bleeding, which is the cause of many surgeons rejecting the prescription of heparin.
155. At the hearing held in Lausanne on 14 and 15 April 2010:
- It was undisputed that there are at least two schools of thoughts which diverge considerably in regard to treatments to be applied during the pre-operative as well as the post-operative periods. The controversy is over the best regimens, which include mechanical efforts and early rehabilitation efforts, on one side, or pharmacological agent methods, on the other side.
 - Despite the fact that he is convinced that the failure of the Club to administer heparin led to the Player developing his condition, Dr M. confirmed his witness statement according to which *"because of the massive delay in diagnosing the Player's condition as set out below, it is not possible to state with certainty that the*

Club's failure to institute the appropriate system of prophylaxis was necessarily the cause of his DVT and PE" (Dr M.'s witness statement, dated 25 September 2009, par. 33. See also par. 35).

- It was also confirmed that DVT / PE usually occur (if they occur) within the 10-15 first days after the surgery. In the present case, the fact that DVT and PE developed over six months after the surgery is unusual.
156. The Panel observes that Dr G. did not support his opinion with any documents. In addition, Drs G.'s and M.'s statements are very general and do not provide an individual evaluation of the surgical operation itself. They have not made any comment on the specific situation of the Player just before and after the operation, on whether the mosaicplasty was the appropriate intervention and, if not, on what were the alternatives, on how invasive the surgical intervention carried out by Dr T. actually was. In their evidence, there is no indication that they actually based their opinion on the Player's medical records, despite the fact that those documents were in their possession. As a matter of fact, on 2 April 2008, the Player affirmed to FIFA that they were "*in possession of A.'s full and official medical history, and the Club's medical report*". It results that the medical opinions of Drs G. and M. are not tailored to the specific case of the Player and consist in general assertions.
 157. Under such circumstances, the Panel has difficulty in accepting that Drs G. and M. can affirm, without any reservation, that the clinical criteria defined by the American Heart Association were met and that the Player presented a moderate risk of developing DVT, for which heparin had to be prescribed, before and after the operation.
 158. Likewise, at the hearing, the Player's representatives pointed out that according to Dr T.'s own testimony, DVT prophylaxis is not recommended after arthroscopic surgery. Hence, they alleged that, since there was a mosaicplasty (and not just an arthroscopy), pharmaceutical prophylaxis had to be instituted. The Panel finds this allegation ungrounded and dismisses it as it is not supported by any scientific evidence confirming that mosaicplasty is in all cases much more invasive than an arthroscopic and must be in any event considered as an "*extensive surgery*", "*major orthopedic surgery*" or "*major knee surgery*", as provided by the guidelines of the American Heart Association filed by Dr M. in support to his evaluation. At the hearing, Dr T. explained that the incision made to perform the mosaicplasty was very small (according to his terms) and that the operation lasted less than an hour. The Player does not explain how such an intervention is so different from an arthroscopy and requires automatically pharmaceutical prophylaxis.
 159. It appears that the Player failed to establish that it is standard procedure to automatically institute pharmaceutical prophylaxis when mosaicplasty is performed on a patient. Furthermore, in his pre-operative medical examination of the Player, Dr T. weighed the benefits of pharmaceutical prophylaxis against the potential risks to the Player in view of his concrete situation. On that basis, Dr T. deemed that the use of pharmacological agents was not recommended. In accordance with Dr T.'s choice of treatment, physiotherapy started immediately after the operation with 4 to 6 hours of continuous passive motion per day and the Player was monitored on a daily basis by the Club's doctors and on a weekly basis by Dr T. during the six first weeks, and thereafter

monthly. Finally, the Player failed to prove that there was a causal connection between the post-operative treatment applied to him and his DVT / PE.

160. Based on the foregoing the Panel comes to the conclusion that there was no failure to institute the adequate prophylaxis.

b.1.5) The deviation of the standard of care – the alleged persistent failure to diagnose and treat the Player as suffering from DVT and PE

In general

161. Article 55 par. 1 CO states the following:

"The employer shall be liable for damages caused by his employees or other auxiliary persons in the course of their employment or business, unless he proves that he took all precautions appropriate under the circumstances in order to prevent damage of that kind, or that the damage would have occurred in spite of the application of such precautions."

162. Article 101 par. 1 CO reads as follows:

"If an obligor, even though authorized, has performed an obligation, or exercised a right arising out of a legal relationship through an auxiliary person such as a co-tenant or an employee, the obligor must compensate the other party for any damages caused by the acts of an auxiliary person."

163. Article 55 CO describes a general standard of tort liability for the act of another, which applies whenever a person employs an auxiliary to carry on an activity and damage is caused to a third party by this auxiliary. In addition to the general provisions of damage and causation, this liability presupposes that the following four conditions are present (P. Tercier and D. Dreyer, in Introduction of Swiss Law, Zurich 2004, p. 151):

- 1) An employer must have required a subordinate (called an auxiliary) to accomplish a task. The quality of employer supposes personal subordination of the auxiliary, i.e. the employer has the duty to supervise the one who acts.
- 2) The auxiliary must have committed an unlawful act.
- 3) This act must have been committed "*during the performance of the work*". There must consequently exist direct, functional relations with the accomplishment of the work.
- 4) Finally, the employer must have failed to supply the exculpatory proofs offered by the law: he is relieved, if he succeeds to prove that he has chosen his auxiliary with due care (*cura in eligendo*), that he has trained him (*cura in instruendo*) and supervised him (*cura in custodiendo*) adequately.

In particular

164. On the one hand, it is the Player's case that, despite the fact that he had consistently presented to the Club alarming symptoms from July to December 2007, Club X. failed

to take the adequate and obvious measures and therefore caused extreme damages to the Player.

165. The Club alleges that the post-operative period was uneventful until 5 September 2007, when the Player complained for the first time about "*fatigue, dyspnea and cough*".
166. In the absence of any convincing evidence to the contrary, the Panel can only accept that the first signs indicating health problems were shown on or shortly before 5 September 2007.
167. It is undisputed that on 5 September 2007, the Player was referred by Club X. to the [...] hospital where a pulmonary diseases specialist conducted an echocardiography as well as a range of respiratory function tests. "*Pursuant to that examination a bronchospasm was detected and the reversibility test was positive. As consequence of the above, the Player was medicated with a bronchodilator drug*" (Club's appeal brief, par. 17). The treatment foreseen consisted in two puffs of Symbicort to be administered by inhalation twice daily.
168. According to the Player, he did not respond rapidly to the prescribed treatment. However, he has not established with any convincing evidence how quickly he complained again about his difficulties to breath, who he complained to and how seriously.
169. On 10 October 2007, he was referred back to the [...] hospital. In this regard, the undated medical report of Club X.'s doctor, Dr A. (which is referred to by both Parties in support of their respective submissions) reads as follows, where relevant:

"In the check up respiration function tests, values have been observed to have increased. Therefore his treatment has been continued and a control appointment has been set up for 2 months later. As his respiration complaints recurred in the beginning of December, Symbicort treatment has been set as 4 puffs in the morning and 4 puffs in the evening with the recommendation of the Pulmonary Diseases Specialist".
170. Here again, the Player has not proven nor made plausible that he actually raised complaints concerning his general state of health and his difficulties to breath between 5 September and 10 October 2007, and between 10 October and beginning of December 2007. With regards to the burden of proof, it is the Player's duty to objectively demonstrate the existence of what he alleges (article 8 of the Swiss Civil Code, ATF 123 III 60 consid. 3a), ATF 130 III 417 consid. 3.1.). It is not sufficient for him to simply assert a state of fact for the Panel to accept it as true.
171. In particular, the Player failed to establish that the appointment of 10 October 2007 was arranged because he was not feeling well. Under those circumstances, the Panel cannot set aside the possibility that this appointment was arranged just for a control check of the progresses made after the prescribed treatment of 5 September 2007. With this regard, the Panel observes that this second meeting coincided with the period of time when the Player resumed playing in official games, in particular for [his] national team.

172. Likewise, Dr A.'s report according to which the Player's "*respiration complaints recurred in the beginning of December*", suggests that the latter did not complain about breathing difficulties before December 2007. When he did, Club X.'s medical staff followed the recommendations of the specialist of the [...] hospital and increased the dosage of the Symbicort treatment. As the Player's condition was not improving, the Player was referred back to the [...] hospital on 8 December and then again on 12 December 2007, i.e. when DVT / PE were diagnosed.
173. In the present case, two kind of "*auxiliaries*" must be distinguished:
- Club X.'s medical staff. This team consisted of Dr K., who was later replaced by Dr A., two physiotherapists Mr S. and Mr Sa. and the club masseur Mr M.
 - The [...] hospital, a part of the [...] Healthcare Group, which is a network of hospitals, medical centres and other healthcare-oriented companies in Country Z. It is one of the leading healthcare institutions in Country Z., which operates with over 7,000 employees in 27 different locations through a network of several general hospitals, medical centres, clinics, ophthalmology centres and laboratories.
174. The Panel is of the opinion that the medical staff of Club X. was not at fault and that it cannot be held responsible for the "*alleged persistent failure to diagnose and treat the Player as suffering from DVT and PE*". From the established facts put forth here above, it appears that the Club's medical team referred the Player to the [...] hospital as soon as the Player showed signs of breathing difficulties or other health problems. At the hospital, various tests were conducted by several experts, who had at their disposal highly sophisticated equipment. It may reasonably be assumed that the doctors working in the [...] hospital have more specialized knowledge than the medical staff of a football club, which mainly deals with the more general day-to-day care. The Panel does not see how the Player can expect Club X. to be in the position to supervise or question the treatment recommended by experienced specialists, to overrule their opinion and decide not to comply with their instructions. It is not clear how competent Dr A. is, but it can be assumed that his expertise is more limited than a knee surgery/cartilage specialist, a cardiovascular surgery specialist, a pulmonary diseases specialist and a general surgery specialist, in their respective fields of activity.
175. Furthermore, even if it had been established that the doctors of the [...] hospital were auxiliaries of Club X. and had committed an unlawful act – which is not the case –, the Panel accepts that the Club chose its auxiliary with due care as it referred the Player to the [...] hospital, one of the leading healthcare institutions in Country Z. with many specialized physicians. The Club cannot be held responsible for the eventual misdiagnosis of those specialists because it simply does not have the capacity and the expertise to cast doubt on the choices made by those experts.
176. The situation would be different if Club X. had decided not to refer the Player to the [...] hospital. In such a case, the Club would have to bear the responsibility for its misjudgement of the situation and of the seriousness of the Player's condition. However, this is not what happened as Club X. systematically sought help from one of the most sophisticated and well-equipped medical establishment in Country Z.

II.3 CONCLUSION

177. Based on the foregoing, the Panel must conclude a) that the Player was not entitled to be absent from Club X. for an indefinite period of time, b) that the multiple instructions given to the Player to join the Club's facilities were legitimate, justified and made perfect sense, c) that the Player waived his right to terminate with immediate effect the contract and chose to remain bound by the said contract, d) that his explanations for not returning to Country Z. are not convincing and inadequate, e) that he failed to identify any breach of contract by the Club and f) that the Club cannot be held liable for any alleged medical malpractice/misdiagnosis. The Panel finds that Club X. was not in breach of the terms of the labour agreement in such a manner that the Player was entitled not to perform his side of the contract or had a valid reason not to appear at the work place. In other words, the Player is the party in breach, and that such breach had no just cause.

III. WHEN WAS THE CONTRACTUAL RELATIONSHIP TERMINATED ?

178. For the reasons already set out, the Player waived his right to terminate with immediate effect the contract and chose to remain bound by the said contract. Despite the fact that he considered the labour agreement as in full force, he refused to perform his side of the contract without any valid reason.

179. In order to measure the consequences of the Player's unjustified breach of contract, the Panel must assess when exactly Club X. considered the labour agreement as unilaterally terminated by the Player. As long as the Club accepted that the contract was still in force, there is no reason for the Panel to think differently.

180. On 16, 22, 24, 25 January 2008, Club X. summoned the Player to come back to Country Z. and on 31 January 2008 it asked FIFA to "*caution the Player (...) to respect his contractual obligations and return to join the Club*". It reiterated the same request on 4 February 2007.

181. On 28 March 2008, Club X. confirmed that it was not opposed to finding an amicable settlement. Furthermore, it sought a delay of 14 days to submit an additional claim against the Player with regard to his persistent and unjustified absence, which must be considered "*as a serious breach*" of his employment contract. At that moment, the Club did not proclaim that it considered the contract as terminated by the Player. On the contrary, it kept paying the latter's wages.

182. Finally, it is only on 21 April 2008 that Club X. formally initiated proceedings with the DRC and claimed for the first time that the Player had "*terminated his employment contract without just cause during the so-called protected period*". At all time, the Club paid to the Player his wages, including the monthly salary for April 2008, which was to be paid on 25 April 2008.

183. Under the above circumstances, the Panel finds that the Club accepted that the labour agreement was still in force until the end of April 2008.

IV. IS THE INJURED PARTY ENTITLED TO ANY COMPENSATION ?

1) In general

184. As already exposed, the present dispute is primarily governed by the FIFA Regulations. In case of breach of contract, the FIFA Regulations provide for financial compensation as well as sporting sanctions.

185. Article 17 of the FIFA Regulations reads as follows:

“Article 17 Consequences of Terminating a Contract Without Just Cause

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.

2. Entitlement to compensation cannot be assigned to a third party. If a professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment. The amount may be stipulated in the contract or agreed between the parties.

3. 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. In all cases, these sporting sanctions shall take effect from the start of the following season at the new club. 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.

4. In addition to the obligation to pay compensation, sporting sanctions shall be imposed on any club found to be in breach of contract or found to be inducing a breach of contract during the protected period. It shall be presumed, unless established to the contrary, that any club signing a professional who has terminated his contract without just cause has induced that professional to commit a breach. The club shall be banned from

registering any new players, either nationally or internationally, for two registration periods.

5. Any person subject to the FIFA Statutes and regulations (club officials, players' agents, players, etc.) who acts in a manner designed to induce a breach of contract between a professional and a club in order to facilitate the transfer of the player shall be sanctioned."

186. In view of the facts of the present dispute, the Panel refers in particular to the findings of another recent CAS case with regard to the above article 17 and to the principles outlined therein. The case in question is CAS 2008/A/1519 – FC Shakhtar Donetsk (Ukraine) v/ Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) & FIFA & CAS 2008/A/1520 – Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) v/ FC Shakhtar Donetsk (Ukraine) & FIFA, in which the CAS insisted on the following points:

- The termination of a contract without just cause, even if it occurs outside of the Protected Period and following the appropriate notice period, remains a serious violation of the obligation to respect an existing contract and triggers the consequences set out in article 17 par. 1 of the FIFA Regulations. In other words, article 17 of the FIFA Regulations does not give to a party, neither a club nor a player, a free pass to unilaterally breach an existing agreement at no price or at a given fix price.
- The purpose of article 17 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 deterrent against unilateral contractual breaches and terminations, be it breaches committed by a club or by a player. This, because contractual stability is crucial for the well functioning of the international football. The deterrent effect of article 17 of the FIFA Regulations shall be achieved through the impending risk for a party to incur disciplinary sanctions, if some conditions are met (cf. article 17 par. 3 to 5 of the FIFA Regulations), and the risk to have to pay a compensation for the damage caused by the breach or the unjustified termination. In other words, both players and clubs are warned: if one does breach or terminate a contract without just cause, a financial compensation is due, and such compensation is to be calculated in accordance with all those elements of article 17 of the FIFA Regulations that are applicable in the matter at stake, including all the non-exclusive criteria listed in par. 1 of said article.
- 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.
- By asking the judging authorities to duly consider a whole series of elements, including such a wide concept like "*sport specificity*", and asking the judging authority to even consider "*any other objective criteria*", the authors of article 17

of the FIFA Regulations achieved a balanced system according to which the judging body has on one side the duty to duly consider all the circumstances of the case and all the objective criteria available, and on the other side a considerable scope of discretion, so that any party should be well advised to respect an existing contract as the financial consequences of a breach or a termination without just cause would be, in their size and amount, rather unpredictable. At the end, however, the calculation made by the judging authority shall be not only just and fair, but also transparent and comprehensible.

2) In particular

187. The present dispute is very atypical from the more common situations where a player unilaterally and prematurely terminates the labour agreement in order to join another employer. What makes the present case so unusual is first that A., a world class athlete, highly ranked and paid, whose last transfer fee amounted EUR 8,390,000, left Club X. and the football scene for numerous months.
188. Obviously, the Player decided not to return to his employer for personal reasons and not because he already was in negotiations with another club. Leaving Club X. caused him to give up a EUR 200,000/month salary until at least 31 May 2009 (the expiry date of the labour agreement).
189. The Player's attitude is even more peculiar that he breached the contract at a moment where he was not fit to play. Instead of remaining at the service of his Club and get paid without playing until his full recovery, he chose not to return to his club and to expose himself to a claim for compensation, making his chances to find another employer all the more complicated. As a matter of fact, the Panel can hardly see a new club willing to take the chance of hiring an injured player with the possible consequences of being found to be jointly and severally liable for the payment of a compensation in favour of a third club (cf. article 17 par. 2 of the FIFA Regulations and FIFA Commentary on the FIFA Regulations, fn 77).
190. According to the witness statement of Dr M. (Witness statement dated 25 September 2009, par. 65), the failure to rapidly diagnose DVT and PE caused the Player's veins to *"have suffered so much damage that the blood clot is now impossible to remove and the blood flow to his heart must now be effected by the superficial veins in his leg. However those veins are too small and ill equipped to perform this function, meaning that they have and will continue to be exceptionally pressured, becoming varicose and exposed. This means that those veins are at high risk of exploding upon any trauma consistent with high contact sport - such as a kick to the leg. Moreover, because the Player will have to remain anticoagulated, the risk that the Player may suffer massive blood loss in the event of such trauma to his varicose superficial veins is very significant."* Dr M. explained to the Panel in a very convincing way how some of the Player's vessel walls lost irremediably their elasticity with the consequence that blood that should be travelling towards the heart may back up and cause the veins to swell.
191. Finally and according to Mr T., a FIFA licensed players' agent, the Player failed to secure several deals as concerns rose over his fitness. In this regard, he failed to pass

several medical examinations. It is only in November 2009 that the Player found a new employer (Club B.) willing to take the chance to sign him up for a EUR 200,000 net/year salary.

192. Since he left Club X. and even since November 2009, the Player has not yet been fielded in any official games, either because of minor injuries or because of his lack of fitness.
193. Based on the foregoing and on the course of events following the month of January 2008, the Panel is of the opinion that the Player was not in a condition to play without exposing himself to major health complications, at least not before the expiry of the agreed term of the contract signed with Club X. Therefore, these exceptional circumstances lead the Panel to start considering the situation from the perspective of the money saved by Club X. due to the early termination of the contract by the Player. Such an approach is consistent with the principle of the so-called positive interest.

a) The calculation of the money saved by the Club due to the Player's breach of the contract

194. Pursuant to the terms of the contract, the Player was entitled to a salary net of taxes, which were paid by Club X.
195. Hence, the amounts actually saved by the Club must be determined by grossing up the stipulated monthly instalments to include the Country Z. tax. According to the evidence filed by Club X. itself (annex 62 of its answer), the applicable tax rate is 15,06 %.
196. The yearly net remuneration for the 2007/2008 season was amounting to EUR 1,950,000 payable in 10 equal instalments. Given that a) the 2007/2008 season started in August 2007 and ended the following May, that b) Club X. accepted that the contract was still in force in April 2008, only one more instalment of EUR 195,000 was due for the said season. By not having to pay this monthly wage, the Club saved the amount of **EUR 229,573.80** (195,000 x 100/84.94).
197. The yearly net remuneration for the 2008/2009 season was amounting to EUR 2,000,000 payable in 10 equal instalments. By not having to pay this salary, the Club saved the amount of **EUR 2,354,603.20** (2,000,000 x 100/84.94).
198. Club X. exercised its alleged option in order to unilaterally extend the contract for the sporting seasons 2009/2010. The yearly net remuneration was also amounting EUR 2,000,000. The validity and enforceability of such an option clause is not accepted under Swiss law (ATF 108 II 115; ATF 123 III 246; Rémy Wyler, op. cit., p. 437; CAS 2007/A/1219 – Sekondi Hasaacas FC v/ Borussia Mönchengladbach; TAS 2005/A/983&984 Penarol c. Bueno, Rodriguez & PSG; see the references in W. Portmann, Einseitige Optionsklauseln in Arbeitsverträgen von Fussballspielern, eine Beurteilung aus der Sicht der internationalen Schiedsgerichtsbarkeit im Sport, Causa Sport 2/2006, 5.2 a). Furthermore, the Panel observes that when the option was exercised (i.e. on 22 January 2008) the dispute between the Parties was already a matter of fact. Further, the Panel notes that any reasonable club, with still a long period of time to exercise an option, would wait and execute the option in relation to an injured player only after the full recovery of such player and not while the player's physical health is

unclear. Based on these elements, the Panel is satisfied that the execution of the option was artificial and aimed to increase the claim for compensation in the financial dispute that was already launched. Therefore, Club X.'s right to extend the contract for the 2009/2010 season must be dismissed without further consideration (*cf.* art. 18 CO).

199. In order to assess the amounts effectively saved by Club X., one must also take into consideration the other benefits that came with the Player's contract, i.e. a fully furnished flat with a rent that cannot exceed USD 3,000, an Audi A4 and 5 flight tickets [...] per year.
200. In its answer (page 82), Club X. evaluated the expenses related to the use of the car to EUR 300 per month and assessed the price of each flight ticket to EUR 1,976.77. According to the Club, the Player only used one flight ticket during the 2007/2008 season. The Panel has no reason to doubt the amounts made available by the Club itself and accepts them as being exact. Likewise, the Panel does not see any reason to depart from the currency rate applied by Club X. in its answer (annex 90 to the answer, USD 1 = EUR 0.696225).
201. Hence, considering that the contract was eventually considered as being terminated on 30 April 2008 with 13 months remaining until the agreed fixed term (i.e. 31 May 2009), Club X. saved 13 months of rent (13 x USD 3,000 x EUR 0.696225 = EUR 27,152.75) and of car expenses (13 x EUR 300 = EUR 3,900) as well as 9 flight tickets (9 x EUR 1,976.77 = 17,790.90). Hence, the amounts saved add up to **EUR 48,843.65** (EUR 27,152.75 + EUR 3,900 + EUR 17,790.90).
202. To summarise, Club X. saved the following amounts:
- | | | |
|---|------------|---------------------|
| - Player's salary for the 2007/2008 season: | EUR | 229,573.80 |
| - Player's salary for the 2008/2009 season: | EUR | 2,354,603.20 |
| - Other benefits (rent, car, flight tickets): | <u>EUR</u> | <u>48,843.65</u> |
| TOTAL | EUR | 2,633,020.65 |

b) The calculation of the Compensation of the Club due to the Player's early termination of the contract

The Remuneration element

203. Through the unjustified termination of a player, the Club loses the value of the services of the employee (CAS 2008/A/1519 – 1520 par. 91).
204. However and for the reasons set out above, it has been established that the Player was not in a position to work, at least not without exposing his health to severe damages before the end of the agreed contractual period, i.e. 31 May 2009. Hence, due to the very special circumstances of the present case and taking in consideration in particular the status of the health of the Player as well as the financial situation of the Player before and after the breach of the contractual relationship with the Club, the Club cannot be expected to be awarded any compensation for the loss of the Player's services.

205. Likewise, the Club cannot base its claim for compensation on the "benefit in kind" (rent, car, flight tickets), which it did not have to pay.

The fees and expenses paid or incurred by the former club

206. According to article 17 of the FIFA Regulations, the amount of fees and expenses paid or incurred by the Club, and in particular those expenses made to obtain the player, is an additional objective element that must be taken in consideration. Article 17 par. 1 requires those expenses to be amortised over the whole term of the contract. This, independently on whether the club has amortized the expenditures in such a linear way or not (CAS 2008/A/1519 – 1520 par. 91).
207. Club X. agreed to pay to Club C. a transfer fee, which was composed of the following two amounts: a) a sum of EUR 8,000,000 and b) the payment of the contributions related to the solidarity mechanism, in the total amount of EUR 390,000. The payment of these sums is not contested.
208. Club X. also claims that it paid EUR 400,000 to the agent R. in relation with the Player's transfer from Club C. It appears that the said agent signed every page of the contract dated 19 July 2005, and that the amount of EUR 400,000 was the object of a distinct contract between the Club and the agent, dated 19 July 2005. As a proof of the payments made in favour of the Player's agent, Club X. filed a bank statement showing that EUR 200,000 were paid to R. on 22 July 2005. The payment of the remaining EUR 200,000 is substantiated by a partially hand-written document, which contains no reference whatsoever to R.'s services. The Panel finds that only the payment of EUR 200,000 was satisfactorily established.
209. The Player also received a signing-on fee of EUR 250,000. By terminating the labour contract prematurely, the Player did not allow Club X. to amortize the amount of the signing-on fee which it agreed to pay for the acquisition of his services for a period of four seasons. This amount must also be taken into account.
210. As no other charges, fees, expenses have been submitted in relation with the acquisition of the Player, the non-amortised fees and expenses must be calculated on the amount of EUR 8,840,000 (= EUR 8,000,000 + EUR 390,000 + EUR 200,000 + EUR 250,000). The Parties signed a fix-term agreement for four years, effective from 1 July 2005 until 31 May 2009 (i.e. 47 months). The contract was considered terminated upon breach of the Player 13 months before the agreed term.
211. As a result, by breaching the contract, the Player did not allow the Club to amortize the cost of its investment, thereby causing a financial damage to Club X. of EUR 2,445,106.35 (EUR 8,840,000 ./ 47 x 13).

Extra Replacement Costs

212. The criteria listed in article 17 par. 1 of the FIFA Regulations are non-exclusive. Accordingly, the Panel is called to examine whether in the concrete dispute there are any other objective criteria to be taken into consideration when assessing the amount of compensation due under article 17 par. 1 of the FIFA Regulations. Among such

additional objective criteria, the question arises whether the expenses that a club incurs to replace a player that has left prematurely shall be considered (CAS 2008/A/1519 – 1520 par. 133).

213. In the case at hand, it has been established that the Parties agreed that the Player could not play for the remainder of the 2007/2008 season. As things turned out, the Player could actually not play for the 2008/2009 season, either.
214. As a result, the Panel is of the view that, even though it was appropriate for Club X. to hire Mr M. to replace the Player, such transfer was not directly linked to the Player's breach of the contract since Club X. would have needed to replace the Player in any event, even if the Player had not breached the contract. Therefore, the Club cannot derive any right or compensation under this criterion.

Additional Objective Criteria

215. Following the requirements of article 17 of the FIFA Regulations, the Panel must also examine whether there are other objective elements to consider when determining the level of the compensation due to Club X. Such elements could be for instance the damage incurred by a club, which - because of the premature termination - was not any longer in a position to fulfil some obligations towards a third party, like a sponsor or an event organiser to whom the presence of the player was contractually warranted (CAS 2008/A/1519 – 1520 par. 148).
216. In the present matter, Club X. claimed that the Player's absence had "*a major impact on the sales of merchandising under his name*" and caused a sporting loss of EUR 3,000,000. As regards the burden of proof, it is the Club's duty to objectively demonstrate the existence of its rights (article 8 of the Swiss Civil Code). Club X. has not proven nor made plausible the existence of the alleged damage it suffered because of the Player's termination of the contract without just cause.
217. On 28 January 2008, Club X.'s internal disciplinary body imposed upon the Player a fine of USD 73,500 for non-compliance with several provisions of its internal regulations. It is undisputed that the said disciplinary decision was duly notified to the Player on 1 February 2008. The fine was imposed at a moment when both Parties considered the contract as not terminated. The Player did not appeal the said decision, which entered into force. Club X. is entitled to the amount of EUR 51,172.50 (USD 73,500 x EUR 0.696225 = EUR 51,172.50)
218. Under those circumstances, Club X. can be awarded EUR 51,172.50 for supplementary damages.

c) Specificity of sport

219. Sport, similarly to other aspects of social life, has an own specific character and nature and plays its own important role in our society. Similarly as for the criterion of the "law of the country concerned", the judging body has to take into due consideration the specific nature and needs of sport when assessing the circumstances of the dispute at stake, so to arrive to a solution which takes into reasonable account not only the

interests of players and clubs but, more broadly, those of the whole football community. Based on this criterion, the judging body shall therefore assess the amount of compensation payable by a party under article 17 par. 1 of the FIFA Regulations, keeping duly in mind that the dispute is taking place in the somehow unique world of sport. In other words, the judging body shall aim at reaching a solution that is legally correct, and that is also appropriate upon an analysis of the specific nature of the sporting interests at stake, the sporting circumstances and the sporting issues inherent to the single case. (CAS 2008/A/1519 – 1520 par. 151 ss).

220. From the above, it can be noted that because of the Player's unilateral breach of the contract Club X. saved EUR 2,633,020.65, which is EUR 136,741.80 superior to the sum of compensation it is entitled to receive from the Player, i.e. its non amortized investment (i.e. EUR 2,445,106.35) and supplementary damages (i.e. EUR 51,172.50). The amount saved by the Club would have been even greater if the Player had accepted to extend the contractual relationship for the 2009/2010 season. Conversely, the damage suffered by the Player is not only financial as he could have earned a monthly wage of EUR 200,000 despite his inability to play or despite his diminished sporting skills and performance, but is also physical. It has been established that his injury caused him irreparable harm and kept him away from the football scene for a period of over 18 months. Although he has been able to find a new employer (who agreed to pay him a tenth of what he was earning previously), his condition is such that he has not been fielded yet, despite his reputation and renowned experience. In addition and according to the experts, his participation to official games and his exposition to harsh physical contact could expose him to sever physical consequences.
221. In view of the above, the Panel concludes that the principle of specificity of sport commends that in these circumstances, when it was established that Club X. saved more money compared to its losses because of the breach of contract committed by the Player, and taking into account the situation of the Player due to his injury, no compensation shall be awarded to Club X. and that no sporting sanction shall be imposed upon the Player.
222. 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.
223. (...)

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeals filed on 25 May 2009 by Club X. and by the player A. are partially upheld.
2. The decision of the FIFA DRC dated 9 January 2009 is partially reformed in the sense that A. must not pay any compensation to Club X. for breaching the contracts signed in July 2005.
3. (...).
4. (...).
5. All other or further claims and counterclaims are dismissed.

Done in Lausanne, on 7 June 2010

THE COURT OF ARBITRATION FOR SPORT

Efraim Barak
President

James Robert Reid
Arbitrator

Michele Bernasconi
Arbitrator

Patrick Grandjean
Ad hoc clerk

Bundesgericht
Tribunal fédéral
Tribunale federale
Tribunal federal

{T 0/2}
4A_402/2010

Urteil vom 17. Februar 2011
I. zivilrechtliche Abteilung

Besetzung
Bundesrichterin Klett, Präsidentin,
Bundesrichter Corboz,
Bundesrichterin Rottenberg Liatowitsch,
Gerichtsschreiber Leemann.

Verfahrensbeteiligte
X. _____,
vertreten durch Rechtsanwälte
Philipp J. Dickenmann und Reto Hunsperger,
Beschwerdeführerin,

gegen

A. _____,
vertreten durch Rechtsanwalt Dr. Stephan Netzle,
Beschwerdegegner,

Fédération Internationale de Football Association (FIFA),
vertreten durch Rechtsanwalt Christian Jenny,
Verfahrensbeteiligte.

Gegenstand
Internationales Schiedsgericht; rechtliches Gehör,

Beschwerde gegen den Schiedsentscheid des Tribunal Arbitral du Sport (TAS) vom 7. Juni 2010.
Sachverhalt:

A.
A.a X. _____ (Beschwerdeführerin), eine juristische Person mit Sitz in Istanbul, ist ein türkischer Fussballclub. Die Beschwerdeführerin ist Mitglied des türkischen Fussballverbands, der wiederum der Fédération Internationale de Football Association (FIFA; Verfahrensbeteiligte) mit Sitz in Zürich angehört.
A. _____ (Beschwerdegegner), ist ein professioneller Fussballspieler aus Y. _____. Er spielt derzeit beim italienischen Fussballclub FC Z. _____.
A.b Seit der Saison 2003/2004 spielte der Beschwerdegegner für den italienischen Fussballclub Q. _____. Im Juli 2005 stimmte der Q. _____ gegen Erhalt einer Entschädigung von EUR 8 Mio. einem Transfer des Beschwerdegegners zur Beschwerdeführerin zu. Im Zusammenhang mit diesem Transfer musste die Beschwerdeführerin zudem Solidaritätsbeiträge an Dritte im Betrag von EUR 390'000.-- erbringen. Zudem zahlte sie dem Spielervermittler des Beschwerdegegners EUR 200'000.--.
Am 19. Juli 2005 schloss der Beschwerdegegner mit der Beschwerdeführerin einen Arbeitsvertrag mit einer festen Dauer vom 1. Juli 2005 bis 30. Juni 2009 ab. Der Vertrag sah neben einem sofort zahlbaren Handgeld ("signing fee") von EUR 250'000.-- für die vereinbarten vier Dienstjahre ein Jahressalär von EUR 1.85 Mio. (1. Jahr), EUR 1.9 Mio. (2. Jahr), EUR 1.95 Mio. (3. Jahr) bzw. EUR 2 Mio. (4. Jahr) vor. Im Weiteren verpflichtete sich die Beschwerdeführerin, dem Beschwerdegegner einen Audi A4, eine möblierte Wohnung sowie jährlich fünf Flugscheine Istanbul - Y. _____ - Istanbul zur Verfügung zu stellen. Der Beschwerdeführerin wurde

schliesslich das Recht eingeräumt, das Arbeitsverhältnis einseitig um ein Jahr, d.h. für die Spielsaison 2009/2010, zu verlängern.

In der Folge unterzeichneten die Parteien einen weiteren, undatierten Arbeitsvertrag, der die Bedingungen der Vereinbarung vom 19. Juli 2005 bestätigte und einzelne Punkte ergänzte. So wurde unter anderem der Betrag für die dem Beschwerdegegner zur Verfügung zu stellende möblierte Wohnung auf USD 3'000.-- beschränkt und eine erfolgsabhängige Prämie auf Grundlage des "incentive scheme" der Beschwerdeführerin vereinbart, die dem Spieler zusätzlich zu seinem Salär zustehen soll. Der Beschwerdegegner verpflichtete sich zudem ausdrücklich, die Reglemente der Beschwerdeführerin zu beachten, ihre Weisungen zu befolgen, seiner Gesundheit Sorge zu tragen und an den offiziellen Spielen, Freundschaftsspielen, Trainings und Trainingslagern der Beschwerdeführerin teilzunehmen.

Am 22. Juli 2005 unterzeichneten die Parteien einen dritten Vertrag, der dem Formularvertrag des türkischen Fussballverbands entspricht. Darin wiederholten sie im Wesentlichen die Bedingungen der beiden vorangehenden Vereinbarungen, mit Ausnahme der Vertragsdauer, die um einen Monat (d.h. bis zum 31. Mai 2009) verkürzt wurde, sowie der Bestimmung, dass der versprochene Lohn ohne Abzug von Steuern ("free of taxes of the Player") zu entrichten sei.

A.c Im Januar 2007 verletzte sich der Beschwerdegegner anlässlich eines Freundschaftsspiels in Ankara am linken Knie. Nachdem die Verletzung im März 2007 noch nicht verheilt war, veranlasste die Beschwerdeführerin eine medizinische Untersuchung im R. _____ Spital in Istanbul. Dabei wurde eine Schädigung des Knorpels festgestellt, die einen operativen Eingriff erforderlich machte. Der Beschwerdegegner spielte jedoch noch bis zum Ende der Saison 2006/2007 weiter, in der die Beschwerdeführerin den türkischen Meistertitel gewann.

Am 24. Mai 2007 unterzog sich der Beschwerdegegner einer Operation. Dabei wurde in Anwendung eines besonderen Transplantationsverfahrens ("mosaicplasty") der beschädigte durch einen gesunden Knorpel ersetzt. Während der Erholungsphase nach durchgeführter Operation führten der Beschwerdegegner und seine Berater Gespräche mit anderen Fussballclubs. Am 11. Juli 2007 bestätigte der FC S. _____ gegenüber der Beschwerdeführerin sein Interesse an einer Übernahme des Spielers gegen eine Entschädigung von EUR 4 Mio. Obwohl die Beschwerdeführerin dieses Angebot ablehnte, drängten die Berater weiter auf einen Transfer, worauf die Beschwerdeführerin der FIFA beantragte, Sanktionen gegen die Berater des Beschwerdegegners und den deutschen Fussballclub zu verhängen.

Am 5. September 2007 wurde der Beschwerdegegner, nachdem er sich über Ermüdungs- und Atemnoterscheinungen sowie Husten beklagt hatte, wiederum in das R. _____ Spital überwiesen. Ein Lungenspezialist diagnostizierte daraufhin eine Asthmaerkrankung und verschrieb die Einnahme von Medikamenten.

Am 10. Oktober 2007 wurde der Beschwerdegegner wegen Atembeschwerden erneut in das gleiche Spital eingewiesen.

Im Oktober 2007 nahm der Beschwerdegegner seine offizielle Wettkampftätigkeit wieder auf. Er spielte im November 2007 anlässlich eines Vierländerturniers für die Nationalmannschaft Y. _____ und absolvierte am 1. Dezember 2007 sein letztes Wettkampfspiel für die Beschwerdeführerin.

Im Dezember 2007 wurde der Beschwerdegegner abermals in das R. _____ Spital eingewiesen, da sich sein Gesundheitszustand nicht gebessert hatte. Diesmal stellten die Ärzte eine akute Thrombose im linken Oberschenkel sowie eine Lungenembolie fest. Diese Diagnose wurde sodann auch von den italienischen Ärzten bestätigt, die der Beschwerdegegner im Dezember 2007 bzw. Januar 2008 mit Zustimmung der Beschwerdeführerin konsultierte.

Am 12. Januar 2008 fand in Italien ein Treffen statt, an dem neben dem Beschwerdegegner sowie verschiedenen Vertretern der Beschwerdeführerin auch ein Arzt des R. _____ Spitals und die vom Beschwerdegegner beauftragten Ärzte teilnahmen. Anlässlich dieses Treffens wurde der Beschwerdegegner erneut untersucht, wobei die italienischen Ärzte diverse Blutgefässerkrankungen im operierten linken Bein des Spielers sowie eine Lungenembolie feststellten. Noch während des Treffens kam es zwischen den medizinischen Experten der Parteien zu Meinungsverschiedenheiten hinsichtlich der Diagnose, der erforderlichen Behandlung sowie der Frage, ab wann der Spieler wieder in der Lage sein sollte, zu trainieren und wettkampfmässig zu spielen.

Angesichts der verletzungsbedingten Spielunfähigkeit bat die Beschwerdeführerin den Beschwerdegegner um Aussetzung seiner Spielberechtigung bis zum letzten Spiel der Saison 2007/2008, das auf den 11. Mai 2008 angesetzt war, was der Beschwerdeführerin nach den anwendbaren Regeln des türkischen Fussballverbands erlaubt hätte, einen anderen ausländischen Spieler anstelle des Beschwerdegegners einzusetzen. Am 14. Januar 2008 bestätigte die Beschwerdeführerin gegenüber dem Beschwerdegegner, dass er trotz Aussetzung seiner Spielberechtigung weiterhin seinen Lohn sowie andere vertragliche Leistungen erhalten und sein Arbeitsvertrag aufrechterhalten würde. Der Beschwerdegegner verweigerte seine Zustimmung, da ihm die möglichen Folgen einer solchen Aussetzung seiner Spielberechtigung unklar waren.

Am 16. Januar 2008 bat die Beschwerdeführerin den Beschwerdegegner, der sich noch immer in Italien aufhielt, sich bis spätestens 19. Januar 2008 zurück zur Mannschaft nach Istanbul zu begeben, um seine medizinische Behandlung und Rehabilitation unter der Aufsicht ihres Medizinalpersonals weiterzuführen. Dabei drohte sie ihm an, seinen Fall der FIFA zu melden, sollte er diese Anweisungen nicht befolgen. Der Beschwerdegegner erschien am 19. Januar 2008 nicht in Istanbul, sondern reiste nach Y. _____, um zwischen 20. Januar und 10. März 2008 dem Afrika Cup als Berater ("special advisor") beizuwohnen.

Am 22. Januar 2008 erklärte die Beschwerdeführerin, ihr vertragliches Recht zur Verlängerung des Arbeitsverhältnisses um ein Jahr ausüben zu wollen. Im Weiteren forderte sie den Beschwerdegegner auf, unverzüglich nach Istanbul zurückzukehren.

Am 25. Januar 2008 hielt die Beschwerdeführerin den Beschwerdegegner vergeblich dazu an, sich auf ihre Kosten für eine am 29. Januar 2008 vorgesehene Untersuchung in die T. _____ Klinik, Arizona (USA), zu begeben.

A.d Am 28. Januar 2008 verhängte die interne Disziplinarkommission der Beschwerdeführerin eine Busse im Betrag von USD 73'500.-- gegen den Beschwerdegegner wegen Zuwiderhandlung gegen verschiedene Bestimmungen der internen Reglemente.

A.e Mit Schreiben vom 31. Januar und 4. Februar 2008 beschwerte sich die Beschwerdeführerin bei der FIFA und beantragte ihr unter anderem, es seien der Beschwerdegegner und seine Berater zu verwarnen, es sei der Beschwerdegegner zur Rückkehr nach Istanbul aufzufordern und es seien sportliche Sanktionen zu verhängen. Es folgte ein Austausch verschiedener Eingaben.

Am 21. April 2008 leitete die Beschwerdeführerin bei der Kammer zur Beilegung von Streitigkeiten der FIFA ("Dispute Resolution Chamber") ein Verfahren ein und beantragte, der Beschwerdegegner sei zur Zahlung einer Entschädigung im Betrag von EUR 12 Mio. zu verpflichten und zudem während sechs Monaten für die Teilnahme an offiziellen Wettkämpfen zu sperren.

Mit Entscheid vom 9. Januar 2009 sprach die Kammer zur Beilegung von Streitigkeiten der Beschwerdeführerin eine Entschädigung von EUR 2'281'915.-- zu; die Widerklage des Beschwerdegegners wies sie ab.

Im November 2009 unterzeichnete der Beschwerdegegner einen Einjahresvertrag mit dem Fussballclub FC Z. _____ für ein Jahressalär von ungefähr EUR 200'000.-- netto. Bislang wurde er allerdings bei keinem offiziellen Spiel eingesetzt.

B.

Am 25. Mai 2009 appellierte die Beschwerdeführerin beim Tribunal Arbitral du Sport (TAS) gegen den Entscheid der Kammer zur Beilegung von Streitigkeiten der FIFA vom 9. Januar 2009 mit dem Antrag, es sei der angefochten Entscheid teilweise aufzuheben und der Beschwerdegegner zur Zahlung von EUR 12'131'178.-- sowie EUR 701'190.--, jeweils zuzüglich Zins, zu verpflichten.

Ebenfalls am 25. Mai 2009 erhob der Beschwerdegegner beim TAS Berufung gegen den Entscheid der Kammer zur Beilegung von Streitigkeiten der FIFA vom 9. Januar 2009. Er beantragte, es sei der angefochtene Entscheid aufzuheben und festzustellen, dass er gegenüber der Beschwerdeführerin nicht haftbar sei, weil er sein Arbeitsverhältnis aus wichtigem Grund beendet habe, eventualiter weil der geschuldete Schadenersatz Null betrage. Zudem sei die Beschwerdeführerin widerklageweise wegen Vertragsverletzung und unerlaubter Handlung zu einer vom Schiedsgericht festzusetzenden Schadenersatzzahlung zu verurteilen.

Mit Schiedsspruch vom 7. Juni 2010 hiess das TAS die Berufung des Beschwerdegegners insoweit gut, als es den Entscheid der Kammer zur Beilegung von Streitigkeiten der FIFA vom 9. Januar 2009 teilweise aufhob, das Klagebegehren der Beschwerdeführerin abwies und feststellte, dass der Beschwerdegegner keine Entschädigung schulde.

Das TAS erwog gestützt auf die Reglemente der FIFA sowie das subsidiär anwendbare schweizerische Recht, dass dem Beschwerdegegner eine Vertragsverletzung vorzuwerfen sei. Hinsichtlich der Vertragsdauer hielt es dafür, dass die Beschwerdeführerin aufgrund ihrer Lohnzahlungen sowie ihres sonstigen Verhaltens zu Beginn des Jahres 2008 anerkannt habe, dass das bis Ende Mai 2009 befristete Arbeitsverhältnis mit dem Beschwerdegegner zunächst bis Ende April 2008 aufrechterhalten wurde und zu diesem Zeitpunkt vorzeitig endete. Die von der Beschwerdeführerin geltend gemachte einseitige Vertragsverlängerung erachtete das TAS für ungültig. Es stellte fest, dass der Beschwerdegegner ab Anfang 2008 und mindestens bis zum vereinbarten Vertragsende aus gesundheitlichen Gründen nicht in der Lage war, Spiele auszutragen, ohne sich der Gefahr ernsthafter Gesundheitsschäden auszusetzen. In Bezug auf den Vermögensschaden erwog das TAS in Anwendung von Art. 17 des FIFA-Reglements bezüglich Status und Transfer von Spielern, Ausgabe 2005, ("Regulations for the Status and Transfer of Players"; nachfolgend: FIFA-Transferreglement), dass die Beschwerdeführerin mit der vorzeitigen Beendigung des Arbeitsverhältnisses EUR 2'633'020.65 eingespart habe, indem sie dem Beschwerdegegner von Anfang Mai 2008 bis Ende Mai 2009 weder einen Lohn noch andere

vertragliche Leistungen habe erbringen müssen. Der ihr aufgrund der ungerechtfertigten vorzeitigen Vertragsauflösung zustehende Ersatz entspreche demgegenüber lediglich der Summe von EUR 2'445'106.35 für nicht amortisierten Transferaufwand sowie dem zusätzlichen Schadenersatz ("supplementary damages") von EUR 51'172.50 (entsprechend der verhängten Disziplinarstrafe im Betrag von USD 73'500.--). Unter Berücksichtigung der "Besonderheit des Sports" ("specificity of sport") nach Art. 17 Abs. 1 des FIFA-Transferreglements stehe der Beschwerdeführerin, die durch die vorzeitige Vertragsauflösung EUR 136'741.80 mehr eingespart als verloren habe, kein Schadenersatz zu.

C.

Mit Beschwerde in Zivilsachen vom 7. Juli 2010 beantragt die Beschwerdeführerin dem Bundesgericht, es sei der Schiedsentscheid des TAS vom 7. Juni 2010 aufzuheben und die Sache zur neuen Entscheidung an das Schiedsgericht zurückzuweisen.

Der Beschwerdegegner beantragt die Abweisung der Beschwerde, soweit überhaupt darauf eingetreten werden könne. Das TAS beantragt die Abweisung der Beschwerde. Die FIFA hat auf eine aktive Beteiligung am Verfahren verzichtet.

Die Akten des Schiedsverfahrens wurden beigezogen. Mit einer weiteren Eingabe vom 7. Dezember 2010 nahm die Beschwerdeführerin Stellung zur Beschwerdeantwort sowie zur Vernehmlassung des TAS.

Erwägungen:

1.

Im Bereich der internationalen Schiedsgerichtsbarkeit ist die Beschwerde in Zivilsachen unter den Voraussetzungen der Art. 190-192 IPRG (SR 291) zulässig (Art. 77 Abs. 1 lit. a BGG).

1.1 Der Sitz des Schiedsgerichts befindet sich vorliegend in Lausanne. Sowohl die Beschwerdeführerin als auch der Beschwerdegegner hatten im relevanten Zeitpunkt ihren Sitz bzw. Wohnsitz ausserhalb der Schweiz. Da die Parteien die Bestimmungen des 12. Kapitels des IPRG nicht schriftlich ausgeschlossen haben, gelangen diese zur Anwendung (Art. 176 Abs. 1 und 2 IPRG).

1.2 Zulässig sind allein die Rügen, die in Art. 190 Abs. 2 IPRG abschliessend aufgezählt sind (BGE 134 III 186 E. 5 S. 187; 128 III 50 E. 1a S. 53; 127 III 279 E. 1a S. 282). Nach Art. 77 Abs. 3 BGG prüft das Bundesgericht nur die Rügen, die in der Beschwerde vorgebracht und begründet worden sind; dies entspricht der in Art. 106 Abs. 2 BGG für die Verletzung von Grundrechten und von kantonalem und interkantonalem Recht vorgesehenen Rügepflicht (BGE 134 III 186 E. 5 S. 187 mit Hinweis). Appellatorische Kritik ist unzulässig (BGE 119 II 380 E. 3b S. 382).

1.3 Das Bundesgericht legt seinem Urteil den Sachverhalt zugrunde, den das Schiedsgericht festgestellt hat (Art. 105 Abs. 1 BGG). Es kann die Sachverhaltsfeststellung des Schiedsgerichts weder berichtigen noch ergänzen, selbst wenn diese offensichtlich unrichtig ist oder auf einer Rechtsverletzung im Sinne von Art. 95 BGG beruht (vgl. Art. 77 Abs. 2 BGG, der die Anwendbarkeit von Art. 97 BGG sowie Art. 105 Abs. 2 BGG ausschliesst). Allerdings kann das Bundesgericht die tatsächlichen Feststellungen des angefochtenen Schiedsentscheids überprüfen, wenn gegenüber diesen Sachverhaltsfeststellungen zulässige Rügen im Sinne von Art. 190 Abs. 2 IPRG vorgebracht oder ausnahmsweise Noven berücksichtigt werden (BGE 133 III 139 E. 5 S. 141; 129 III 727 E. 5.2.2 S. 733; je mit Hinweisen). Wer sich auf eine Ausnahme von der Bindung des Bundesgerichts an die tatsächlichen Feststellungen der Vorinstanz beruft und den Sachverhalt gestützt darauf berichtigt oder ergänzt wissen will, hat mit Aktenhinweisen darzulegen, dass entsprechende Sachbehauptungen bereits im vorinstanzlichen Verfahren prozesskonform aufgestellt worden sind (vgl. BGE 115 II 484 E. 2a S. 486; 111 II 471 E. 1c S. 473; je mit Hinweisen).

1.4 Die Beschwerdeführerin stellt ihren rechtlichen Vorbringen eine ausführliche Sachverhaltsdarstellung voran, in der sie den Ablauf der Ereignisse sowie des Verfahrens aus ihrer Sicht darlegt. Sie weicht darin in verschiedenen Punkten von den tatsächlichen Feststellungen der Vorinstanz ab oder erweitert diese, ohne substantiiert Ausnahmen von der Sachverhaltsbindung geltend zu machen. So trägt sie etwa vor, das Schiedsgericht sei fälschlicherweise davon ausgegangen, dass sie im Rahmen des Transfers des Beschwerdegegners effektiv lediglich einen Betrag von EUR 200'000.-- an den Spielervermittler bezahlt habe. Sie kritisiert in ihrer Sachverhaltsdarstellung zudem in appellatorischer Weise den angefochtenen Schiedsentscheid, als ob das Bundesgericht den Rechtsstreit von Grund auf neu beurteilen könnte. So stellt sie den Erwägungen des TAS zum Zeitpunkt der Vertragsbeendigung sowie zur Schadensberechnung ihre eigene

Ansicht entgegen. Sie bringt etwa vor, das Schiedsgericht sei fälschlicherweise von der Ungültigkeit der von ihr erklärten Vertragsverlängerung ausgegangen. Auch habe es zu Unrecht dafür gehalten, der Beschwerdegegner sei ab Januar 2008 bis zum Ablauf seines Arbeitsvertrags gesundheitlich nicht mehr in der Lage gewesen, Spiele zu bestreiten. Die Beschwerdeführerin trägt über mehrere Seiten vor, weshalb die Schadensberechnung sowie die Schadenersatzbemessung durch das TAS ihrer Meinung nach in tatsächlicher und rechtlicher Hinsicht an verschiedenen Fehlern leide. Ihre entsprechenden Ausführungen, denen sich keine rechtsgenügend begründete Rüge nach Art. 190 Abs. 2 IPRG entnehmen lässt, haben daher unberücksichtigt zu bleiben.

Nach Art. 99 Abs. 1 BGG unzulässig ist die erstmals vor Bundesgericht aufgestellte Behauptung, der Beschwerdegegner sei an der FIFA-Weltmeisterschaft 2010 in mehreren Ernstkämpfen eingesetzt worden. Diese ist für das Beschwerdeverfahren vor Bundesgericht ebenso unbeachtlich wie die von der Beschwerdeführerin hierzu eingereichten neuen Beweismittel.

2.

Die Beschwerdeführerin bringt vor, das Schiedsgericht habe im Zusammenhang mit den eingeklagten Ansprüchen auf Lohnrückerstattung sowie Bezahlung der Disziplinarstrafe ein ihm unterbreitetes Rechtsbegehren unberücksichtigt gelassen (Art. 190 Abs. 2 lit. c IPRG) und in verschiedener Hinsicht ihr rechtliches Gehör verletzt (Art. 190 Abs. 2 lit. d IPRG).

2.1

2.1.1 Die Beschwerdeführerin rügt, sie habe im Verfahren vor dem Schiedsgericht "drei komplett unterschiedliche Ansprüche" eingeklagt, nämlich gestützt auf Art. 17 des Transferreglements Schadenersatz infolge unzulässiger vorzeitiger Vertragsauflösung im Umfang von EUR 12'131'178.--, die Rückzahlung zu Unrecht bezahlter Löhne für den Zeitraum 19. Januar bis 30. April 2008 im Betrag von EUR 650'000.-- sowie die im Januar 2008 ausgesprochene Disziplinarstrafe im Betrag von EUR 51'190.10. Das Schiedsgericht habe sich jedoch mit dem Anspruch auf Rückzahlung von EUR 650'000.-- überhaupt nicht auseinandergesetzt, während es den Anspruch auf Bezahlung der Disziplinarstrafe über EUR 51'190.10 "in einem völlig falschen Gesamtkontext abgehandelt" habe.

2.1.2 Das Schiedsgericht ging davon aus, dass der Beschwerdegegner ab Anfang 2008 und mindestens bis zum vereinbarten Vertragsende aus gesundheitlichen Gründen nicht ohne ernsthafte Gesundheitsgefährdung arbeiten bzw. spielen konnte. In Bezug auf den Lohn für die Monate Januar bis April 2008 hielt es fest, die Beschwerdeführerin habe dem Beschwerdegegner während dieser Zeit vorbehaltlos Lohn ausgerichtet. Obwohl sie am 21. April 2008 formell ein Verfahren bei der Kammer zur Beilegung von Streitigkeiten der FIFA eröffnet habe, sei dem Beschwerdegegner noch am 25. April 2008 der Lohn für den Monat April bezahlt worden. Aufgrund dieser Umstände ging das TAS davon aus, die Beschwerdeführerin habe anerkannt, dass das Arbeitsverhältnis bis Ende April 2008 Bestand hatte, bevor es vom Beschwerdegegner vorzeitig beendet wurde. Vor diesem Hintergrund kann der Beschwerdeführerin nicht gefolgt werden, wenn sie vorbringt, das TAS habe in Ziffer 222 des Schiedsspruchs selbst bestätigt, den von ihr geltend gemachten Rückforderungsanspruch nicht beurteilt zu haben. Vielmehr ist davon auszugehen, dass das Schiedsgericht den von ihr nach Bereicherungsrecht geltend gemachten Rückerstattungsanspruch für den von Januar bis April 2008 ausgezahlten Lohn mit seinen entsprechenden Erwägungen zumindest sinngemäss beurteilte, indem es für diese Zahlungen gerade von einem von der Beschwerdeführerin anerkannten Rechtsgrund ausging. Wenn das TAS entschied, dass der Beschwerdegegner der Beschwerdeführerin keine Entschädigung schulde (Dispositiv-Ziffer 1) und alle weiteren Klagen abgewiesen werden (Dispositiv-Ziffer 4), so hat es damit auch den eingeklagten Bereicherungsanspruch im Betrag von EUR 650'000.-- für angeblich irrtümlich bezahlten Lohn im Zeitraum vom 19. Januar 2008 bis 30. April 2008 abgewiesen. Dass es nicht ausdrücklich auf den Bereicherungsanspruch Bezug nahm, verletzt unter diesen Umständen den Gehörsanspruch der Beschwerdeführerin nicht. Aus dem Grundsatz des rechtlichen Gehörs im Sinne von Art. 190 Abs. 2 lit. d IPRG ergibt sich nach der Rechtsprechung des Bundesgerichts kein Anspruch auf Begründung des Schiedsspruchs (BGE 134 III 186 E. 6 S. 187 f. mit Hinweisen).

Das Schiedsgericht hat demnach weder ein Rechtsbegehren der Beschwerdeführerin unbeurteilt gelassen (Art. 190 Abs. 2 lit. c IPRG) noch den Grundsatz des rechtlichen Gehörs verletzt (Art. 190 Abs. 2 lit. d IPRG). Wenn die Beschwerdeführerin in ihren weiteren Ausführungen unter Berufung auf Art. 62 ff., Art. 82 und Art. 324a OR geltend macht, die Lohnzahlungen irrtümlich vorgenommen zu haben, weshalb ihr ein bereicherungsrechtlicher oder gegebenenfalls vertraglicher Rückerstattungsanspruch zustehe, kritisiert sie den angefochtenen Entscheid in inhaltlicher Hinsicht. Die materiellrechtliche Überprüfung eines internationalen Schiedsentscheids durch das Bundesgericht ist jedoch auf die Frage beschränkt, ob der Schiedsspruch den Ordre public missachtet (BGE 121 III 331 E. 3a S. 333). Dass dies der Fall wäre, macht auch die Beschwerdeführerin nicht geltend.

2.2

2.2.1 In Bezug auf den geltend gemachten Anspruch von EUR 51'172.50 hielt das Schiedsgericht fest, dass der Beschwerdeführerin unter Berücksichtigung der von ihr am 28. Januar 2008 verhängten Disziplinarstrafe von USD 73'500.-- (entsprechend EUR 51'172.50) gegen den Beschwerdegegner für Zuwiderhandlungen gegen verschiedene Bestimmungen ihrer internen Reglemente grundsätzlich ein zusätzlicher Schadenersatzanspruch in diesem Betrag zustehe. Die Beschwerdeführerin habe aufgrund der Vertragsbeendigung jedoch EUR 2'633'020.65 eingespart, was den ihr an sich zustehenden Ersatzanspruch, bestehend aus dem nicht amortisierten Transferaufwand (EUR 2'445'106.35) und dem zusätzlichen Schadenersatz (EUR 51'172.50), um EUR 136'741.80 übersteige. Der Grundsatz der "Besonderheit des Sports" ("specificity of sport") nach Art. 17 Abs. 1 des FIFA-Transferreglements gebiete es angesichts der konkreten Umstände, insbesondere der nicht wieder gutzumachenden Gesundheitsschäden des Beschwerdegegners und deren Auswirkungen auf seine sportliche Laufbahn, dass der Beschwerdeführerin kein Schadenersatz zugesprochen werde, wenn sich schon erwiesen habe, dass sie infolge der Vertragsverletzung sogar Geld einsparte.

2.2.2 Die Beschwerdeführerin zeigt keine Gehörsverletzung auf, wenn sie hierzu vorträgt, das Schiedsgericht habe den von ihr geltend gemachten Anspruch auf Bezahlung der verhängten Disziplinarstrafe zwar nicht völlig unerwähnt gelassen, ihn jedoch "unter einem komplett falschen Gesamtkontext" abgehandelt. Ebenso wenig zeigt sie einen nach Art. 190 Abs. 2 IPRG vorgesehenen Rügegrund auf, indem sie dem TAS eine "krass falsche" und "absurde" Rechtsauffassung vorwirft und behauptet, es habe verkannt, dass dieser Anspruch "absolut nichts mit dem FIFA Transferreglement 2005 zu tun" habe. Sie kritisiert damit vielmehr in unzulässiger Weise die rechtlichen Erwägungen des angefochtenen Entscheids.

Die Beschwerdeführerin bringt zudem zu Unrecht vor, das Schiedsgericht habe ihre wesentlichen Argumente nicht zur Kenntnis genommen, genauer den Umstand, dass sie ihren Anspruch auf Bezahlung der Konventionalstrafe unabhängig und separat vom Schadenersatzanspruch gestützt auf Art. 17 des FIFA-Transferreglements eingeklagt habe. Das Schiedsgericht hat den geltend gemachten Anspruch über USD 73'500.-- (entsprechend EUR 51'172.50) vielmehr als berechtigt erachtet, diesen jedoch - zusammen mit der Entschädigung für den nicht amortisierten Transferaufwand - unter Berücksichtigung der "Besonderheit des Sports" gemäss Art. 17 Abs. 1 des FIFA-Transferreglements gegen die noch höheren Ersparnisse aufgerechnet. Die genannte Bestimmung stand im Zentrum des Verfahrens. Beiden Parteien, die im Schiedsverfahren je von mindestens zwei Rechtsanwälten vertreten waren, musste das dem Schiedsgericht aufgrund der verwendeten unbestimmten Rechtsbegriffe eingeräumte weite Ermessen bei Festsetzung der Entschädigung bewusst sein, zumal die Bestimmung dazu anhält, die "Besonderheit des Sports" ("specificity of sport") sowie "alle anderen objektiven Kriterien" ("any other objective criteria") zu berücksichtigen. Der Einbezug der Konventionalstrafe in die Überlegungen des Schiedsgerichts unter diesem Titel erfolgte daher nicht in einer Weise, die es nach der bundesgerichtlichen Rechtsprechung ausnahmsweise geboten hätte, die Parteien zu dieser rechtlichen Würdigung noch besonders anzuhören. Entgegen der in der Beschwerde vertretenen Ansicht trifft nicht zu, dass die Beschwerdeführerin bezüglich der eingeklagten Konventionalstrafe mit der Erheblichkeit von Art. 17 des FIFA-Transferreglements vernünftigerweise nicht habe rechnen müssen (vgl. BGE 130 III 35 E. 5 S. 39 f.; 126 I 19 E. 2c/aa S. 22; 124 I 49 E. 3c S. 52).

Ob die Aufrechnung der verschiedenen Posten zutreffend erfolgte, beschlägt die schiedsgerichtliche Rechtsanwendung, die - mit Ausnahme einer vorliegend (zu Recht) nicht gerügten Missachtung des Ordre public (Art. 190 Abs. 2 lit. e IPRG) - einer materiellen Überprüfung durch das Bundesgericht nicht zugänglich ist.

3.

Die Beschwerdeführerin bringt vor, das Schiedsgericht habe ihren Anspruch auf rechtliches Gehör in einem kontradiktorischen Verfahren verletzt, indem es feststellte, der Beschwerdegegner sei ab Anfang 2008 und mindestens bis zum vereinbarten Vertragsende (d.h. Ende Mai 2009) nicht in der Lage gewesen, ohne Gefährdung seiner Gesundheit Spiele auszutragen.

3.1 Nach Art. 182 Abs. 1 und 2 IPRG können die Parteien und allenfalls das Schiedsgericht die schiedsgerichtliche Verfahrensordnung selbst bestimmen. Als verfahrensrechtliche Minimalgarantien der Parteidisposition entzogen sind jedoch nach Art. 182 Abs. 3 IPRG die Ansprüche auf Gleichbehandlung der Parteien und auf rechtliches Gehör in einem kontradiktorischen Verfahren. Art. 190 Abs. 2 lit. d IPRG lässt die Anfechtung allein wegen der zwingenden Verfahrensregeln gemäss Art. 182 Abs. 3 IPRG zu. Danach muss das Schiedsgericht insbesondere den Anspruch der Parteien auf rechtliches Gehör wahren. Dieser entspricht - mit Ausnahme des Anspruchs auf Begründung - dem in Art. 29 Abs. 2 BV gewährleisteten Verfassungsrecht (BGE 130 III 35 E. 5 S. 37 f.; 128 III 234 E. 4b S. 243; 127 III 576 E. 2c S. 578 f.). Die Rechtsprechung leitet daraus insbesondere das Recht der Parteien ab, sich über alle für das Urteil wesentlichen Tatsachen zu äussern, ihren

Rechtsstandpunkt zu vertreten, ihre entscheidungswesentlichen Sachvorbringen mit tauglichen sowie rechtzeitig und formrichtig offerierten Mitteln zu beweisen, sich an den Verhandlungen zu beteiligen und in die Akten Einsicht zu nehmen (BGE 130 III 35 E. 5 S. 38; 127 III 576 E. 2c S. 578 f.; je mit Hinweisen).

3.2 Die Beschwerdeführerin verkennt die Tragweite des Gehörsanspruchs in einem kontradiktorischen Verfahren, wenn sie unter Hinweis auf verschiedene Parteivorbringen im Rahmen des Schiedsverfahrens vorbringt, das Schiedsgericht verletze die in Art. 190 Abs. 2 lit. d IPRG erwähnten Verfahrensrechte, indem es seinem Entscheid eine angeblich unbestritten gebliebene Tatsachenbehauptung nicht zugrunde gelegt habe, sondern von einem anderen Sachverhalt ausgegangen sei. Dies betrifft vielmehr die Beachtung der anwendbaren Verfahrensmaxime zur Feststellung des Sachverhalts, nicht jedoch das Recht der Beschwerdeführerin, ihren Standpunkt in das Verfahren einzubringen. Sie legt denn auch nicht dar, dass es ihr im Schiedsverfahren verunmöglicht worden wäre, zu den Vorbringen des Beschwerdegegners Stellung zu nehmen. Mit ihrem Vorbringen, sie habe in ihrer Beschwerdeantwort an das TAS vom 10. Dezember 2009 aufgezeigt, dass der Beschwerdegegner während der Saison 2008/2009 im Rahmen der Qualifikation für die FIFA-Weltmeisterschaft 2010 mindestens dreimal für die Nationalmannschaft von Y._____ im Einsatz gestanden habe, was vom Beschwerdegegner im Schiedsverfahren angeblich unbestritten geblieben sei, lässt sich keine nach Art. 190 Abs. 2 lit. d IPRG zulässige Rüge begründen.

Abgesehen davon gibt die Beschwerdeführerin die Feststellungen des angefochtenen Entscheids ungenau wieder, wenn sie dem Schiedsgericht vorwirft, es sei angesichts der Tatsachenbehauptungen der Parteien "völlig überraschend" davon ausgegangen, der Beschwerdegegner sei bis zum Ablauf des Arbeitsvertrags (d.h. bis zum 31. Mai 2009) nicht in der Lage gewesen, wettkampfmässig Fussball zu spielen. Das Schiedsgericht sah es vielmehr für erwiesen an, dass dies nicht ohne ernsthafte Gefährdung seiner Gesundheit ("without exposing himself to major health complications") möglich gewesen sei. Im Übrigen ergibt sich - worauf der Beschwerdegegner zu Recht hinweist - aus der Darstellung der Parteivorbringen im angefochtenen Entscheid (Ziffer 89 S. 21), dass das Schiedsgericht die Behauptungen der Beschwerdeführerin zur Teilnahme des Beschwerdegegners an WM-Qualifikationsspielen durchaus zur Kenntnis genommen hat. Die Rüge der Beschwerdeführerin, sie sei mit ihren Vorbringen im Schiedsverfahren nicht gehört worden, ist unberechtigt. Wenn die Beschwerdeführerin vorbringt, aus der Teilnahme des Beschwerdegegners an den erwähnten Qualifikationsspielen folge - entgegen dem angefochtenen Entscheid - zwingend die Spiel- und Arbeitsfähigkeit des Spielers bis zum Ablauf der Vertragsdauer und damit ein hoher Ersatzanspruch der Beschwerdeführerin, legt sie lediglich in appellatorischer Weise ihren Standpunkt dar und zieht die materielle Richtigkeit des Schiedsspruchs in Zweifel. Der Gehörsanspruch beinhaltet jedoch keinen Anspruch auf einen materiell richtigen Entscheid (BGE 127 III 576 E. 2b S. 577 f.). Entsprechendes gilt für die Ausführungen der Beschwerdeführerin hinsichtlich der Dauer der verunmöglichten Amortisation des Transferaufwands infolge der Vertragsverletzung, die sich in unzulässiger Kritik an der Rechtsauffassung des Schiedsgerichts erschöpfen.

4.

Die Beschwerdeführerin rügt schliesslich eine Verletzung ihres Gehörsanspruchs auch im Zusammenhang mit der dem Spielervermittler geschuldeten Provision für den Transfer des Beschwerdegegners.

4.1 Das Schiedsgericht berücksichtigte für die Berechnung der infolge vorzeitiger Vertragsauflösung verhinderten Amortisation des Transferaufwands neben der an den ehemaligen Fussballclub des Beschwerdegegners bezahlten Transfersumme von EUR 8 Mio., den Solidaritätsbeiträgen von EUR 390'000.-- sowie dem Handgeld von EUR 250'000.-- auch die von der Beschwerdeführerin geltend gemachten Provisionen zugunsten eines Spielervermittlers. Es erwog, dass die Beschwerdeführerin gestützt auf eine vom 19. Juli 2005 datierende Vertragsurkunde zwar eine Provision von EUR 400'000.-- geltend gemacht habe, dass sie jedoch lediglich eine Zahlung über EUR 200'000.-- habe nachweisen können, während der angebliche Beleg für die Bezahlung des Restbetrags keinen Zusammenhang mit den Dienstleistungen des betreffenden Spielervermittlers erkennen lasse. Entsprechend berücksichtigte das TAS den Provisionsbetrag von EUR 200'000.--, anteilmässig für die restlichen 13 Monate der insgesamt 47-monatigen Vertragsdauer.

4.2 Die Beschwerdeführerin bringt zu Unrecht vor, das TAS habe seinen Entscheid damit auf juristische Argumente gestützt, auf die sich die beteiligten Parteien nicht berufen hätten und mit deren Erheblichkeit sie nicht habe rechnen müssen. Sie verkennt die Entscheidbegründung des Schiedsgerichts, wenn sie in diesem Zusammenhang vorbringt, nicht einmal ein Laie komme auf die Idee, dass eine noch unbezahlte Schuld keine Schuld sei, weshalb sie zu dieser "schlicht und einfach unhaltbaren" Rechtsauffassung besonders anzuhören gewesen wäre. Das TAS hat die von der Beschwerdeführerin eingereichten Vertragsurkunden und

Zahlungsbelege, mit denen sie die behauptete Bezahlung des Gesamtbetrags von EUR 400'000.-- in zwei Raten zu beweisen suchte, gewürdigt und befunden, es seien dem Spielervermittler nur EUR 200'000 geschuldet. Die Berücksichtigung dieses Betrags beruht entgegen der Ansicht der Beschwerdeführerin nicht auf einem Rechtsgrund, mit dem sie nicht hätte rechnen können, sondern ergibt sich folgerichtig aus der Beweiswürdigung durch das Schiedsgericht. Von einer überraschenden Rechtsanwendung, die vorgängig eine besondere Anhörung erfordert hätte (vgl. BGE 130 III 35 E. 5 S. 39; 126 I 19 E. 2c/aa S. 22; 124 I 49 E. 3c S. 52), kann keine Rede sein. Wie die Beschwerdeführerin im Übrigen selbst einräumt, wäre der (für die Restdauer des Vertrags anteilmässig) geltend gemachte Mehrbetrag von EUR 200'000.-- angesichts der schiedsgerichtlichen Berechnung der Ersparnisse einerseits und der Ersatzforderung andererseits, die vor Bundesgericht vergeblich als unzutreffend gerügt worden ist, ohnehin nicht entscheidrelevant.

5.

Die Beschwerde erweist sich als unbegründet und ist abzuweisen, soweit darauf eingetreten werden kann. Dem Ausgang des Verfahrens entsprechend wird die Beschwerdeführerin kosten- und entschädigungspflichtig (Art. 66 Abs. 1 sowie Art. 68 Abs. 2 BGG).

Demnach erkennt das Bundesgericht:

1.

Die Beschwerde wird abgewiesen, soweit darauf einzutreten ist.

2.

Die Gerichtskosten von Fr. 40'000.-- werden der Beschwerdeführerin auferlegt.

3.

Die Beschwerdeführerin hat den Beschwerdegegner für das bundesgerichtliche Verfahren mit Fr. 50'000.-- zu entschädigen.

4.

Dieses Urteil wird den Parteien, der Verfahrensbeteiligten und dem Tribunal Arbitral du Sport (TAS) schriftlich mitgeteilt.

Lausanne, 17. Februar 2011

Im Namen der I. zivilrechtlichen Abteilung
des Schweizerischen Bundesgerichts
Die Präsidentin: Der Gerichtsschreiber:

Klett Leemann