Arbitration CAS 2008/A/1589 MKE Ankaragücü Spor Külübü v. J., award of 20 February 2009

Panel: Prof. Petros Mavroidis (Greece), President; Mr Michele Bernasconi (Switzerland); Mr Goetz Eilers (Germany)

Football
Validity and enforceability of an employment agreement
Definition of a "precontract"
Just cause for the termination of a contract
Compensation for breach

1. **A "precontract" is the reciprocal commitment of at least two parties to enter later into a contract, a sort of "promise to contract" (in French: "promesse de contracter"). The clear distinction between a "precontract" and a "contract" is that the parties to the "precontract" have not agreed on the essential elements of the contract or at least the "precontract" does not reflect the final agreement.**

2. **For a contract to be repudiated the employee's attitude during the negotiations must have been in bad faith, meaning that he deliberately hid an important information to his future employer, for example on his health status. One should expect from a football club to be cautious on the health status of a potential employee, hence the onus is quite high in this context. A player does not act in bad faith and hide information if, at the moment of the negotiations, he had been granted a TUE and had all medical and practical confirmations that his disease did not impact on his sport performances.**

3. **If a player's disease does not prevent him from performing his services as a professional player, it does not constitute a breach of contract and thus does not justify the termination *ex nunc* of the employment agreement.**

4. **A player has a just cause to terminate the employment agreement if his employer has not met its obligations as an employer, i.e. it has not paid the player's salary and has not reacted when the player formally offered his services, making himself available to his employer and requesting access to his employer's facilities.**

5. **The party in breach must compensate the other party for the whole damage caused, considering all claims based on the employment agreement. The employer in breach of a contract signed for a definite period of time must pay the employee his salary until the end of the period fixed in the contract.**

MKE Ankaragücü Spor Külübu ("the Appellant") is a football club affiliated to the Turkish Football Federation (Türkiye Futbol Federasyonu), a member of FIFA since 1923.

J. ("the Respondent" or "the Player") is a professional Czech football player born in 1978. He is currently playing for the Czech Club MFK Ružomberok.

The Player and the Austrian club, FC Wacker Innsbruck signed an employment contract starting on July 1, 2006 and ending on June 30, 2009.

In July 2007, FC Wacker Innsbruck and the Appellant, on the one hand, signed a one year agreement for the loan of the Player. On July 20, 2007, the Appellant and the Player signed, on the other hand, a one year agreement starting on July 20, 2007 and ending on July 19, 2008.

The loan agreement between FC Wacker Innsbruck and the Appellant provided for a loan fee of EUR 75,000.- in favour of FC Wacker Innsbruck as well as an option for the "final" transfer of the Player to the Appellant of EUR 200,000.- which could be exercised until the end of April 2008. As to the transfer of the Player after the signature of the loan agreement, its Article 6 provided that *"Players Inter National Transfer Certificate will be sent immediately after the check mentioned in the article 5* [recte: 4]*, is paid"*. Under Article 7 of the same agreement, the Appellant put as a condition for the validity of the agreement that *"the player passes the medical check and signs the Turkish Football Federation uniform player contract"*.

The content of the agreement signed between the Parties is the following:

> *"**AGREEMENT***
>
> *1- Parties*
>
> *CLUB: MKE ANKARAGUC J SPOR KULUBU, Cemal AYDIN Spor Kompleksi Silahtar Cad. Carsiyolu sok. Gazi Mah. /ANKARA*
> *PLAYER: J.*
>
> *2-Subject:*
> *Club and the player agree to sign 1 year uniform contract starting from 20th of July 2007*
>
> *3-Contract value and payment terms*
> *Club agrees to pay the following amounts to the player:*
>
> *2007-08 Season Total Euro 200.000.-*
> *Down payment (total): Euro 50.000 (Euro 10.000.- cash and Euro 40.000.- cheque due to 01.08.2007)*
> *Monthly Payment: Euro 5000 x 10 months = Euro 50.000 (Starting from August 2007)*
> *Per Game Payment: USD 100.000.- divided to 34 games*
> *If Player is in the first 11 he will receive Euro 2941*
> *If Player is in the enter as a substitute he will receive Euro 2205*
> *If Player is in the 18 but do not play he will receive Euro 1470*

4-In case of player gets injured at the training or official game player will receive 2 per game payments according to the last 2 games mean average before he get injured, after the 2 games player will be paid according to medical staffs report.

5- Except transfer fee player will receive the same amount of bonus as other players.

6-Player accepts to follow the program of technical director.

7-This contract is valid after the players International Transfer Certificate arrives to Turkish Football Federation.

8- Player had received, reed and accepts to obey the club regulations and directions; player accepts the execution of the regulations

9- House and car will give for use,affer contrats will give To back to club.
Rent coasts for the house will be pay by the club

10- 2 Times fly tickets Ankara — Prag for the player and his family

This contract has been read, accepted and signed by both parties on 20.07.2007".

The Player flied to Turkey on August 1, 2007. Upon his arrival he was asked by Mr. T., the Appellant's manager, to pass a medical exam, which he did the next day. As the results of the medical exam showed that the Player was suffering from "bronchitis asthma", the Appellant's medical staff filed a request for a Therapeutic Use Exemption (TUE) on August 8, 2007.

A few days after, the Player came for training with the Appellant's first team. The Appellant's manager told him that he would not be authorized to take part and asked him to go back to his hotel room. A few days after, the Player was told by Mr. T. that the Appellant did not want him to play in his first team and that he was allowed to leave Turkey.

On August 14, 2007, the Appellant sent a letter to FC Wacker Innsbruck, together with the results of the medical test made on the Player, claiming that the Austrian club and the Player had stated that the Player had no health problems while knowing this was false. Based on these allegedly delusive and captious declaration and on the fact that the Player was suffering from "bronchitis asthma" and should, as a consequence, be under constant medication which contained doping substances, the Appellant declared to FC Wacker Innsbruck that it had decided to terminate the loan agreement and requested the reimbursement of the transfer fee it had paid to the Austrian club. On August 16, 2007, FC Wacker Innsbruck replied to the Appellant's letter and contested the termination notice made by the Appellant, claiming that the Austrian Club's doctors had confirmed that the Player's disease did not prevent him from playing football and that the Player's medication would be accepted by Doping Commissions.

On August 16, 2007, the Player, represented by his attorney, wrote to the Appellant claiming that the Appellant prevented him from fulfilling his obligations as provided under the employment agreement dated July 20, 2007. He declared further that he had offered and was still offering its services to fulfill such obligations. Referring to the employment agreement, to Turkish labour law as well as to the FIFA regulations and those of the Turkish Football Federation, the Player then claimed in the same letter that the Appellant was obliged to secure proper training for him, and thus

called on the Appellant to *"enable him immediately to participate in the team training and to* (…) *enter the training facilities of the club"*. The Player then further requested that the Appellant rent a house for him, pay the agreed down payment of EUR 50,000.- as well as the agreed monthly salary. As to his health status, the Player explained in his letter that his disease did not impact on his capacity to exercise his profession as a football player. He attached a copy of the *"Certificate of Approval for Therapeutic Use"* which had been issued by the Austrian Anti Doping Committee on June 25, 2007 and was lasting until December 31, 2008 to which he made explicit reference in this letter. Additionally, the Player explained to the Appellant that he was asthmatic for a long time. He noted that his condition did not prevent him for instance from taking part in the training of the Appellant's team in Austria since July 20, 2007 without any problems.

On the same day, the Player's attorney informed FIFA and the Turkish Football Federation of the situation between the Parties and provided both with a copy of the letter sent to the Appellant.

On October 1, 2007, the Player, acting through his (new) attorney and referring to the FIFA Regulations, wrote to the Appellant's president, claiming that the Appellant had breached the employment agreement. The Player declared in this letter that he was terminating the agreement unilaterally for the reasons mentioned above in nr 10. In the same letter, the Player reserved his legal rights with respect to all possible claims he might have against the Appellant *"in accordance with the relevant FIFA regulations"*.

On October 2, 2007, the Football Association of the Czech Republic requested the Austrian Football Federation to issue the International Transfer Certificate (ITC) for the Player in order to register the Player for its member club, FK Mladà Boleslav. During the FIFA procedure before the Single Judge of the Players' Status Committee linked to this request, the Appellant explained that it had never signed a standard employment contract with the Player, which prevented any transfer of the Player to Turkey. The Appellant confirmed as well that it had never registered the Player with the Turkish Football Federation. Based on the circumstances of the case FIFA authorized a provisory registration of the Player with the Czech club until December 31, 2007.

On November 14, 2007, the Player filed a request against the Appellant before FIFA's Dispute Resolution Chamber with the following requests for relief:

> *"1. In accordance with Article 14 of the FIFA Regulations for Status and Transfer of Players we request the Dispute Resolution Chamber to resolve, that the employment contract entered into by and between my client, Mr. J. and the football club MKE Ankaragucu Sport Club on 20th July 2007 was legitimately terminated by my client for just cause and in compliance with the FIFA Regulations for Status and Transfer of Players.*
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> *2. In accordance with the FIFA Regulations for Status and Transfer of Players we request that the Dispute Resolution Chamber resolves that the football club MKE Ankaragucu Sport Club shall be obliged to pay my client a compensation for breach of the employment contract concluded with my client on 20th July 2007, amounting to 76.033,- EUR, whereby the requested compensation composes of:*
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> > *a) compensation for the time period from 1st August 2007 to 1st October 2007 amounting to 20.000,- EUR, what is a sum equal to the basic monthly salary together with the first downpayment, which should have been paid by the football club MKE Ankaragucu Sport Club to my client in the particular time period,*

b) compensation for the time from 1st October 2007 to 31st December 2007, which shall be calculated as the difference between the basic salary stipulated in the employment contract entered into with the football club MKE Ankaragücü Spor Club amounting to 5.000,- EUR monthly and the basic salary amounting to 30.000,- CZK monthly as it was stipulated in the employment contract entered into with the FK Mlada Boleslav (approx. 1.089,- EUR pursuant to the exchange rate on 1. 10. 2007 as published by the National Bank of the Czech Republic). The difference amounts to 3.911,- EUR monthly, therefore the compensation for the whole period from 1st October 2007 to 31st December 2007 amounts to 11.733,- EUR,

c) a sum amounting to 4.300,- EUR, which composes of the costs of legal representation and costs for the flight ticket to Ankara paid by my client, in particular: costs for the flight ticket amounting to 13.023,- CZK, what is 470,-EUR pursuant to the exchange rate on 17. 8. 2007 as published by the National Bank of the Czech Republic, and costs for the legal representation of Mr. J., whereby these expenses for legal representations were calculated in compliance with the Ordinance no. 655/2004 Coll. on remunerations and reimbursements for attorneys for provision of legal services in actual wording, and which amount to the sum of 3.830,- EUR (including 19 % VAT), whereby this remuneration belongs to the attorney of Mr. J. for 6 acts of legal service (takeover of the case, first meeting with client, termination of the-employment contract with MKE Ankaragucu Sport Club, lodging the first claim with FIFA, lodging the second claim with FIFA, and provision of further legal services and consulting, for example by preparation of the request for assistance to the FC Wacker Innsbruck).

d) a sum amounting to 40.000,- EUR, which is a sum covered by a cheque issued by the football club MKE Ankaragucu Sport Club for my client on the basis of the employment contract, however this sum has never been paid to my client.

Furthermore we also request, that MKE Ankaragucu will be obliged by FIFA to compensate any and all costs of the proceeding at FIFA, which will be incurred to my client, as well as further costs for legal representation, which will arise to my client in the course of the proceeding at FIFA.

3. We also request that FIFA will resolve about the status of my client after 1st January 2007, when his employment contract entered into with the football club FK Mlada Boleslav will expire. We request FIFA to resolve, whether the football club FC Wacker Innsbruck shall be obliged to employ my client as a professional football player after the 1st January 2008, to enable him to participate on the football trainings and official matches and to pay him the agreed remuneration".

On January 18, 2008, the Player's attorney requested from the FIFA's Dispute Resolution Chamber the extension of its request for relief in order to include the Player's net loss of earnings from January 1st, 2008 until January 18, 2008.

FIFA notified the Player's requests to the Appellant. The Appellant replied on December 10, 2007 with a letter signed by its Manager, Mr. T., and rejected all the Player's requests for relief on the following grounds:

"1. Player avoided having the medical control. Finally due to our insist he accepted to take the medical check on 08.08.2007 and with the report it has been found out that the player has "bronchitis asthma" and this sickness is chronic and under the exercise his sickness increases. In the report it has been stated that the player has to use medication continuously. After our clubs search its found out that the medication that the

player has to use contains doping agents. Another fact we discovered that under the continuous usage of this medication some side effects will appear.

2. Here the conflict arising not if the player Is sick or not but it arose from the point that while having the transfer negotiations the information that the player sickness had been hidden and if the transfer had been done if this information was not hidden.

3. it is two different things that a players sickness allows him to play football and the club will accept such a sickness. CLUB CANNOT RISK IT. Even though an asthma sick player can play football until now with a report that shows he can eligible to play he must tell his sickness to the club during the negotiations. These negotiations held in front of the player manager Alper Gökdemir, Vice President Serdar Özersin, Board Member Mehmet Ural, they should be listened as witnesses.

Moreover in the contract terminated by the player's attorney it is clearly stated that the contracts validity is bound by signing the uniform contract of the national team. The International Transfer Certificate shall be asked upon notary approved signed uniform contract submitted to federation. Player did avoid the signing of the contract after his sickness became aware of the club.

Player has been paid Euros 10,000.- for some of his expenses and while player left the club he declared that he would not demand anything from the club.

As J.'s attorney accepted he did not attend the trainings and matches. J.'s attorney also accepted that he contract is not valid. Parties cannot demand anything from each other depending on an invalid contract.

According to Turkish and Switzerland law no demands can be made depending on an invalid contract. However J. made his demands as if the contract is valid.

Briefly:

a. Player's sickness has been hidden from the club

b. Player's attorney accepted that the contract is invalid

These actions and behaviors eliminate the international law and sports ethic.

We kindly ask from your committee that due to the fact that the sickness of the player had been hidden from us the contract that had been signed between the clubs should be considered null and the player's demands rejected.

T.
General Manager"

The Appellant did not reply to the Player's complementary request.

On January 4, 2008, the Player signed another employment agreement with FK Mladà Boleslav starting on January 1, 2008 and ending on June 30, 2008. As neither the Appellant nor FC Wacker Innsbruck reacted to the ITC procedure based on this second employment agreement with the Czech club, FIFA again authorized on February 26, 2008, the provisory registration of the Player with the Czech Federation until June 30, 2008.

However on January 23, 2008, FC Wacker Innsbruck informed all interested parties that it could not grant any transfer authorization for the reason that it considered the Player to be on loan with the Appellant. The Player wrote to the Austrian Club on January 29, 2008, asking for its assistance,

notably with respect to his impossibility to actively play as a professional football player, should FIFA not grant him a provisional authorization to play with his Czech club, which FIFA eventually did, a few days later. FC Wacker Innsbruck apparently never replied to this request.

On January 30, 2008, FIFA granted a final deadline until February 7, 2008 to the Appellant in order to submit its comments on the Player's complementary request. As the Appellant did not reply within that deadline and as the FIFA Dispute Resolution Chamber deemed the investigations in this matter as completed, the FIFA Dispute Resolution Chamber (DRC) took its decision ("the DRC Decision") on May 7, 2008. The DRC Decision can be summarized as follows for its relevant parts:

> *"1. First of all, the Dispute Resolution Chamber analysed whether it was competent to deal with the case at hand. In this respect, it took note that the present matter was submitted to FIFA on 14 November 2007. Consequently, the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (hereinafter: Procedural Rules) are applicable to the matter at hand (cf. art. 18 par. 2 and 3 of the Procedural Rules).*
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> *2. Subsequently, the members of the Chamber referred to art. 3 par. 1 of the Procedural Rules and confirmed that in accordance with art. 24 par. 1 in combination with art. 22 lit. b of the Regulations on the Status and Transfer of Players (edition 2008) the Dispute Resolution Chamber is competent to deal with the matter at stake, which concerns an employment-related dispute with an international dimension between a Czech player and a Turkish club.*
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> *3. Furthermore, the Chamber analyzed which regulations should be applicable as to the substance of the matter. In this respect, it confirmed that in accordance with art. 26 par. 1 and 2 of the Regulations on the Status and Transfer of Players (edition 2008) the previous version of the regulations (edition 2005; hereinafter: Regulations) is applicable to the matter at hand as to the substance.*
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> *4. The competence of the Chamber and the applicable regulations having been established, the Chamber entered into the substance of the matter. The members of the Chamber started by acknowledging the above-mentioned facts and documentation contained in the file and, in view of the circumstances of the case at stake, focused their attention on the question whether a breach of contract occurred and which party is responsible for such a possible breach of contract, and to verify and decide upon the consequences to be applied for breach of contract.*
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> *5. In this respect, the Dispute Resolution Chamber noted that the player J. (hereinafter: the Claimant), while being contractually bound to the Austrian club, FC Wacker Innsbruck ("Wacker") as from 1 July 2006 to 30 June 2009, had been loaned by the latter to the Turkish club, MKE Ankaragücü Spor Kulübü (hereinafter: the Respondent), for the season 2007/2008. Furthermore, the Chamber acknowledged that the Claimant and the Respondent signed on 20 July 2007 an employment contract which was to be valid until 20 July 2008.*
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> *6. As regards the aforesaid employment contract, the members of the Chamber took note that the Claimant was entitled to receive the total amount of EUR 200,000, i.e. EUR 40,000 by cheque and EUR 10,000 in cash, EUR 50,000 divided into 10 monthly salaries and a global amount of EUR 100,000 as per match premiums. Furthermore, in point 7, the employment contract stipulated that "the contract is valid after the players International Transfer Certificate arrives to Turkish Football Federation".*

7. *Subsequently, the Chamber noted that, according to the Claimant, he terminated the employment contract with the Respondent with just cause on 1 October 2007. The Claimant submitted a copy of his termination letter that he addressed to the Respondent. The Claimant particularly alleges that the Respondent, after a few weeks of training, besides no longer allowing him to train with the team, failed to pay him any of the salaries as agreed upon in the employment contract signed between them. What is more, according to the Claimant, the Respondent had failed to ask the Association of his previous club, i.e. the Austrian Football Federation, for the issuance of his International Transfer Certificate in order for him to be registered for the Respondent at the Turkish Football Federation.*

8. *Turning its attention to the Respondent, the deciding body took note of the latter's objections towards the Claimant's claim. In particular, the Respondent alleged that the Claimant's state of health was weak due to a "bronchitis asthma" and that this was found out after the medical check of the Claimant. Equally, the Respondent submitted that it eventually never signed the necessary standard employment contract with the Claimant and thus actually never registered the Claimant at the Turkish Football Federation. Finally, the Respondent maintains having paid the Claimant the amount of EUR 10,000 for some of his expenses incurred and that the Claimant, after having left, stated that he would not demand anything for the Respondent in future.*

9. *In view of the above, with regard to the clause contained in the employment contract according to which the validity of the contract is subject to the Turkish Football Federation obtaining the International Transfer Certificate (ITC) for the Claimant, the deciding authority started by emphasizing that the Respondent is solely responsible for the proper registration of the Claimant at the Turkish Football Federation and therefore has to submit its application for obtaining the ITC for the player in question to its Association and to advise the latter to request the player's ITC from his former club's Association.*

10. *Furthermore, the deciding authority underlined that the player does not have any influence on the application process for the issuance of his International Transfer Certificate. Thus, the player is left at full discretion of his employer, i.e. the Respondent, whether or not the request for the issuance of his ITC is going to be made or not.*

11. *In view of the above, the Chamber considered this clause potestative and unilateral in favour of the Respondent only without providing the Claimant with any possibility to influence that the condition, i.e. the receipt of his ITC by the Turkish Football Federation, will be fulfilled. Therefore, the Chamber decided that the aforementioned clause shall not have any effect.*

12. *After having vehemently rejected the validity of the aforementioned contractual clause, the members of the Chamber established that they could not find any further provisions in the "agreement" signed between the Claimant and the Respondent on 20 July 2007 stating a further condition in order for the contractual relationship between the parties involved to be considered valid. In fact, the parties to the "agreement" had agreed upon all principle elements such as the place of work, the period of validity, the salary etc. Therefore, the members of the Chamber decided that the "agreement" contained all essentialia negotii and thus is to be considered a valid and binding employment contract.*

13. *In continuation, the members of the Chamber took note of the Respondent's subsequent position according to which the player had been hiding information on his physical condition.*

14. *In this regard, the deciding authority referred the parties to art. 18 par. 4 of the Regulations, which stipulates that the validity of a contract may not be made subject to a positive medical examination. The*

Chamber stated that the Respondent's stance clearly contravenes art. 18 par. 4 of the Regulations and therefore cannot be considered in the present affair.

15. *Furthermore, the members of the Chamber referred to the Respondent's argument whereas they never signed the standard employment contract with the Claimant for which reason his transfer to the Respondent could not be completed.*

16. *In this respect, the members reiterated that the "agreement" signed between the Claimant and the Respondent on 20 July 2007, as established above, does not provide for any condition in order for the contractual relationship between them to be considered valid. Therefore, such argument submitted by the Respondent was likewise rejected by the deciding body.*

17. *In light of the above, having established that a valid employment contract was signed between the Claimant and the Respondent, the members of the Chamber recalled the Claimant's allegations according to which he had just cause to terminate the said contract due to the Respondent's failure to pay him any salaries since the beginning of their contractual relationship.*

18. *In this context, the Chamber noted that the Respondent does not deny having not paid the Claimant his salaries but instead put forward having paid the Claimant the amount of EUR 10,000 for some of the latter's expenses and that by this payment the parties settled their relationship.*

19. *As regards the payment of EUR 10,000 the Respondent allegedly made to the Claimant, the Chamber took note of the fact that the Respondent did not provide any kind of documentary evidence in order to corroborate its allegations related to such payment.*

20. *Taking into account all the above, the Chamber stated that the persistent failure of the Respondent to pay the agreed remuneration to the Claimant without just cause is generally to be considered as a unilateral breach of an employment contract. The Respondent could not provide valid reasons justifying the non payment of the Claimant's salaries and other remuneration since the beginning of the contractual relationship. The Dispute Resolution Chamber therefore reached the conclusion that the Claimant had just cause to terminate the employment contract he signed with the Respondent.*

21. *In consequence, in application of art. 17 of the Regulations, the members had to deliberate whether the Respondent is accountable for outstanding payments and compensation towards the Claimant.*

22. *As far as the responsibility of the Respondent for outstanding payments is concerned, the Dispute Resolution Chamber stated that the Respondent has to indemnify the Claimant for the time he was employed with the Respondent, by paying him the salary and signing-on fee payments from the start of the contract until the month it was terminated. As regards the down payment agreed by the parties, the Chamber explained that, in accordance with its well-established jurisprudence, the said down payment due to the player has to be calculated on a pro-rata temporis basis, while thereby taking into consideration the period of time the Claimant rendered his services to the Respondent compared to the whole duration of the contract.*

23. *In view of the above, the Dispute Resolution Chamber decided that the Respondent must pay to the Claimant the two monthly salaries of August and September 2007 amounting to EUR 10,000 and the flight tickets in the amount of EUR 470. Furthermore, considering a contractually agreed duration of one year, i.e. twelve months, and taking into account that the Claimant rendered his services to the Respondent for two months, i.e. August and September 2007, the deciding body held that the*

Respondent has to pay to the Claimant, as part of the down payment, the amount of EUR 8,333 (2/12 of EUR 50,000).

24. *In total, the Respondent must pay to the Claimant as outstanding payments under their contractual relationship the amount of EUR 18,803.*

25. *Moreover, the Chamber had to verify and decide whether the Respondent is accountable for compensation for breach of contract without just cause.*

26. *The Chamber referred to art. 17 par. 1 of the Regulations, in particular to the non-exhaustive enumeration of objective criteria, and took into account the remuneration due to the Claimant under the employment contract signed between the parties to the present dispute as well as the time remaining on the said employment contract as from the Claimant's termination. The deciding authority came eventually to the conclusion that an amount of EUR 56,303 is adequate, taking particularly into consideration the behaviour of the Respondent in the present procedure.*

27. *In conclusion, the Dispute Resolution Chamber decided that the Respondent has to pay to the Claimant the amount of EUR 18,803 for outstanding payments and EUR 56,303 as compensation for breach of contract without just cause.*

28. *Finally, as regards the claimed amount to cover legal costs submitted by the Claimant, the Chamber referred to its well-established jurisprudence in accordance with which no procedural compensation shall be awarded in proceedings in front of the Dispute Resolution Chamber (cf. art. 15 par. 3 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber).*

29. *To conclude with, as regards the request of the Claimant pertaining to his contractual situation and status, the members of the Chamber deemed it appropriate to explain that for the duration of the loan, the effects, rights and obligations of the employment contract concluded between the Claimant and his club of origin, i.e. Wacker, are temporarily suspended. This implies, however, that after the end of the agreed loan period, the relevant effects come back into force. In lieu thereof, the Single Judge of the Players' Status Committee, when considering and passing the relevant decisions with regard to the provisional registration of the Claimant for the Czech club, FK Mlad6 Boleslav, at the Football Association of Czech Republic, authorized such provisional registrations of the Claimant with a limit in time only until 31 December 2007 respectively until 30 June 2008".*

For the above-mentioned reasons, the DRC decided the following:

"1. The claim of the Claimant, player J., is partially accepted.

2. The Respondent, MKE Ankaragücü Spor Kulübü, has to pay the amount of EUR 75,106 to the Claimant, player J., within 30 days as from the date of notification of this decision.

3. In the event that the due amount is not paid within the stated deadline, an interest rate of 5% p.a. will apply as of expiring of the fixed time limit and the present shall be submitted to FIFA's Disciplinary Committee, so that the necessary disciplinary sanctions may be imposed.

4. The Claimant, player J., is directed to inform the Respondent, MKE Ankaragücü Spor Kulübü, immediately of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received".

The DRC Decision was notified to the Parties on June 11, 2008. On June 16, 2008, the Player's attorney requested from the Appellant the payment of EUR 75,106, within 30 days from the notification of the DRC Decision as mentioned in it and provided the Appellant with all bank details for the payment. On June 25, 2008, the Player sent back to the Appellant the original cheque of EUR 40,000.-, dated August 1, 2007.

On June 26, 2008, the Appellant filed with CAS a statement of appeal against the DRC Decision and completed it with a letter dated July 3, 2008 and an appeal brief dated July 14, 2008.

The Appellant reaffirmed basically the various statements and submissions made to the Player and FIFA but developed before CAS a new submission where it qualified the contract signed by the Player as a "precontract". The Appellant's submissions, in essence, may be summarized as follows:

- According to the Appellant it signed with the Respondent a "pre-contract" for the transfer of the Player from FC Wacker Innsbruck to the Appellant. Then the Appellant referred to what it called a "protocol" with FC Wacker Innsbruck and pointed out that this document was valid only in case the player passed a medical exam, as provided under point 7 of that document.
- The Appellant then stressed that it had never been warned, be it in writing or orally, about the Player's health problems. It further argued that the Player had rejected the medical check, which the Appellant claimed to have proposed several times to him and this, for no reason at all. The Appellant pretended that the first medical check of the Player took place on August 8, 2007. The report issued by the Appellant's medical staff showed that the player was suffering from "bronchitis asthma", a chronic disease, which, according to the Appellant increases when performing a sport activity. After having inquired on the medication needed by the Player, the Appellant discovered that such medication contained doping agents. The Appellant further claimed that those medicines contained some side effects, which could give rise to other illnesses. The Appellant concluded on this point that if it had known about the Player's medical status, it would have never signed the employment agreement. According to the Appellant, the Player and the Austrian club were in bad faith which leads to the agreement being void.
- Then the Appellant explained that he had terminated the contract after having discovered the results of the medical test with its letter dated August 14, 2007.
- The Appellant further argued that the only relevant contract was the uniform contract of the Turkish Football Federation that had to be signed between the Parties in accordance with Article 7 of the "pre-contract". The Appellant then stressed that no ITC had ever been issued and that the request of such a certificate is not only the responsibility of the club but also of the Player. Quite confusingly, the Appellant stated that the Player did not want to sign said uniform contract. Then the Appellant mentioned the various formalities provided by the regulation of the Turkish Football Federation notably, the need to sign a uniform contract before a notary and the issuance of a health report proving that the player is eligible to play as a professional. According to the Appellant the health status of the Player rendered the signing of the uniform contract and the issuance of the ITC impossible.

- The Appellant then claimed that the Respondent received a cheque of EUR 10.000.- for his current expenses in view of his move to Turkey and that he had stated when he left in August that this amount settled any claim he might have had against the Appellant. The Appellant claimed further that the Respondent's representative had admitted that the contract was invalid and that the Player could not ask anything out of an invalid contract.

Based on these submissions, the Appellant filed the following request for relief: *"The decision of FIFA shall be annulled. The sanctions taken by the club against the player shall be executed and outstanding penalties shall be collected from the player".*

The Respondent's reply of August 5, 2008 can be summarized, in essence, as follows:

- The Player explained that the Appellant refused to allow him to participate in the training of the 1st team, so that he could not fulfill his contractual obligations. The Player claimed to have offered his services to fulfill his obligations several times, but to have systematically been denied to do so. The Appellant did not provide any housing to him either, although this had been agreed in the employment agreement.
- The Respondent claimed further that the Appellant did not request for the issuance of the ITC, which is, according to the Respondent a further example of the Appellant's breach of the employment agreement, as only the Appellant was in a position to file this request and ensure that the Player be registered as a professional football player with the Turkish Football Federation. The Respondent stressed that he had not received his wages.
- Based on this, the Player concluded first in his statement of defence that he found himself in a very disadvantageous situation; this situation was not at all caused by him, but solely by the Appellant as a result of the various breaches of the employment contract.
- Although the Respondent's previous attorney at law had notified the Appellant in writing of the breaches of the employment contract and claimed remedy, the Appellant continued to breach its obligations. The Player therefore used its right to terminate the contract with just cause, in accordance with the FIFA Regulations for the Status and Transfer of Players.
- Coming then to the question of his health status, the Respondent explained in his statement of defence that he had been actively playing football since his youth. After the termination of his employment agreement with the Appellant, the Respondent joined a new club, namely FK Mlada Boleslav and he continued to play football for this club. Moreover, the Respondent was granted an official confirmation proving that his health status allowed him to actively play football, without any limits or restrictions and that the medication used by the Player was not considered as a doping agent.
- Referring to Article 18 par. 4 of the FIFA Regulations for the Status and Transfer of Players, the Respondent claimed that *"the validity of a contract may not be made subject to a positive medical examination and/or the granting of a work permit"* and stressed that pursuant to the provision of Article 1 par. 3 let. a) of the same Regulations, Article 18 is binding at

national level and must be included in the regulations of the national federations. Based on those provisions, the Player claimed that any and all arguments used by the Appellant in its appeal concerning the Player's medical examination and health condition were not admissible. The Respondent further referred to the official FIFA commentary on the Regulations for the Status and the Transfer of Players (edition 2008) pertaining to provision of Article 18 which states that: *"the special provisions in this article are also binding at national level and are meant to regulate the relationship between professionals and clubs in a uniform manner. The validity of an employment contract between a player and a club shall not be made subject to the positive results of a medical examination or to the acquisition of a work permit from the local authorities. Any such conditions included in a contract are not recognized and the contract is still valid without this clause. In other words, this means that the new club's failure to respect the contract represents an unconditional breach of a contract without just cause"* (par. 1). The commentary further states that *"a player's prospective club is required to undertake all necessary research and to take all appropriate steps before concluding a contract. Once a contract has been signed, all parties involved can rely in good faith on it being respected and enforced"* (par. 2).

- The Respondent then stressed that his employment agreement with the Appellant did not contain any provision concerning any health or medical issues. Such provisions were contained in the loan agreement between FC Wacker Innsbruck and the Appellant. However this loan agreement had no impact on his employment agreement with the Appellant.
- As to the validity of the employment agreement, the Respondent stated that it contained all required parts of a standard employment agreement and was valid, effective and binding for the Parties. The employment agreement contained notably the names of the Parties, place of work, the period of validity, the salary, etc., as confirmed in the decision of the Dispute Resolution Chamber. As to the only condition in the contract, namely the issuance of the ITC, the Respondent claimed it to be invalid and without any effect. According to the Respondent, the allegations contained in the appeal that the signed employment agreement was only a "pre-contract" is neither true nor accurate. The Player claimed further that there was no obligation for him to sign the uniform agreement of the Turkish Football Federation. The fact that such an obligation had been agreed between the Appellant and FC Wacker Innsbruck was irrelevant for the Respondent.
- Eventually as to the question of the cheque of EUR 10,000 issued by the Appellant in favor of the Respondent, the latter pointed out that this cheque was issued and handed over to him before the employment agreement had been entered into between the Parties. The Respondent thus stressed that the Appellant could not claim that this issuance of this cheque aimed at settling the claims between the Parties.

Based on these submissions, the Respondent submitted to CAS the following requests for relief: *"For the reasons stated above, we would like to propose that the Court of Arbitration for Sport will dismiss the appeal filed by the football club MKE Ankaragucu Sport Club and confirm in full extent the decision of the Dispute Resolution Chamber of FIFA issued on 7th June* [recte: May] *2008 (…)".*

On October 21, 2008, the Panel sent a letter to the Parties in order to address some procedural issues and to order some evidentiary proceedings in application of Article R44.3 of the Code of Sports-related Arbitration ("the Code"). This letter contained notably the following questions:

Questions to the Appellant

1. How far was the Appellant aware of the medical confirmation regarding the Respondent? and since when?
2. How far was the Appellant aware of the fact that the Respondent was playing with a Czech club? and since when?
3. On which points/aspects does the medical expertise established in Turkey contradict the medical expertise established in Austria?

Questions to the Respondent

1. Has he filed some medical confirmations in Turkey, and if yes, when and which ones?
2. If yes, what was the reaction of the Appellant when he became acquainted of these medical confirmations?
3. When the Appellant told him that he was not allowed to play because of his sickness, what was his reaction?
4. Did he have to undergo a new medical check in order to play in the Czech Republic?

The Respondent answered the Panel's questions in a letter dated November 3, 2008, which can be summarized as follows: The Respondent explained that he had submitted a medical confirmation to the Appellant's medical staff issued by the Austrian anti-doping committee. This documentation confirms that he is allowed to take his medicine. Upon receipt of the documentation, the doctor in charge of this file confirmed that the Appellant had acted very professionally and further stated that there should be no complication resulting from the consumption of the prescribed medicine. The doctor prescribed another medicine which should *"rise his overall performance"*. When the Appellant's representatives told him that he was not allowed to play, the Player was very disappointed and did not understand why given that he had understood that he had passed the medical test, he was not allowed to play. When he went back to Czech Republic and started to train with his new club, the Respondent did not have to pass any other medical check; the Czech anti-doping committee confirmed that it had no objection to him using his medicine, he would have to keep permanently with him his TUE certificate of the Austrian anti-doping committee. The Respondent mentioned that after having played with FC Mladá Boleslav, when he joined his current club MFK Ružomberok, he passed a medical test and no objections were raised by the club.

The Appellant provided the Panel with its answers on November 20, 2008. The Appellant explained that it had been informed about the Player's sickness with the medical report dated August 8, 2008 [recte: 2007] that was enclosed in its Appeal Brief. The Appellant did then not explain its reaction to the medical results but explained that the Player did not sign the uniform contract and left the country. The Appellant claimed that there had been no communication between the Parties after that. It then explained that it had not been aware of the controls made in Austria. The control in Turkey had however been made by a specialist of the subject and the Appellant had been informed

that the Player could not perform at *"top level and can face problems as football is a high intensity performance sport"*. The Appellant then further explained that if it had known about the Player's sickness *"before the transfer this transfer would have never been done"*.

A hearing was held on December 10, 2008. The Appellant called its doctor, Mr. S., as a witness.

Mr. S.

Mr. S. first confirmed that he was member of the Appellant's medical staff. In this capacity, Mr. S. was in Austria during the summer camp of the Appellant's first team in 2007. The doctor explained to the Panel that the Appellant had asked the Player if he had suffered an injury or a sickness, which the Player denied. When the Player came to Ankara, the Appellant put as a condition, for the signing of an employment agreement, that he passes the medical test before the employment agreement could be signed. It is at the occasion of this test that the Player explained to Mr. S. that he was under specific medication. The Doctor immediately contacted a specialist and asked for complementary tests. The Doctor found that the levels were lower than expected and mentioned that the asthma problem which the Player was suffering from could get worse under football training. Mr. S. however admitted that the Player could play under the required medication. Yet Mr. T., the Appellant's representative, stressed that the worst period of pollution in Ankara was in November and December. According to him, at this period, it would not be possible for the Respondent to play. It could be even dangerous for his health. Mr. T. claimed that in November the Respondent would lose 25% of his capacity, and in December 50%. Then Mr. S. confirmed that the Appellant was always proceeding with a medical check before an employment agreement were signed. To the question of the Panel on his competences, Mr. S. explained that he was a medical specialist in orthopedics. He therefore only checked the Player for orthopedics questions when he first met him in Austria. Mr. S. moreover confirmed that the Respondent had played several friendly games with the Appellant's first team after the signature of the agreement dated July 20, 2007. Mr. S. then confirmed to the Panel that he had signed the TUE application form for the Player after the results of the medical test.

The Player

The Player explained first to the Panel that it was confirmed to him that he was suffering from bronchitis asthma in July 2007 but that previous medical analysis showed this problem since he was seven years old. FC Wacker Admira was aware of his health status when they signed a contract with him. As to his relationship with the Appellant, the Player explained that he had been in contact with Mr. T. and that after various exchanges he showed interest in meeting the Appellant's management. After some negotiations, an agreement was signed in the end of July 2007. The Player confirmed that his decision to move to Ankara was not linked to his health status. The Player confirmed as well that he had never refused to undergo a medical test and that he had never been asked to sign another contract. In this respect, the Player contested strongly Mr. T. statements. He recalled that after the results of the test, the Appellant's doctor had said that after a day he would perform better if he used a specific medication, which the doctor recommended to him.

Coming now to the circumstances of his stay in Ankara, the Player explained that he stayed until August 17, 2007, when Mr. T. and others members of the Appellant's management told him to leave several times and prevented him from training and denied him access to the Club's facilities.

He stressed that he was ready to play for the Appellant but was not allowed to. He remembered that he was completely dressed up, ready for training, when Mr. T. told him that he had no access to the pitch. When he arrived back home, the Player talked to his manager and asked his former Czech club if he could train with the first team. The Player then explained the circumstances of his two contracts with his Czech Club as well as the issue of his provisional registration with the Czech Football Federation.

As to the question of his remuneration from August 2007 until January 18, 2008, the Player confirmed the figures provided to FIFA and explained that he did not request the compensation for the remaining period of his agreement with the Appellant.

During the oral pleadings the Appellant insisted on the fact that the contract signed with the Player was subjected to various conditions, notably the signing of an uniform contract of the Turkish Football Federation as well as the successful passing of a medical test and the issuance of an ITC, these conditions proved, in the Appellant's view, that the signed contract was a "precontract" and could not be considered as the final employment contract covered by the FIFA Regulations. As the conditions of the precontract were never met, the Parties never went any further, and no transfer ever took place. As the Respondent never signed a valid employment contract with the Appellant, he never became the Appellant's employee and consequently the Appellant could not owe anything to him. The DRC Decision should thus be declared null. The Respondent insisted on the fact that he never hid his disease and did not try to avoid any medical test, as he passed it one day after coming in Turkey. He insisted on the fact that he had been playing as a professional football player before joining the Appellant and he was still playing as a professional football player now, years after he had left Turkey. He was granted a TUE for his disease which should prove that he may use his medication while exercising his profession as football player. The Respondent then provided the Panel with confirmations on the salaries and other payments received from third clubs from August 2007 until January 18, 2008.

LAW

CAS Jurisdiction

1. The jurisdiction of CAS is not disputed and both Parties signed the order of procedure where a specific reference is made to the competence of CAS based on Article 61 of the FIFA Statutes, the legal basis for CAS jurisdiction.

2. As to the time limit to lodge an appeal before CAS, Article 61 par. 1 of the 2007 FIFA Statutes provides that the appeal must be lodged *"within 21 days of notification of the decision in question"*. The decision was notified to the Appellant by means of a fax dated June 11, 2008 and the Appellant's appeal was lodged on June 26, 2008, therefore within the statutory time limit set forth by the 2007 FIFA Statutes, which is undisputed.

3. It follows that the appeal is admissible.

Applicable law

4. Art. R58 of the 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".

5. The Panel noted first that both Parties refer in their written proceedings to FIFA Regulations and that the application of the FIFA Regulations is thus not disputed, subject to the Appellant's claim that the regulations of the Turkish Football Federation should specifically apply as to the conditions of validity of the agreement signed between the Appellant and the Respondent. The Parties did not agree on specific rules of law which should apply to their relationship in general or to the present case in addition to the FIFA Regulations. The FIFA Statutes provide, under Article 60 par. 2 of the 2007 edition which is applicable to the present case, that CAS will apply Swiss law "additionally" to the FIFA Regulations. Considering that the challenged decision was issued by the Dispute Resolution Chamber of FIFA, whose corporate seat is in Zurich, Switzerland, that the Appellant is a member of the Turkish Football Federation which is a member of FIFA, that the Respondent is a professional player who was and is registered with clubs which are all members of associations which are all members of FIFA, the Panel shall decide the whole dispute according to the FIFA Regulations and Swiss law. As to the question of the opposability of the rules set by the Turkish Football Federation with regard to the validity of the employment agreement signed between the Parties, the Panel considers that the Appellant's claim does not as such contradict the overall application of the FIFA Regulations but refers to a specific point which the Panel will cover further in the award when dealing with the issue of the validity of the employment agreement. The Panel notes further that both Parties expressly agreed on the application of Swiss law to the present dispute.

6. The Panel further decided that in accordance with Article 26 par. 1 and 2 of the Regulations on the Status and Transfer of Players (edition 2008), the previous version of the regulations (i.e. the edition 2005; "the FIFA Regulations") was applicable in the present matter; a similar decision had been adopted by the FIFA DRC.

Merits

7. The Panel noted that the Appellant was focusing in its submissions on the question of the validity of the employment agreement that it had signed on July 20, 2007 ("the Employment Agreement") with the Respondent. The Appellant did not question the calculation of the amounts due by the Appellant made by the Respondent, on one side, and the FIFA DRC in its Decision, on the other side, on the basis of the Employment Agreement.

8. The key issue in the present matter concerns thus the validity and the enforceability of the Employment Agreement.

9. The Panel observed that the Appellant based its submissions on various legal arguments. First, the Appellant claims that the Employment Agreement was actually a "precontract", whose role was to state in writing the agreement reached by the Parties and their commitment to enter into a separate employment agreement governed by Turkish law and the regulations of the Turkish Football Federation. The Appellant claimed that in order to enter into this separate employment agreement, the Parties had agreed in the "precontract" that several conditions should be met, namely (1) the issuance of the ITC, (2) the signing of the Turkish Football Federation's uniform employment agreement and (3) the successful passing of a medical test. Subsidiarily, the Appellant claimed that it was misled by the Respondent and FC Wacker Innsbruck, the Austrian lending club, that both hid abusively the Player's physical condition. The Appellant did not contest the applicability of Article 18 par. 4 of the FIFA Regulations, which states that *"the validity of a contract may not be made subject to a successful medical examination and/or the grant of a work permit"*.

10. The Appellant claimed alternatively that either the Employment Agreement was not such a contract covered by said Article 18 but only a precontract or, should the Panel consider that there was no precontract, the Employment Agreement should be declared void *ab ovo* due to the willful misconduct of the Respondent and the lending club towards the Appellant during the negotiations which led to the signing of the Employment Agreement and of the loan agreement.

11. The Respondent objected to this interpretation of the scope of the Employment Agreement and of the circumstances of its negotiations and claimed that the Employment Agreement was valid and enforceable. In its Decision, the FIFA DRC insisted on the fact that it was considering the condition provided in the Employment Agreement of the issuance of the ITC as a potestative clause, which left full discretion to the Appellant whether or not to request the issuance of the ITC. The FIFA DRC thus decided that this condition in the Employment Agreement had no effect on its validity. As it could not find any further condition of execution in the Employment Agreement and as it considered that the Parties had agreed on all the *essentialia negotii* in the Employment Agreement, the FIFA DRC decided that such agreement had to be considered as valid and binding. Coming to the question of the physical condition of the Player, the FIFA DRC rejected this submission on the basis of Article 18 par. 4 of the FIFA Regulations. Eventually, the FIFA DRC rejected the submission on the need to sign and execute the Turkish Football Federation's uniform employment agreement in order

to validly complete the transfer, noting that this was not a condition under the Employment Agreement.

A. Definition of a "precontract"

12. The Panel considered the submissions made by both Parties in the light of the evidence submitted and of the documentation they provided in the proceedings before CAS and on the basis of the FIFA file which was requested by the President of the Panel.

13. Starting with the argument of the existence of a "precontract", the Panel first noted that the FIFA Regulations and Swiss law do not provide a specific, explicit definition of a "precontract". This notion is however well known in legal practice and the Panel would define it as the reciprocal commitment of at least two parties to enter later into a contract, a sort of "promise to contract" (in French: "promesse de contracter"). The clear distinction between a "precontract" and a "contract" is that the parties to the "precontract" have not agreed on the essential elements of the contract or at least the "precontract" does not reflect the final agreement. On the contrary, if the interpretation of the "precontract" leads to the conclusion that the parties agreed on all the essential elements of the final contract, on the basis of the general principles applicable to the conclusion of a contract as defined under Article 1 et seq. of the Swiss Code of Obligations (SCO), the "precontract" would be nothing else but the final contract (see notably Art. 1 and 2 par. 1 SCO). In this respect, the Panel stressed that it was well known that in contractual negotiations, the parties must consider the risk to be bound at an earlier stage than they sought. This risk is covered by specific wordings that one can find for instance in letters of intent, which can in some cases be considered as "precontract" as the parties agree on some important elements in view of the negotiation of the final contract and may provide for sanctions to be imposed in case of violation of specific commitments already taken at the level of the letter of intent. However, good practice requires from the parties to expressly mention that the document is not the final contract and that it does not represent the definitive agreement between the parties.

14. In the present matter, the Employment Agreement does clearly contain an agreement on all the essential elements of the contract, namely the transfer of the Player and the terms and conditions of his engagement with the Appellant. The Panel considered without any doubt that the Employment Agreement was clearly not a "precontract" as defined above. The copies of the Employment Agreement and of the loan agreement signed between the Appellant and FC Wacker Innsbruck, as well as the statements made by the Player, on one side, and Mr. T., the Appellant's representative on the other side, showed clearly that all Parties agreed on the transfer of the Player from FC Wacker Innsbruck to the Appellant and on the engagement of the Player by the Appellant. The Player trained in Austria with the Appellant's first team and then flew to Ankara, showing up for training in the Appellant's premises. In the Employment Agreement, the Player expressed that he had read and agreed with the Appellant's regulations and directions (Art. 8). This was known by FC Wacker Innsbruck, which did not oppose it. The Appellant organized a medical exam in Ankara and its doctor filled in a form for a Turkish TUE. Beyond the clear wording of the Employment Agreement, the Panel finds that

the circumstances before and after the signing of this agreement prove that all Parties considered that the transfer of the Player and his engagement by the Appellant had been agreed between them. The Appellant's thesis that the Employment Agreement contained only the commitment to negotiate an additional agreement, as developed by the Appellant in particular during the hearing, is, thus, not accepted.

15. This being stated, the Panel did not exclude that the Employment Agreement could be subject to conditions which would allow the Appellant to rescind from it. Although the term "precontract" does not appear appropriate in this case, the non execution of one or the other conditions of the Employment Agreement could, under certain circumstances, lead to the same consequences, namely the non enforceability of the Employment Agreement *ex tunc*.

16. The Panel first notes that the Employment Agreement's wording is not of a very high standard and that the document was drafted by the Appellant. In any event, according to Swiss law, in a dispute, it is the real intent of the parties to a contract to be relevant, and not the wording itself. Additionally, a court may consider, when interpreting a contract, which party drafted it and the court may want to apply the principle *"contra stipulatorem"*, according to which by equal possible interpretations the one against the party responsible for drafting the wording shall be given priority.

17. This being mentioned, the Panel notes that the Employment Agreement provides that the Parties *"agree to sign a 1 year uniform contract starting from 20th of July 2007"* (Art. 2). It then further provides that *"this contract is valid after the players International Transfer Certificate arrives to Turkish Football Federation"*. The issuance of the ITC is a clear condition of the execution of the Employment Agreement, whereas the signing of the *"uniform contract"* of the Turkish Football Federation is not specifically referred to as a condition but nevertheless is clearly considered in the Employment Agreement. There is eventually no specific reference in the Employment Agreement to a medical exam to be passed by the Player, as an independent condition of execution of the Employment Agreement.

18. Considering the condition of the issuance of the ITC, the Panel stresses that the ITC procedure was set up by FIFA in order to ensure that old and new clubs agree on the transfer of players. In case of disputes between the clubs, FIFA provides for provisional measures which aim at finding suitable solutions on a case by case basis. A careful analysis of the ITC procedure proves that a football player is not as such party to it. In this respect, the Panel tends to agree with the FIFA DRC when it states that the Player has no control on the issuance of the ITC. To condition the validity or the starting date of an employment contract upon the issuance of the ITC may be legitimate if the new club has doubts on the reliability of the old club.

19. In the present case, it appears that FC Wacker Innsbruck never opposed the issuance of the ITC. The various correspondences in the FIFA file prove actually the contrary. FC Wacker Innsbruck indeed opposed the issuance of an ITC in favour of the Player's new Czech club, stressing that it was bound by a transfer agreement with the Appellant. Actually FC Wacker Innsbruck never had the chance to approve any ITC request because the Appellant never

started the ITC procedure with the Turkish Football Federation. The Appellant mentioned during the hearing that it was not necessary to start it because the uniform employment agreement of the Turkish Football Federation had not been signed by the Parties and because the medical status of the Player would have prevented him from being registered with the Turkish Football Federation. The Panel notes first that those allegations are not substantiated sufficiently and the file lacks official statements from the Turkish Football Federation as to the correct interpretation and the scope of the relevant articles of the Turkish Football Federation's regulations. It then stresses that in any case it was the Appellant's duty to make all its best efforts to obtain the ITC. In other words, the submissions of the Appellant do not justify its total passivity towards the competent bodies of the Turkish Football Federation, through which the ITC could have been obtained. What was expected from the Appellant was to prepare the uniform employment agreement, if it was needed, to have it signed by the Player and to join in the ITC file the various papers produced by the Player on August 2, 2007, notably the TUE issued by the Austrian antidoping commission, or a new TUE, to be issued following an appropriate request by the Appellant.

20. Far from acting in that way, the Appellant unilaterally decided that the Player's health status did not justify the efforts to ask for an ITC as it considered that the Player had no chance to be registered with the Turkish Football Federation and could not perform well in Turkey due to his disease. This, *nota bene*, even though originally, the medical representative of the Appellant had signed the necessary TUE form.

21. As far as the question of the ITC condition is concerned, the Appellant's behaviour leads the Panel to conclude that it is responsible for the non issuance of the ITC related to the transfer of the Player. Therefore, whether the issuance of an ITC was a valid condition or not for the validity of the Employment Agreement, is an issue can left be open. Indeed, even accepting that said issuance was a condition, based on Article 156 SCO, the Appellant cannot claim the non execution of this condition to rescind the Employment Agreement. On the contrary, based on the same article, this condition must be considered as fulfilled in the present matter as the Appellant prevented it from taking place.

22. Coming then to the question of the need to sign the uniform form agreement in order for the contract to be valid, the Panel comes to the same conclusion. It notes first that it is not clear at all that this was a condition for the execution of the contract. Article 7 of the Employment Agreement does indeed clearly provide that *"This* (red.) *contract is valid after the players International Transfer Certificate arrives to Turkish Football Federation"*. The Panel sees in this wording the proof that the Employment Agreement is considered by both Parties as the legal document which governs the employment relationship. The reference to the signing of the uniform employment agreement of the Turkish Football Federation mentioned under Article 2 of the Employment Agreement must then be understood as an additional formality required by the Turkish Football Federation for the registration of the Player with this federation. In this respect, the Panel stresses that both Parties agreed to sign this agreement in the Employment Agreement. As a member of the Turkish Football Federation, it was up to the Appellant to make sure that all mandatory requirements, if any, in the standard form agreement were met in the present case, before signing the Employment Agreement. The

Panel notes further that the Appellant never filed the uniform agreement and that, contrary to Mr. T.'s statements, the Player's attitude and correspondences show that he did not avoid signing it but, on the contrary, the Appellant refused to go ahead with the registration procedure. Moreover, as provided under Article 1 par. 3 of the FIFA Regulations, Article 18 of the FIFA Regulations is directly applicable at national level and no room is left for any amendment to this article by the national federations. For the same reasons as expressed above, the Panel is thus of the opinion that should there be any additional mandatory requirements from the Turkish Football Federation they could most likely not be opposed to the Player who signed in good faith the Employment Agreement. However, as expressed above, the Panel considers that it does not have to deal in the present award with the question of the compatibility with the FIFA Regulations of the regulations issued by the Turkish Football Federation, as the Appellant did anyway not face a formal refusal of the Turkish Football Federation. It is actually up to the employer to face the consequences of a non registration of its player with its national federation after the execution of an employment agreement, just like the employer has to face the consequences of the non issuance of a work permit by the competent national authorities. Based on the foregoing, the Panel concludes that the Appellant cannot claim to be freed from the Employment Agreement due to the non execution of the uniform agreement of the Turkish Football Federation, which was indeed not a condition to the validity of the Employment Agreement.

23. The Panel then considered the fact that the Player suffers from a disease which requires permanent medication. The Panel stresses first that the present case is not a doping case but a civil case between an employer and an employee. The question of the presence of doping substances, if any, in the Player's medication is not an issue before the Panel.

24. The Appellant bases several of its submissions on the question of the Player's health status. At first, the Appellant claims that the Player's status jeopardized any chance for the Player to be registered by the Turkish Football Federation. There is no element in the file which corroborates the Appellant's submission. On the contrary, the Appellant itself produced the Player's Austrian TUE granted by the Austrian antidoping committee. As mentioned under nr. 23 the validity of this TUE abroad is not relevant as the present matter is not a doping case. This document is however important as it proves to the Panel that the Player was validly registered before one national football federation despite the use of a medication which apparently contains doping substances. Considering that the WADA list of prohibited substances was adopted by FIFA and most national football federations by reference, there is no reason for the Panel to accept the Appellant's claim to the effect that the Turkish Football Federation would have refused any TUE. The Panel notes that actually the Appellant's doctor had filled in a TUE application form; the Panel sees thus force in the Player's claim that, after having considered the documentation related to the Austrian TUE, the doctor and his assistant did not see any problem with the Player's medication at all. There is no reason to believe that no TUE would have been granted by the Turkish Football Federation. It was the Appellant's duty to apply for it, and it failed to do so. Finally, the above is also confirmed by the fact that the Player after termination of the Employment Agreement was able to be registered and play for other clubs.

25. The Appellant then claimed that in any case the Player's disease would impact on his performances. It comes out of the documentation and the statements produced during the CAS proceedings that the Player had been suffering from this disease for many years. The doctor, who examined him, diagnosed his condition but all testifies that it would not adversely impact on his performance as a professional athlete. The Panel was notified of various medical certificates to this effect. Obviously he was still good enough to convince the Appellant to hire him after various test matches in Austria. The Player is still playing now and FC Wacker Innsbruck did not terminate his employment relationship with the Player when it heard about the Player's disease but on the contrary supported the Player's application for a TUE. All these elements prove to the Panel that the Player can exercise his profession and that his performances satisfy his employers. This second submission in relation with the Player's health status shall thus be rejected.

26. Close to the end of the proceedings and notably at the hearing, the Appellant and his doctor added that the particular high level of pollution in Ankara, which the Appellant claimed as being well known, created particular circumstances which could explain why the Player would be subject to underperformance in Ankara more than in a less polluted area like Innsbruck. The Panel is of course aware that some industrialized cities are more polluted than others. However, here again, the Panel cannot admit this claim only on the basis of the Appellant's statement even if it is supported by its doctor. The level of pollution can indeed vary from one city to the other; the Panel considers that this must be taken into consideration by the employer before it signs a contract with a new employee. The Appellant appears not to have considered the issue of the pollution in Ankara as particularly important when negotiating the Employment Agreement with the Player. Further, the Panel is not satisfied that the pollution only would have prevented the Player to fulfill his duties, in particular assuming that the Player would have received an ordinary medical support from his employer, the Appellant, and the appropriate medicines. Therefore, the pollution argument raised by the Appellant has no merit.

27. Having decided that the Appellant did not prove that the Player's health status prevented his registration with the Turkish Football Federation and impacted on his overall performances, the Panel now considers the question of the impact of the Player's disease *per se* on the Employment Agreement. In this respect, the Appellant makes two main claims: it claims that a successful medical test was a condition for the validity of the Employment Agreement; it also claims that it was misled by the Player and FC Wacker Innsbruck and that their attitude justified rescinding the contract *ab ovo*.

28. With respect to the first claim, the Panel notes that the Employment Agreement does not make a successful medical test a condition for its enforceability. The Appellant claims that the loan agreement does it. This latter agreement was not signed by the Player. As such it is a *"res inter alios acta"*. Moreover, the fact that the condition was not taken over in the Employment Agreement by the Appellant, which drafted this document, proves either that the Appellant did not want this condition in it or that the Appellant knew it could not put this condition to the employment of the Player. Indeed, would the Employment Agreement be conditioned by

a positive medical test, the relevant clause would anyway be declared void, based on Article 18 par. 4 of the FIFA Regulations. This claim must thus be rejected.

29. With respect to the second claim, the Panel holds that the Employment Agreement is valid. The Panel recalls its findings with regard to Article 18 above. The Panel accepts that, for a contract to be repudiated the employee's attitude during the negotiations must have been in bad faith, meaning that he deliberately hid an important information on his health status to his future employer. One should expect from a football club to be cautious on the health status of a potential employee, hence the onus is quite high in this context. The doctrine supports this view (see notably BERNASCONI M. in: Rechtsfragen bei Spielertransfers mit einem besonderen Blick auf die Frage der Gewährleistung, Schutz & Verantwortung, St-Gallen 2007, p. 133 *et seq*.). In a nutshell, those authors consider that, under certain circumstances, the unsuccessful medical test can legitimate the employer to rescind from the contract if the Player's medical status of the football player as it comes out from the results of the test is so essential to the employment relationship that it cannot be expected from the employer to execute the contract and that it is clear that if it had known about it before signing the employment agreement it would have never signed it. Such rescission would of course be subject to the establishment by the new club of all factual elements required by the applicable law.

30. The Panel refers also to the comments previously made in the award on the Player's health status. The Player's sporting activity, past and current, tends to show that his disease did not impact on his performance. Moreover, the medication he is using was approved until the end of 2008, which covers the period he was supposed to play with the Appellant's first team. This leads the Panel to conclude that he could have taken his medication during the whole contractual period. Therefore, even assuming a potential right to rescing the Employment Agreement under the mentioned conditions, the Panel concludes that the Appellant failed to prove that the Player's health status was that serious that it could justify a rescission of the Employment Agreement.

31. The Panel further notes that the Appellant on the one hand admitted not having actively tested the Player before signing the Employment Agreement, and on the other hand is arguing that the Player tried to avoid being tested when he arrived in Turkey. The information in the FIFA file shows however that the Player arrived in Turkey on August 1st, 2007 and that the test results were dated August 8, 2007. Mr. T., the Appellant's manager, based the argument of the Player's attitude on this delay of seven days without realizing that the tests had actually taken place on August 2, 2007, which the Panel considers as a proof that the Player did collaborate. The Panel notes as well that the Appellant's first reaction was to fill in a form for a TUE. This tends to prove that, as it comes out from the various statements, the Appellant's medical staff did not see the Player's disease as a cause of termination *ex tunc* of the Employment Agreement.

32. The Panel considered the last claim of the Appellant on this point, namely the one of the Player's attitude during the negotiations. As expressed before, the Panel considers that the onus associated with this claim is quite high, since, in its view, a professional football club

must actively deal with the matter and submit professional players to medical tests before entering into any employment agreement. As mentioned previously, a club is well advised to follow such an attitude taking in consideration the clear wording of Article 18 par. 4 of the FIFA Regulations according to which the validity of an employment contract between a new club and a player – other than the one of a transfer agreement between clubs – cannot be made subject to a positive medical examination.

33. In the present case, the Appellant did not prove that it proactively questioned the Player on his health status. Although the Panel does consider, on the one hand, that the Player could have spontaneously talked about his disease, the Panel believes, on the other hand, that the fact that at the moment of the negotiations the Player had been granted a TUE and that he had all medical and practical confirmations that his disease did not impact on his sport performances, there was no reason for the Player to consider that this information had a material impact on the object of the Employment Agreement, namely his employment by the Appellant. The reaction of the medical representative of the Appellant, i.e. the preparation of the TUE form, does confirm this further. The Panel does therefore not consider that the Player's attitude, in the particular circumstance, justifies a termination *ex tunc* of the Employment Agreement, since the Player did not act in bad faith and did not hide any information that would have prevented him to perform the Employment Agreement.

34. Based on all the above, the Panel concludes that the Employment Agreement is valid and that the Appellant is bound by it.

B. Breach of contract and termination with just cause

35. The Panel then considered whether the Appellant committed a breach of contract which justifies the Respondent's claim for payment.

36. It is undisputed that the Appellant informed the Player that he should not train anymore. It is undisputed as well that the Player was allowed to leave the country, considering that he had no access to the Appellant's facilities, notably even housing facilities.

37. On the other side, the Appellant claims that it terminated the contract on August 14, 2007, on the basis of the Player's negative test results. As mentioned previously, the Panel decided that in the present case, the Player's physical condition cannot lead to the termination of the contract *ex tunc*. As the Player's disease did obviously not prevent him from performing his services as a professional player, it does not constitute a breach of contract and thus does not justify the termination *ex nunc* of the Employment Agreement. Moreover, the Panel notes that the termination letter was sent to FC Wacker Innsbruck and was not even addressed to the Player. The notification is thus not valid. The Appellant further claims that the Player agreed on the termination of the Employment Agreement. No evidence proves the Appellant's statement. On the contrary, the several letters sent to the Appellant by the Player's attorneys prove clearly that the Player claimed that the Employment Agreement had been breached and that he was claiming damages for this. The Panel then came to the Appellant's

unsubstantiated claim that the EUR 10,000.- cheque, which appears to have been given by the Appellant to the Player before the signing of the Employment Agreement, was eventually accepted by the Player as a final settlement of the dispute between the Parties on the Employment Agreement and its correct execution. The Panel notes there that the Appellant did not provide any written settlement or third party statement which could prove that a settlement was agreed between the Parties in August 2007. On the contrary, the file reflects clearly that from the beginning the Player requested his attorneys to defend his rights and to claim damages for the non execution of the Employment Agreement. Nothing in the file and in the Player's attitude before FIFA and CAS can lead the Panel to consider that he was ready to settle the matter against the EUR 10,000 cheque.

38. The Respondent in fact notified formally the Appellant on August 16, 2007 and offered his services, making himself available to the Appellant and requesting access to the Appellant's facilities. As no reaction came from the Appellant, the Player declared that he was terminating the contract with just cause in a letter dated October 1, 2007 with effect on the same date.

39. Based on the information provided by the Parties and in the FIFA file, the Panel notes that the Appellant did not allow the Respondent to perform his activity as a professional player failing in this to meet the requirements of the Regulations notably Article 14 *"Terminating a contract with just cause"* and 15 *"Terminating a contract with sporting just cause"*. The Player's salary was not paid and more generally, the Appellant did not meet its obligations of employer. Based on the foregoing, the Panel decides that the Appellant was in breach of the Employment Agreement. The Panel thus confirms that the Respondent terminated the Employment Agreement with just cause according to Article 14 of the Regulations. This conclusion is as well in line with Swiss law, notably Article 337 SCO (see notably CAS 2008/A/1491). The Appellant's attorneys confirmed at the hearing that there was no material difference between Swiss law and Turkish law as to the definition of a termination with cause of an employment agreement. Consequently, although Swiss law applies to the present dispute and the Parties have agreed to it, one may note that the behaviour by the Appellant is inconsistent with Turkish law as well.

C. Damages

40. The Panel decided that the Employment Agreement was valid and that the Respondent terminated it with just cause. It now has to determine the consequences of such termination in terms of damages.

41. Based on Article 337b SCO and on CAS jurisprudence (CAS 2008/A/1491 with references), the Panel notes that a party that terminates a contract for just cause, must be compensated. The party in breach must compensate the other party for the whole damage caused, considering all claims based on the employment agreement. Further, no other consequences derive from the applicable FIFA Regulations. Based on Article 337 SCO which applies as well in case of termination for just cause (see again CAS 2008/A/1491 with references), the employer in breach of a contract signed for a definite period of time must pay the employee

his salary until the end of the period fixed in the contract. In this respect, the Panel notes first that the calculation made by the FIFA DRC is not disputed by the Parties. The Panel stresses that the Respondent limited his claim to the period starting from August 1, 2007 and ending on January 18, 2008. When asked for the reason of this limitation of the Respondent's claim, his legal representative did not clearly explain if the Panel should consider that the Player intended to raise a new claim before FIFA for the remaining period or if it simply renounced to any rights on the remaining period. The Panel cannot decide *"ultra petita"* and thus considers that it is limited here by the amount claimed by the Respondent.

42. After having carefully reviewed the information provided by the Parties, notably by the Respondent at the hearing, as well as the calculation of the FIFA DRC detailed into its Decision, which is not disputed by the Parties, the Panel comes to the conclusion that the calculation made by the FIFA DRC is correct. As the Respondent limited his claim before FIFA to the period from August 1st 2007 until January 18th, 2008, the Panel did not take into consideration any further amounts earned by the Player from that date.

43. Based on the foregoing the Panel decides that the statement of appeal must be dismissed, all other prayers for relief rejected and the DRC Decision must be upheld.

The Court of Arbitration for Sport rules:

1. MKE Ankaragücü Spor Külübü's appeal against the decision dated May 7, 2008 of the FIFA Dispute Resolution Chamber is dismissed and the decision of the FIFA Dispute Resolution Chamber is upheld.

(…)

4. All other motions or prayers for relief are dismissed.