4A_402/2010[1]

Judgment of February 17, 2011

First Civil Law Court

Composition:

Federal Judge KLETT (Mrs.), Presiding,

Federal Judge CORBOZ,

Federal Judge ROTTENBERG LIATOWITSCH (Mrs.),

Clerk of the Court LEEMANN

Parties

X._____,

Appellant,

Represented by Mr. Philipp J. Dickenmann and Reto Hunsperger,

v.

A._____,

Respondent,

Represented by Dr. Stephan Netzle,

Fédération Internationale de Football Association (FIFA),

Party joined to the proceedings,

Represented by Mr. Christian Jenny,

Facts:

A.

A.a X._____ (Appellant), a legal person domiciled in Istanbul, is a Turkish football club. The Appellant is a member of the Turkish Football Federation, which is, in turn, a member of the Fédération Internationale de Football Association (FIFA; Joined Party).

[1] Translator's note : Quote as X._____ *v.* A._____, 4A:402/2010. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch.

A._____ (Respondent), is a professional football player from Y._____. He currently plays for the Italian soccer club FC Z._____.

A.b. From the 2003/2004 season on, the Respondent played for the Italian football team Q._____. In July 2005, Q. agreed to a transfer of the Respondent to the Appellant in exchange for compensation in the amount of EUR 8 million. In connection with this transfer, the Appellant was also required to make solidarity contributions to third parties in an amount totaling EUR 390'000. In addition, it paid a fee of EUR 200'000 to the players' agent.

On July 19, 2005, the Respondent signed an employment contract with the Appellant for a fixed term from July 1, 2005 to June 30, 2009. In addition to the immediate payment of a signing fee in the amount of EUR 250'000.-- for the agreed four years of service, the contract provided for the payment of annual salaries for the agreed four years of service in the respective amounts of EUR 1.85 million (year 1), EUR 1.9 million (year 2), EUR 1.95 million (year 3) and EUR 2 million (year 4). Furthermore, the Appellant undertook to place at the Respondent's disposal an Audi A4, a furnished apartment, and five round trip flight tickets between Istanbul and Y._____ each year. Finally, the Appellant was granted the unilateral option of extending the employment relationship for an additional year, that is, to include the 2009/2010 playing season.

Subsequently the Parties signed an additional, undated, employment contract confirming the terms of the agreement dated July 19, 2005, and adding further clarifications on certain points. Thus, among other things, the amount available for the furnished apartment to be placed at the Respondent's disposal was limited to USD 3'000.-- ; and it was agreed that the player would be entitled, in addition to his salary, to a performance bonus based on the Appellant's “incentive scheme”. Moreover the Respondent expressly undertook to obey the Appellant's rules, to follow its instructions, to take due care of his health, and to take part in the Appellant's official and friendly games, and to attend its training sessions and camps.

On July 22, 2005, the Parties signed a third agreement corresponding to the standard contract of the Turkish Football Federation. They essentially reiterated the terms of the two previous agreements with the exception of the duration of the contract, which was shortened by one month (that is, to May 31, 2009) and of the provision that the salary promised was to be paid without deduction of taxes (“free of taxes of the player”) [sic].

A.c. In January 2007, the Respondent suffered an injury to his left knee during a friendly match in Ankara. Inasmuch as, by March 2007, the injury had not yet healed, the Appellant arranged for a medical examination at the R._____ hospital in Istanbul. This led to a diagnosis of damage to the cartilage, for which surgery was required. The Respondent nevertheless continued to play until the end of the 2006/2007 season, in which the Appellant won the Turkish championship title.
The Respondent underwent surgery on May 24, 2007. This involved the replacement of the injured cartilage with healthy cartilage using a special transplant procedure ("mosaicplasty)".

During the period of recuperation following surgery, the Respondent and his advisors conducted discussions with other football teams. On July 11, 2007, the FC S._____ confirmed to the Appellant that it was interested in taking over the player in exchange for compensation in the amount of EUR 4 million. Although that the Appellant turned this offer down, the advisors continued to pressure it to agree to a transfer, upon which the Appellant applied to FIFA for sanctions against both the Respondent's advisors and the German football club.
On September 5, 2007, having complained of symptoms exhaustion and shortness of breath, as well as a cough, the Respondent was once again referred to the R._____ hospital. He was diagnosed by a pulmonary specialist as suffering from asthma, for which medication was prescribed.

On October 10, 2007, the Respondent was once again referred to the same hospital due to breathing difficulties.

In October 2007, the Respondent resumed his official competitive activity. In November 2007, he played for his national team Y._____ at a four-nation tournament and participated in his last competitive match for the Appellant on December 1, 2007.

In December 2007, the Respondent was once again admitted to R._____ hospital, as the state of his health had not improved. This time, the doctors diagnosed an acute left femoral thrombosis as well as a pulmonary embolism. The diagnosis was then confirmed by the Italian doctors who were consulted by the Respondent in December 2007 and January 2008 with the Appellant's consent.
On January 12, 2008, a meeting took place in Italy, in which, in addition to the Respondent and various representatives of the Appellant, a doctor from the R._____ Hospital and the doctors consulted by the Respondent also took part. At that meeting, the Respondent underwent further

examinations, on the basis of which the Italian doctors diagnosed various venous diseases in the player's left leg, the one that had been operated on, as well as a pulmonary embolism. Even before the meeting ended, differences of opinion arose between the Parties' medical experts as to the diagnosis and the necessary treatment, as well as to the issue of when the player would be able once again to begin training and play in competition.

In view of the Respondent's inability to play, due to injury, he was requested by the Appellant to accept de-registration until the last game of the 2007/2008 season, which was scheduled for May 11, 2008, which would have permitted the Appellant, pursuant to the applicable rules of the Turkish Football Federation, to field another foreign player in the place of the Respondent. On January 14, 2008, the Appellant confirmed to the Respondent that notwithstanding de-registration, he would still receive his salary and other contractual benefits, and that his employment contract would remain in force. The Respondent refused his consent, as the possible consequences of de-registration were not clear to him.

On January 16, 2008, the Appellant requested the Respondent, who was still in Italy at the time, to rejoin the club in Istanbul by no later than January 19, 2008 in order to continue his medical treatment and rehabilitation under the supervision of their medical staff. This was accompanied by a warning that his case would be referred to FIFA if he failed to follow these instructions. The Respondent did not appear in Istanbul on January 19, 2008, but traveled rather to Y._____, in order to attend the Africa Cup, from January 20, to March [sic] 10, 2008, as a “special advisor”.
On January 22, 2008, the Appellant declared its intention to exercise his contractual option to extend the employment relationship for an additional year. In addition, it summoned the Respondent to return to Istanbul without delay.

On January 25, 2008, the Appellant urged the Respondent, without avail, to travel, at the former's expense, to the T._____ Clinic in Arizona (USA), for an examination scheduled for January 29, 2008.

A.d. On January 28, 2008, the Appellant's internal disciplinary committee imposed a fine on the Respondent in the amount of USD 73'500.-- for contravention of various provisions of its internal regulations.

A.e. By writings dated January 31 and February 4, 2008, the Appellant complained to FIFA and requested, among other things, that the Respondent and his advisors be issued a warning and that the Respondent be summoned to return to Istanbul and that sport sanctions be imposed. This was followed by an exchange of various submissions.

On April 21, 2008, the Appellant initiated proceedings with the FIFA Dispute Resolution Chamber and requested that the Respondent be ordered to pay compensation in the amount of EUR 12 million and, in addition, that he be barred from participating in official games for a period of six months.

By decision dated January 9, 2009, the Dispute Resolution Chamber awarded the Appellant compensation in the amount of EUR 2'281'915.--; the Respondent's counterclaim was rejected.
In November 2009, the Respondent signed a one-year contract with the football club FC Z._____, for a net annual salary of approximately EUR 200'000. To date, however, he has not been fielded in any official games.

B.
On May 25, 2009, the Appellant appealed the FIFA Dispute Resolution Chamber decision of January 9, 2009 before the Court of Arbitration for Sport (CAS), requesting that the decision be partially set aside and that the Respondent be ordered to make payments in the amounts of EUR 12'131'178.-- and EUR 701'190.--, with interest.

Also on May 25, 2009, the Respondent filed an appeal before the CAS against the FIFA Dispute Resolution Chamber decision of January 9, 2009. He requested that the decision be set aside and that it be ruled that he was not liable to the Appellant, inasmuch as he had terminated his employment relationship for just cause or, alternatively, because the amount of the damages owed was zero. In addition, by way of a counterclaim, the Appellant was to be found guilty of breach of contract and ordered to pay damages in an amount to be determined by the Arbitral tribunal.

In an award dated June 7, 2010, the CAS upheld the Respondent's appeal, insofar as it set aside in part the FIFA Dispute Resolution Chamber decision of January 9, 2009, dismissed the Appellant's claim and ruled that the Respondent was not liable for any compensation.

The CAS considered that based on the FIFA Regulations and complementarily applicable Swiss law the Respondent was in breach of contract. With regard to the duration of the contract it held that the Appellant, based on its conduct with regard to salary payments and otherwise, had acknowledged that the employment relationship due to expire at the end of May 2009 had first been maintained until the end of April 2008 and then terminated prematurely at that time. The unilateral extension of the contract asserted by the Appellant was held by the CAS to be invalid. It found that the Respondent, from the beginning of 2008 and at least until the end of the agreed term of the contract was, for health reasons, unable to participate in games without risking serious damage to his health. With regard to the financial damage, the CAS held, on the basis of art. 17 of the FIFA Regulations for the Status and Transfer of Players, 2005 edition (hereinafter, Transfer Regulations), that due to the early termination of the employment relationship the Appellant had saved of EUR 2'633'020.65, in that it had not been required to pay the Respondent any salary or other contractual benefits from the beginning of May 2008 to the end of May 2009. The compensation to which it was entitled for the early termination of the contract without cause amounted, by contrast, to only EUR 2'445'106.35 for the non-amortized transfer fee plus supplementary damages of EUR 51'172.50 (corresponding to the disciplinary fine imposed in the amount of USD 73'500.--). In consideration of the “specificity of sport”, pursuant to art. 17 (1) of the FIFA Transfer Regulations, the Appellant, who had made a savings of EUR 136'741.80 more than it had lost through the early termination of the contract, was deemed not to be entitled to any compensatory damages.

C.

In a Civil law appeal of July 7, 2010, the Appellant submits that the Federal Tribunal should annul the arbitral award of the CAS of June 7, 2010 and refer the matter back to the Arbitral Tribunal for a new decision.

The Respondent requests that the appeal be rejected, insofar as the matter is capable of appeal. The CAS submits that the appeal be rejected. The FIFA has waived active participation in the proceedings.

The records of the arbitration proceedings have been produced. By further submission dated December 7, 2010, the Appellant replied to the Respondent's Answer and to the observations submitted by the CAS.

Reasons:

1.

In the field of international arbitration, a Civil law appeal is possible under the requirements of Art. 190-192 PILA[2] (SR 291) (Art. 77 (1) BGG[3]).

1.1 The seat of the arbitral tribunal is in Lausanne in this case. Both the Appellant and the Respondent were domiciled or resided outside Switzerland at the time of the relevant events. As the parties did not exclude in writing the provisions of chapter 12 PILA, they are applicable (Art. 176 (1) and (2) PILA).

1.2 Only those grievances which are set forth exhaustively in Art. 190 (2) PILA are admissible (BGE 134 III 186 at 5 p. 187; 128 III 50 at 1a p. 53; 127 III 279 at 1a p. 282). According to Art. 77 (3) BGG, the Federal Tribunal reviews only the grievances made in the appeal and reasoned; this corresponds to the duty to present reasoned grievances contained in Art. 106 (2) BGG for the violation of fundamental rights and for that of cantonal and inter-cantonal law (BGE 134 III 186 E. 5, p. 187 with references). Criticism of an appellate nature is not allowed (BGE 119 II 380 at 3b p. 382).

1.3 The Federal Tribunal bases its decision on the factual findings of the arbitral tribunal (Art. 105 (1) BGG). It may not rectify or supplement the factual findings of the arbitral tribunal, even when these are obviously inaccurate or result from a violation of the law within the meaning of Art. 95 BGG (see Art. 77 (2) BGG ruling out the application of Art. 97 and Art. 105 (2) BGG). Yet the Federal Tribunal may review the factual findings of the award under appeal when some admissible grievances within the meaning of art. 190 (2) PILA are brought against the factual findings or exceptionally when new evidence is considered (BGE 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 p. 733 with references). In order to claim an exception from the Federal Tribunal being bound by the factual findings of the lower court and to have the facts corrected or supplemented on that basis, an appellant must show with reference to the record that the corresponding factual allegations were already made in conformity with the procedural rules in the proceedings in front of the lower court (BGE 115 II 484 at 2a p. 486; 111 II 471 at 1c p. 473; with references).

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[2] Translator's note : PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

[3] Translator's note: BGG is the German abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173 110.

1.4 The Appellant's legal assertions are preceded by its own thorough presentation of the facts, in which it describes the course of events and the proceedings from its point of view. As to various points, it deviates from the factual findings of the CAS or widens them without alleging any substantiated exceptions to the binding character of the factual findings. It submits, for example, that the Arbitral tribunal wrongly proceeded on the assumption that the Appellant had, in fact, paid an amount of only EUR 200'000.-- to the players' agent in connection with the Respondent's transfer. In its presentation of the facts, moreover, it raises criticisms of an appellate nature regarding the arbitral award, as if the Federal Tribunal were able to adjudicate the dispute again from the beginning. Thus it contrasts its own views with the findings of the CAS concerning the date at which the contract was terminated and the calculation of damages. It submits, for example, that the Arbitral tribunal wrongly proceeded on the assumption that the extension of the contract, declared by the Appellant, was invalid. The Arbitral tribunal would also have wrongly held that, from January 2008 until the expiry of his employment contract, the condition of the Respondent's health was such that he could take part in games. The Appellant devotes several pages to a submission as to why the calculation of the damage and the setting of the compensatory damages suffers, in its view, from various errors of fact and law. Its statements in this regard, in which no grievance pursuant to Art. 190 (2) PILA, satisfactorily reasoned, can be found, must therefore be disregarded.

Inadmissible pursuant to Art. 99 (1) BGG is the allegation, first brought forth before the Federal Tribunal, that the Respondent was fielded in several serious games during the 2010 FIFA World Cup. This is as irrelevant to the appeal proceedings before the Federal Tribunal as is the new evidence submitted by the Appellant in this regard.

2.

The Appellant submits that the Arbitral tribunal failed to consider a request in connection with the claims asserted for the restitution of salaries and for the payment of a disciplinary fine (Art. 190 (2) (c) PILA) and infringed in various respects the Appellant's right to be heard (Art. 190 (2) (d) PILA).

2.1

2.1.1 The Appellant argues that in the proceedings before the Arbitral tribunal it had asserted “three completely different claims”; specifically, for compensatory damages for premature termination of the contract without cause, pursuant to Art. 17 of the Transfer Regulations, in the amount of EUR 12'131'178.--; for the repayment of salaries paid without justification for the period from January 19 to April 30, 2008, in the amount of EUR 650'000.--; and for the disciplinary fine

pronounced in January 2008, in the amount of EUR 51'190.10. However the Arbitral tribunal, it is argued, did not deal at all with the repayment of the EUR 650'000.--, while it dealt with the payment of the disciplinary fine of EUR 51'190.10 “in a completely wrong overall context”.

2.1.2 The Arbitral tribunal proceeded on the assumption that, from the beginning of 2008 and at least until the end of the agreed term of the contract, the Respondent was, for health reasons, unable to work, that is, play, without serious risk to his health. With regard to his salary for the months of January through April 2008, it determined that the Appellant had paid the Respondent his salary, without reservation, throughout this period. In spite of the fact that it had, on April 21, 2008, formally initiated proceedings before the FIFA Dispute Resolution Chamber, the Respondent had still been paid his salary for the month of April, on April 25, 2008. Based on these circumstances, the CAS proceeded on the assumption that the Appellant had acknowledged that the working relation had been maintained until the end of April 2008, until it was prematurely terminated by the Respondent.

Against this background, there is no support for the Appellant's argument that the CAS had itself confirmed in the Award, at 222, that it had not judged the claim for repayment asserted by the Appellant. Rather, it may be assumed that the Arbitral tribunal judged, at the least, the essence of the claim, based on unjustified enrichment, for restitution of the salaries paid from January through April 2008, in its relevant reasons, in that it took as the legal ground for these payments precisely one that had been acknowledged by the Appellant. In deciding that the Respondent did not owe the Respondent any compensation (award no. 1) and that all other claims were dismissed (award no. 4), the Arbitral tribunal also dismissed the unjustified enrichment claim in the amount of EUR 650'000.-- for allegedly mistakenly made salary payments during the period from January 19, 2008 to April 30, 2008. The fact that it did not refer expressly to the unjustified enrichment claim is not, under these circumstances, an infringement of the Respondent's right to be heard. The principle of the right to be heard within the meaning of Art. 190 (2) (d) PILA does not encompass pursuant to the case law of the Federal Tribunal, the right to a reasoned award (BGE 134 III 186 E. 6, p. 187 with references).

The Arbitral tribunal thus neither failed to pass judgment on a request submitted by the Appellant (Art.190 (2) (c) PILA) nor did it infringe the principle of the right to be heard (Article 190 (2) (d) PILA). In asserting in its further arguments, with reference to Art. 62ff., Art. 82 and Art. 324a OR, that the salary payments were made mistakenly, for which reason it is entitled to restitution, based

either on the law of unjustified enrichment or on the law of contract, the Appellant criticizes the merits of the award. Review on the merits of an international arbitral award by the Federal Tribunal is limited to the question of whether the arbitral award is inconsistent with public policy (BGE 121 III 331 at 3a p. 333). The Respondent makes no assertion that this is the case.

2.2

2.2.1 With regard to the claim asserted in the amount of EUR 51'172.50, the Arbitral tribunal found that the Appellant, in consideration of the disciplinary fine in the amount of USD 73'500 (equivalent to EUR 51'172.50), which it had imposed on the Respondent on January 28, 2008, for breach of various provisions of its internal regulations, was, in principle, entitled to compensatory damages in that amount. However, through the termination of the contract, the Appellant made a savings of EUR 2'633'020.65, an amount superior by EUR 136'741.80 to the compensation due to it, which comprises the non-amortized transfer fee (EUR 2'445'1'6.35) and the additional compensatory damages (EUR 51'172.50). In the Arbitral tribunal view, the principle of the “specificity of sport”, pursuant to Art. 17 (1) of the FIFA Transfer Regulations, demands, given the concrete circumstances – in particular the irreversible harm to the Respondent's health and the consequences thereof for his athletic career – that the Appellant not be awarded compensatory damages, where it has already been established that the Appellant actually saved money as a result of the breach of contract.

2.2.2 The Appellant fails to demonstrate an infringement of its right to be heard when it submits in that regard that the Arbitral tribunal, while not omitting entirely to mention the claim for payment of the disciplinary fine as asserted by the Appellant, deals with it “in a completely wrong overall context”. It similarly fails to demonstrate a grievance within by Art. 190 (2) PILA when it accuses the CAS of taking a “blatantly false” and “absurd” position on the law and maintains that the CAS failed to understand that this claim had “absolutely nothing to do with the 2005 FIFA Transfer Regulations”. Rather, it thereby criticizes in an inadmissible manner the legal reasoning of the award.

The Appellant also wrongly submits that Arbitral tribunal failed to take cognizance of its central arguments and, more precisely, of the fact that it had asserted its claim for payment of the contractual penalty independently and separately from the compensatory damage claim based on Art. 17 of the FIFA Transfer Regulations. In fact, the Arbitral tribunal held that the claim for USD 73'500.-- (equivalent to EUR 51'172.50) was indeed justified, but offset it - together with the

compensation for the non-amortized transfer fee - against the even greater amount that was saved, in keeping with the “specificity of sport” principle pursuant to Art. 17 (1) of the FIFA Transfer Regulations. This last-named provision was at the center of the proceedings. Both Parties, each represented in the arbitration proceedings by at least two lawyers, must have been aware of the large measure of discretion vested in the Arbitral tribunal, arising out of the indefinite legal terms employed, for setting the amount of compensation, particularly in view of the fact that the provision called for taking into consideration the “specificity of sport” and “any other objective criteria”. The inclusion of the contractual penalty in the Arbitral tribunal’s considerations on this issue did not, therefore, occur in such a way as to require a hearing with regard to this legal assessment according to federal case law. Contrary to the view expressed in the appeal brief the Appellant could reasonably be expected to have anticipated the relevance of Art. 17 of the FIFA Transfer Regulations to its claim concerning the contractual penalty (cf. BGE III 35 at 5 p. 39f; 126 I 19 at 2c/aa p. 22; 124 I 49 at 3c p. 52).
Whether the various items were correctly set off against each other is an issue as to the application of the law by the Arbitral tribunal, a review on the merits of which - unless in the presence of a breach of public policy (Art. 190 (2) (e) PILA), which has here rightly not been asserted - is beyond the purview of the Federal Tribunal.

3.
The Appellant submits that its right to be heard in adversarial proceedings was violated by the Arbitral tribunal by finding that, from the beginning of 2008 onwards and at least until the agreed expiration of his contract (i.e., until the end of May 2009), the Respondent had not been able to participate in games without danger to his health .

3.1 Pursuant to Art. 182 (1) and (2) PILA, the parties and, if necessary, the arbitral tribunal, may determine the procedure to be followed in the arbitration. In order to assure a minimum level of due process, however, Art. 182 (3) of the PILA provides that not subject to disposition by the parties are the parties' rights to equal treatment and to be heard in adversarial proceedings. Art. 190 (2) (d) PILA allows for appeal only on grounds of breach of the mandatory procedural rules set forth in Art. 182 (3) PILA. The arbitral tribunal must therefore respect, in particular, the parties' right to be heard. With the exception of the requirement for reasons, this corresponds to the constitutionally protected right in art. 29 (2) BV (BGE 130 III 35 at 5 p. 37f.; 128 III 234 at 4b p. 243; 127 III 576 at 2c p. 578f.). Case law deduces therefrom, in particular, the right of the parties to express themselves with regard to all facts relevant to the judgment, to present their legal stand, to prove their essential factual

allegations by admissible evidence produced in proper form and in a timely manner, to participate in the proceedings and to access the record (BGE 130 III 35 at 5 p. 38; 127 III 576 at 2c, with references).

3.2 The Appellant misconstrues the scope of the right to be heard in adversarial proceedings in submitting, with reference to various party submissions in the course of the arbitral proceedings, that the Arbitral tribunal disregarded procedural rights in Art. 190 (2) (d) PILA by not basing its award on an allegation of fact that allegedly remained uncontested, but relying instead on facts of a different nature. This is an issue that relates primarily to the procedural principle applicable to the establishment of the facts, but not, however, to the Appellant's right to present its standpoint in the proceedings. It then also fails to demonstrate that it was not given the possibility in the arbitration proceedings to present its position with regard to the submissions of the Respondent. Its submission to the effect that, in its filing dated December 10, 2009, in answer to the appeal before the CAS, it had demonstrated that the Respondent had been fielded at least three times for the national team of Y._____ during the 2008/2009 season, in qualification games for the 2010 FIFA World Cup, which allegedly remained uncontested by the Respondent in the arbitral proceedings, cannot base an admissible grievance pursuant to Art. 109 (2) (d) PILA.

Aside therefrom, the Appellant incorrectly presents the findings of the award when it argues that, in view of the Parties' allegations of fact, the Arbitral tribunal had acted “completely unexpectedly” in proceeding on the assumption that it had not been possible for the Respondent to play football competitively in the period prior to the expiry of the employment contract (i.e., prior to May 31, 2009). Rather, the Arbitral tribunal considered as proven the fact that this had not been possible for the Respondent “without exposing himself to major health complications”. Moreover, the presentation of the Parties' submissions in the award (at 89, p. 21) shows - as the Respondent rightly points out - that the Arbitral tribunal very well took note of the Appellant's contentions regarding the Respondent's participation in World Cup qualification games. The Appellant's argument that it did not receive a hearing for its submission in the arbitral proceedings, is unfounded.

In submitting that the Respondent's participation in the qualification matches referred to leads necessarily to the conclusion that - contrary to the award - the player was able to play and work up to the end of the contract's term and that the Appellant is thus entitled to a higher amount of compensation, the Appellant merely states its position in an appellatory manner and raises doubts as to whether the award is correct on its merits. The right to be heard, however, does not comprise

the right to a ruling that is correct on its merits (BGE 127 III 576 at 2b p. 577f.). The same applies to the Appellant's arguments regarding the duration of the period over which the transfer fee would have been, but could no longer be, amortized, which consist solely of inadmissible criticism of the Arbitral tribunal’s construction of the law.

4.
Finally, the Appellant claims that its right to be heard was also violated in connection with the commission owed to the players' agent for the transfer of the Respondent.

4.1 In calculating the transfer costs that could not be amortized as a result of the early termination of the contract, the Arbitral tribunal also took into account, in addition to the transfer fee in the amount of EUR 8 million that was paid to the preceding football club of the Respondent, to the the solidarity contributions in the amount of EUR 390'000.--, and to the signing fee in the amount of EUR 250'000.--, the commissions paid to a players' agent that were asserted by the Appellant. It considered that while the Appellant, basing itself on a contractual document dated July 19, 2005, had asserted a commission in the amount of EUR 400'000.--, it had succeeded in proving only an actual payment in the amount of EUR 200'000.--, while the alleged receipt for the payment of the remainder evidenced no indication of any connection with the services of the players' agent in question. The CAS accordingly took into account the commission payment in the amount of EUR 200'000.--, proportionately to the remaining 13 months of the total 47-month duration of the contract.

4.2 The Appellant errs in submitting that the CAS thereby based its award on legal arguments not made by the Parties, and whose relevance they could not be expected to anticipate. It misconstrues the Arbitral tribunal‘s reasoning when it submits, in this connection, that not even a layman could imagine that a debt still unpaid was no debt at all, for which reason it ought to have been heard specially concerning this “purely and simply untenable” legal conception. The CAS examined the contractual documents and payment receipts produced by the Appellant as means of proof in support of its claim of having paid a total amount of EUR 400'000.-- in two installments, and found that the players' agent had been owed only EUR 200'000. That this was the amount taken into consideration is founded, contrary to the Appellant's view, not on a legal conception that it could not have anticipated, but on a deduction logically following from the Arbitral tribunal’s assessment of the evidence. There can be no question here of an unanticipated application of the law, which would have called for a special hearing in advance (cf. BGE 130 III 35 at 5 p. 39; 126 I 19 at 2c/aa p. 22;

124 I 49 at 3c p. 52). As the Appellant itself admits, moreover, in view of the Arbitral tribunal's calculations of the savings made, and of the compensation claim (appealed to no avail before the Federal Tribunal as being incorrect), the surplus amount of EUR 200'000.--, which has been asserted (proportionately to the remaining term of the contract), would in any case have no bearing on the decision.

5.
The appeal is unfounded and must be rejected to the extent that the matter is capable of appeal. In view of the outcome of the proceedings the Respondent must pay the costs and compensate the other party (art. 66 (1) and art. 68 (2) BGG).

Therefore, the Federal Tribunal pronounces:

1. The appeal is rejected, to the extent that the matter is capable of appeal.

2. The judicial costs set at CHF 40'000 shall be borne by the Appellant.

3. The Appellant shall pay to the Respondent compensation of CHF 50'000 for the Federal judicial proceedings.

4. This judgment shall be notified in writing to the parties and to the Court of Arbitration for Sport (CAS).

Lausanne, Thursday, February 17, 2011

In the name of the First Civil Law Court of the Swiss Federal Tribunal

The presiding Judge:	The Clerk:
KLETT (Mrs)	LEEMANN