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

* * * * * * * * * *

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:

1. year	*10 x 185,000 EUROS*	*1,850,000 EUROS*
2. year	*10 x 190,000 EUROS*	*1,900,000 EUROS*
3. year	*10 x 195,000 EUROS*	*1,950,000 EUROS*
4. year	*10 x 200,000 EUROS*	*2,000,000 EUROS*

   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, 1 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 it's 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 <u>with</u> 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

<u>1) Club X.</u>

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, 2ème 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 stuff, 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 mosaiclplasty.

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 moisaicplasty 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 month 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):	EUR	48,843.65
	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 reminder 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