Tribunal Arbitral du Sport
Court of Arbitration for Sport

By DHL

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Lausanne, 22 November 2012/PF/dk

Re: CAS 2011/O/2521 Matteo Ferrari v. Besiktas Futbol Yatirimlari San. Ve Tic. A.S.

Dear Sirs,

Please find enclosed an original copy of the Arbitral Award issued by the Court of Arbitration for Sport in the above-referenced matter.

I remain at the parties' disposal for any further information.

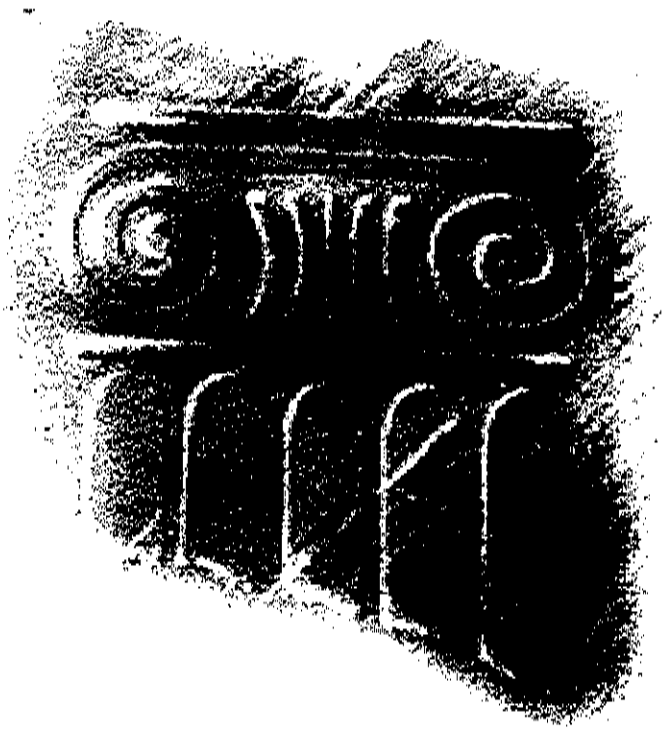
Yours faithfully,

Pedro FIDA
Counsel to the CAS

Enc.
c.c.: Panel and ad-hoc clerk

Tribunal Arbitral du Sport

Court of Arbitration for Sport



ARBITRAL AWARD

MATTEO FERRARI, Italy

v/

BESIKTAS FUTBOL YATIRIMLARI SAN. VE TIC. A.S., Turkey

CAS 2011/O/2521, Lausanne, October 2012

CAS 2011/O/2521 Matteo Ferrari v. Besiktas Futbol Yatirimlari San. Ve Tic. A.S.

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition :

President: Mr Michele **Bernasconi**, attorney-at-law, Zurich, Switzerland

Arbitrators: Prof. Lucio **Colantuoni**, attorney-at-law, Savona, Italy

Mr Efraim **Barak**, attorney-at-law, Tel Aviv, Israel

Ad hoc Clerk: Ms Nora **Krausz**, attorney-at-law, Geneva, Switzerland

in the arbitration between

Mr Matteo Ferrari, Milan, Italy
Represented by Messrs Mario Morelli and Gian Pietro Bianchi, attorneys-at-law, Milan, Italy

- Claimant -

and

Besiktas Futbol Yatirimlari San. Ve Tic. A.S., Istanbul, Turkey
Represented by Messrs Kemal Kapulluoğlu and Emin Özkurt, attorneys-at-law, Istanbul, Turkey

- Respondent -

I. FACTS

A. THE PARTIES

1. Mr Matteo Ferrari ("Mr Ferrari" or the "Claimant") is an Italian professional football player, born on 5 December 1979.

2. Besiktas Futbol Yatirimlari San. Ve Tic. A.S. ("Besiktas" or the "Respondent") is a Turkish professional football club, member of the Turkish Football Federation and therefore, indirectly, of FIFA.

B. FACTS OF THE CASE AND ORIGIN OF THE DISPUTE

3. On 7 July 2009, Mr Ferrari and Besiktas signed an employment agreement (the "Contract"), for a duration of four seasons until 31 May 2013.

4. Art. III a) of the Contract provided that Besiktas shall pay Mr Ferrari a net salary of EUR 2'500'000,-- per season; the salary was to be paid "*free from any and all taxes*" and in ten instalments. In this regard, Art. V a) of the Contract specified that the salary shall be "*net of any and all imposition to which the remuneration of the Player will be subject to either in Turkey and/or in Italy*". The same provision did also foresee that Besiktas must provide the Claimant with the relevant documents regarding the Turkish taxes until 15 April of each season and that, in turn, Mr Ferrari must provide Besiktas with the documents related to the Italian taxes until 15 May of each season. Upon receipt of these documents, the Respondent shall pay to Mr Ferrari the related amounts until 10 June of each season.

5. Besiktas also accepted to provide Mr Ferrari with a full and qualified (according to international standards for a professional football player) medical assistance and to pay all his medical costs (Art. V c) of the Contract).

6. Furthermore, art. V b) of the Contract stated that the Claimant "*shall be entitled to participate to season and pre-season trainings and matches only with the first team of the Club*".

7. Regarding the non-payment of the salary, Art. III b) of the Contract provided the following:

"If the Club, for whatever reason, fails and/or delay to pay any installments mentioned in section (a) above for more than 3 months, this Agreement may be terminated by the Player for just cause. In order to exercise this termination, the Player shall first make a written notification (only via facsimile as well) to the Club and if the Club does not pay the due amount within 15 days after receiving this notification, the present Agreement shall automatically terminate for just cause and therefore the Player will be entitled to receive from the Club, as indemnification and on a monthly basis, an amount corresponding to the total amounts mentioned in section (a) above and still due by the Club until the natural term of the Agreement or until the date of signature by the Player of another employment contract with another professional football team, notwithstanding that the Player will be however entitled to act in front of FIFA relevant bodies in order to claim for the obtainment of the remuneration and the other benefits due to the Player under the present Agreement and in accordance with the regulations of FIFA. Notwithstanding the above, upon termination, the Player will be entitled to claim for any and all arising damages (including, for example, the difference between the amounts received by the new football team and the amounts provided in the present Agreement) as a consequence of such breaches by the Club".

8. During the season 2009 – 2010, the Respondent only paid a salary of EUR 1'631'000 instead of EUR 2'500'000. Furthermore, the Respondent did not pay the amounts due by Mr Ferrari to the Italian tax authorities, in a total of EUR 276'390,53. The Claimant requested payment of these amounts in writing (cf. letter dated 20 July 2010).

9. On 6 August 2010, still not having been paid, the Claimant sent Besiktas a formal notification under Art. III b) of the Contract, warning that if the Respondent did not pay the outstanding amounts within 15 days, the Contract would "automatically terminate for just cause".

10. The Respondent eventually paid some additional amounts, but not all the amounts due. For this reason, Mr Ferrari sent Besiktas a new notification under Art. III b) on 21 October 2010 (regarding salaries for EUR 214'000 and taxes for EUR 276'390,53) and again on 26 November 2010 (regarding salaries and tax reimbursements of EUR 625'390,53 in total).

11. During the 2010/2011 season, in October 2010, Mr Ferrari suffered an injury to his right leg. On 24 December 2010, Besiktas asked the Claimant whether he was fit to

play during the second half of the season and requested a medical report in this sense within three days. The Respondent justified this request with the fact that Mr Ferrari had only played four out of seventeen league games. In a letter dated 27 December 2010, the Claimant assured that he was indeed fit to play, but explained that due to the holiday season, it was impossible for him to provide a medical report within the short three days time limit set by the Respondent. He added that he was ready to undergo medical examination within 15 days, if the Respondent deemed it appropriate.

12. The Claimant indeed provided a medical report on 30 December 2010, indicating that he was still suffering from a lesion to his right leg, as a consequence of the injury suffered in October 2010 and following relapses. Mr Ferrari indicated that he would travel back to Istanbul soon, to submit to medical treatment with Besiktas' medical staff.

13. In a game on 22 February 2011, Mr Ferrari was shown a red card and sent off. Subsequently, Besiktas fined Mr Ferrari with an amount of EUR 225'000, as per an act dressed up by notary public on 18 March 2011. The file of the case does not contain any evidence regarding the notification of this act to Mr Ferrari.

14. Another notification under Art. III b) was sent by the Claimant on 22 March 2011, this time claiming the outstanding sum of EUR 800'390,53.

15. On 31 March 2011, the parties signed a Settlement Agreement, which provided for the payment, by Besiktas, of a total amount of EUR 757'390,53, composed of EUR 480'000 as salary for the season 2010/2011 (to be paid through four bonds) and of EUR 276'390,53 as tax reimbursement for the year 2009 (to be paid on Mr Ferrari's bank account). The Settlement Agreement specified that, in case of non payment of these amounts within the indicated dates, the Contract would be terminated according to Art. III b). For the rest, the Settlement Agreement confirmed the Contract's terms.

16. Following the signature of the Settlement Agreement, Mr Ferrari sent Besiktas the documents supporting his tax reimbursement claim for the year 2009.

17. In April 2011, Mr Ferrari followed a medical treatment in Milan, related to a lesion of his right calf, as well as a rehabilitation, which ended on 7 June 2011, with a successful result.

18. Despite the Settlement Agreement, Besiktas did not fully comply with its payment obligations: only two bonds of a total value of EUR 239'500 were paid. In addition, the Respondent did not pay the Claimant's salaries from January to May 2011 (EUR 1'250'000 in total) nor did the club reimburse the Player for his medical costs of EUR 5'803,62, incurred in 2011.

19. On 27 May 2011, the Claimant sent to Respondent a new notification under Art. III b) of the Contract.

20. As determined in the medical report of Dr. Furio Danelon dated 7 June 2011, by that time, the Claimant had fully recovered his physical skills and was totally healed. Dr. Davide Pisoni, athletic trainer who followed Mr Ferrari's rehabilitation, also confirmed in his witness statement that on 7 June 2011, the Claimant had fully recovered his specific football skills and a perfect athletic condition.

21. A few days after 7 June 2011, as explained in Dr. Danelon's witness statement, he spoke on the telephone with Besiktas' medical staff and informed them that the Claimant was in perfect physical condition. On 16 June 2011, Dr. Danelon sent his report by e-mail to Dr. Mete Duren, member of Besiktas' board and specialist in surgery.

22. In a letter dated 20 June 2011, Besiktas proposed a meeting in Istanbul, in order to discuss payment terms. On the same day, Mr Ferrari answered that, despite the expiration of the 15 days term foreseen in Art. III b), he wished to continue playing with Besiktas during the 2011/2012 season, as he had completed his rehabilitation. He therefore asked the Respondent to pay all outstanding amounts until 25 June 2011 and to officially communicate him the season's starting date (adding that he had learned unofficially that date to be 27 June 2011).

23. On 24 June 2011, the Claimant informed the Respondent that he had difficulties in finding a flight to Istanbul and asked again for an official confirmation of the season's starting date as being 27 June 2011.

24. Finally, Besiktas' translator called Mr Ferrari on behalf of the vice-president and informed him that the season would start on 27 June 2011.

25. Mr Ferrari arrived in Istanbul for the pre-season training camp on 30 June 2011. The same day, given the fact that he still had not received the outstanding amounts, he sent

Besiktas a new notification under Art. III b). This notification also included an outstanding amount of EUR 659'947,80 due for tax reimbursement for the year 2010 (supported by a copy of Mr Ferrari's tax return).

26. Upon his arrival, Besiktas' vice-president informed Mr Ferrari that he was not included in the club's plans for the future. He was also requested to train separately from the other players. This decision came as a surprise for Mr Ferrari, who also learned that Besiktas had acquired another player to replace him, as he noted during his testimony before this Panel.

27. Indeed, Mr Ferrari started to train separately, but, as he explained at the hearing, at that stage he was still hoping to be able to convince Besiktas that he was worth of being reinstated in the first team.

28. On 2 July 2011, Besiktas' website announced the composition of its team bound for the training camp in Austria. Mr Ferrari was not included in this list. The same day, the team departed for Austria and Mr Ferrari was left in Istanbul with only one other player (Mr Michael Fink), Mr Ömer Gülen, member of the A team coaches, and Mr Metin Gumustas, a masseur, as well as the translator and the ware-house keeper of Besiktas. As Mr Gülen explained at the hearing, he was training the second team (A2 team) of Besiktas at the time. He suggested to Mr Ferrari to train with the second team, but the Player refused. No medical staff was left in Istanbul and, despite its allegations to the contrary, the Respondent did not provide satisfactory evidence to the Panel.

29. The Respondent also denies having excluded Mr Ferrari from the team's plans and explains that the Claimant would have deliberately asked to train indoors in the gym. Besiktas adds that the purpose of not including the Claimant in the Austrian training camp would have been to preserve his health. However, Besiktas did not provide any convincing evidence in this regard, while Mr Ferrari established his willingness to join the team and his good physical condition, in particular through his deposition and Dr. Danelon's testimony. In particular, Dr. Danelon explained that he had not recommended a special training for Mr Ferrari after the end of the rehabilitation on 7 June 2011, as he thought that the Claimant was fit to train with his team. Furthermore, on 30 June and 1 July 2011, Besiktas' website announced that Mr Ferrari trained separately from the rest of the team. The same website contained information regarding injured players, who did not train, but were following rehabilitation

treatments and one of whom participated in the Austrian training camp, despite his injury. Furthermore, several players got injured during the camp in Austria and stopped participating in the training sessions.

30. On 7 July 2011, before the team's return from Austria, Mr Ferrari travelled back to Italy. As he explained at the hearing, it had become impossible for him to demonstrate his value to the team, under these conditions.

31. Dr. Danelon examined the Claimant on 7 and 8 July 2011, due to a mild soreness in the right calf. This physician noted a full healing of the lesion and only prescribed some massage sessions, which successfully resolved the symptoms.

32. On 11 July 2011, Mr Ferrari sent a letter to Besiktas (the "Notice of Termination"), complaining that he had been excluded from the preparation of the team and of the training camp in Austria, in breach of the Contract. He underlined that Besiktas' conduct had violated his image and reputation. He added that the amounts stated in his letter of 30 June were still not paid. Consequently, Mr Ferrari notified the Respondent with the immediate termination of the Contract in accordance with Art. III b) and reserved his right to act before competent judicial bodies. He indeed filed his request for arbitration with the Court of Arbitration for Sport ("CAS") on 3 August 2011.

33. On 8 August 2011, Besiktas wrote to Mr Ferrari, claiming that his absence from the training was in violation of the Contract and reserving its right to unilaterally terminate the Contract.

34. After the termination of the Contract, Mr Ferrari only signed a new contract on 1 March 2012, with the Canadian professional football club Montreal Impact (for the year 2012, renewable for the year 2013). His salary is USD 130'000 per annum, payable in semi-monthly instalments. As the Player explained during the hearing, the reasons for him not being able to find a new position earlier were that his status in the Transfer Matching System database was blocked because of the contractual dispute and the fact that potential employers were deterred by Besiktas' counterclaim raised in the present proceedings. He added that at the date of the hearing, he was in effect playing for Montreal Impact and that he hoped that the contract with the Canadian club would be renewed for the year 2013.

C. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

35. As mentioned above, the Claimant filed his request for arbitration with the CAS on 3 August 2011 and nominated Prof. Lucio Colantuoni as Arbitrator.

36. On 9 August 2011, the CAS Court Office acknowledged receipt of the submission of Claimant and invited Besiktas to file its answer within the time limit established by Art. R39 of the Code of Sports-related Arbitration (the "Code").

37. The CAS Court Office also asked the parties whether they chose a one- or three-member panel and whether they opted for English as the language of the arbitration.

38. On 11 August 2011, the Claimant confirmed that he chose a panel of three arbitrators.

39. In a letter dated 17 August 2011, Besiktas agreed to a three-member panel and to English being the language of the proceedings. The Respondent nominated Mr Efraim Barak as Arbitrator.

40. On 2 September 2011, the Respondent requested the time-limit for the filing of the answer to be fixed after the payment by the Claimant of the advance of costs, in accordance with Art. R39 of the Code.

41. This request was granted by the CAS Court Office, as determined in a letter of 5 September 2011 to the parties.

42. On 7 September 2011, the Claimant's share of the advance of costs having been paid, the CAS Court Office invited the Respondent to file its answer within twenty days.

43. On 29 September 2011, the CAS Court Office informed the Parties of the formation of the Panel composed of Mr Michele Bernasconi as President and Mr Efraim Barak and Prof. Lucio Colantuoni as Arbitrators.

44. Besiktas filed its answer on 27 September 2011. In this submission, Besiktas also put forward a counterclaim against Mr Ferrari.

45. In a letter dated 30 September 2011, the CAS Court Office invited the Claimant to file his answer to the counterclaim within twenty days.

46. The Claimant filed his answer to the counterclaim (statement of claim) on 24 October 2011.

47. The Respondent was given a deadline until 27 November 2011 to file its response to the statement of claim.

48. On 5 December 2011, the Panel granted both parties deadlines for filing their last written submissions, including witness statements or other evidentiary measures. The parties were also invited to express their preference for a hearing to be held or for the case to be decided on the basis of the written submissions.

49. In a letter dated 22 December 2011, the Claimant requested an extension of the time limit set for his last written submission. The Respondent confirmed on 26 December 2011 that it did not object to this extension, so that a new time limit was granted to the Claimant until 16 January 2012.

50. Mr Ferrari filed his last written submission on 16 January 2012 and stated that a hearing was necessary in his opinion.

51. Besiktas filed its last written submission on 13 February 2012. In a letter dated 15 February 2012, the Respondent also requested a hearing.

52. On 22 February 2012, the CAS Court Office informed the parties of the appointment of Ms Nora Krausz as ad hoc clerk.

53. A hearing was set for 18 April 2012 in Lausanne in agreement with the parties. However, on 9 April 2012, Besiktas' legal representatives terminated their mandate after the Respondent renewed its board of directors. For this reason, the hearing was postponed to 5 June 2012, date at which both parties were available.

54. The parties received the Procedural Order on 10 April 2012 and they duly signed and returned a copy thereof within the set time limit.

55. On 4 June 2012, after Besiktas expressed the wish to hear Mr Michael Fink as a witness (who had refused to appear, according to an email received by Mr Ferrari's legal representatives), the Panel recalled that based on Art. R44.2 of the Code, each party is responsible for the availability of his/its witnesses. Accordingly, the Panel did not consider appropriate to order any procedural measures.

56. The hearing took place in Lausanne on 5 June 2012. The parties were represented by the following persons: Messrs Mario Morelli, Fabrizio Bergamaschi, Gian Pietro Bianchi, Lorenzo Vigasio and Ennio Bovolenta, attorneys-at-law, for the Claimant, and Messrs Kemal Kapulluoğlu and Emin Özkurt, attorneys-at-law, for the Respondent. The parties all confirmed having no objection regarding the composition of the Panel.

57. At the hearing, Dr. Danelon and Dr. Pisoni, as well as Mr Paolo Casarini (Mr Ferrari's tax advisor) were heard as witnesses for the Claimant and Mr Gülen was heard as a witness for the Respondent. Mr Ferrari also gave an oral statement and answered the Panel's questions. The contents of these declarations are examined in the section B "Facts of the case and origin of the dispute" above, as well as in the part II "Legal analysis" below.

58. The parties had the opportunity to present their case, comment on the evidence on the file, submit their arguments and answer the questions posed by the Panel.

59. During the hearing, Besiktas produced an opinion of Ernst & Young ("E&Y Opinion") regarding the taxation of Mr Ferrari's income. The Panel decided to accept that document and add it to the file of the case.

60. After their final oral submissions, the parties stated that they did not have any objection as to the respect of their right to be heard or the conduct of the proceedings. Thereafter, the Panel informed the parties that it would possibly request an expert opinion on Italian and Turkish tax issues and expressly underlined that it left the evidentiary proceedings open for this question only.

61. At the hearing the Panel did not take any interim decision on additional evidentiary proceedings to be ordered by the Panel. Rather, as mentioned above, the Panel informed the Parties that it would have looked at the evidence submitted, including the E&Y Opinion of 31 May 2012, and reserved the right to appoint an expert in accordance with art. R44.3 and R64.3 of the CAS Code, should the tax issues raised by the Parties make such an appointment appropriate. In such a case, i.e. if the Panel would have taken such a decision on additional evidentiary proceedings, the Panel assured the Parties that the Panel would have followed the procedure foreseen in art. R44.3 para.3 of the CAS Code and consulted the Parties with respect to both the appointment and the terms of reference of such expert(s).

62. On 26 September 2012 the Panel informed the Parties that no additional proceeding had been ordered and no expert had been appointed. Accordingly, there was no additional evidence whatsoever on which the Parties did not have the possibility to comment, at the latest and to their satisfaction at the hearing of 5 June 2012. Furthermore, the Panel has decided, in accordance with Article R44.3 CAS Code, not to order any additional evidentiary proceedings because on the basis of the information and evidence provided by the Parties it considered itself sufficiently informed and such additional evidentiary proceedings were, therefore, in the opinion of the Panel, not appropriate to supplement the presentations of the Parties.

63. On 27 September 2012 the Respondent filed a new version of the E&Y Opinion, which consisted in a signed and slightly amended version of the document originally submitted by the Respondent at the Hearing. Even though this version was not exactly the same as the one already submitted, and even though the signature was not the only amendment made, the Panel informed the Parties that it accepted to add this version into the file also because the changes did not have an impact on the position of the Panel.

D. THE PARTIES' REQUEST FOR RELIEF

64. In his statement of claim, Mr Ferrari requested the following reliefs, partly modifying the relief contained in his request for arbitration:

> *" In light of the above, in partial amendment of the previous "Request for relief", Mr Matteo Ferrari respectfully submits to this honourable Court to rule as follows:*
>
> *I. Ascertain and declare Besiktas' breaches of the contract, as it:*
>
> *- did not pay to Matteo Ferrari the amounts due for remunerations, taxes due to Italian and Turkish Authorities and medical costs;*
>
> *- discriminated and violated the dignity, health and right of personality of Matteo Ferrari.*
>
> *II. Ascertain and declare that Matteo Ferrari has terminated for just cause the Contract for the reasons stated above on this*

Statement of Claim, and/or ascertain and declare the existence of breaches of contract by Besiktas and as consequence declare the termination of the Contract for its fault.

III. Order Besiktas to pay to Mr Matteo Ferrari the total amount of Euro 7'437'252,43 (seven million four hundred thirty seven thousand and two hundred fifty two/43),

- as remuneration for 2010/2011 season an amount of 1'490'500,

- taxes due to Italian Tax Authority in 2009 and 2010 as specified in the Request for Arbitration

- medical costs and indemnification as specified in the Request for Arbitration

plus interests at a 5% rate per annum starting from 11 July 2011 until the effective payment.

IV. Order Besiktas to pay to Mr Matteo Ferrari the amounts due, in accordance with the Contract's clause V a), for the taxes due by the Player to the Italian Tax Authority related to season 2011-2012 and 2012-2013.

V. Order Besiktas to pay all damages caused by the Club to the Player as moral tort and damages to the image of Mr Ferrari, to be determined at the discretion of the Panel.

VI. Dismiss the Counterclaim proposed by Besiktas because completely not proved, undetailed and groundless.

VII. Appoint, if considered necessary or useful, an expert to verify the effective amount due by Matteo Ferrari for Italian and Turkish taxes.

VIII. Order Besiktas to pay all the administrative costs and expenses related the arbitration proceeding.

IX. Order Besiktas to pay to Mr Matteo Ferrari all the legal fees and disbursement for the legal costs he incurred in the present dispute."

65. The Respondent's answer contains the following prayers for relief:

"In view of all the above factual and legal arguments, Besiktas hereby respectfully requests the Panel,

- to reject the Player's request in full,

- to order the Player (and his new Club, in case he signs an employment contract with another club) to pay € 7'750'000,-- compensation to Besiktas,

- to establish that the costs of this arbitration procedure will be borne by the Player,

- to condemn the Player to the payment of the legal expenses incurred by Besiktas."

II. LEGAL DISCUSSION

A. JURISDICTION OF THE CAS

66. As the CAS is an arbitral tribunal with seat in Switzerland and as neither party has his/its domicile or habitual residence in Switzerland, pursuant to Art. 176 of the Swiss Private International Law Act ("PILA"), chapter 12 of this act (Articles 176 to 194 PILA) is applicable to the present arbitration[1].

67. According to Art. 186 PILA, the arbitral tribunal shall rule on its own jurisdiction. Therefore, the Panel is competent to rule on his own jurisdiction.

68. Art. R27 of the Code provides the following: *"These Procedural Rules apply whenever the parties have agreed to refer a sports related dispute to the CAS. Such disputes may arise out of an arbitration clause inserted in a contract or regulations or of a later arbitration agreement (ordinary arbitration proceedings) |…| Such disputes may involve matters of principle relating to sport or matters of pecuniary or other*

[1] CAS 2005/A/983 & 984 marg. no. 61; CAS 2006/A/1180 marg. no. 7.1.

interests brought into play in the practice or the development of sport and, generally speaking, any activity related or connected to sport, [...]".

69. In the case under scrutiny, the Contract contains the following clause (Art. VII c): *"The Parties hereto consent to the exclusive and mandatory jurisdiction of the CAS - Court Arbitral of Sport* [sic] *and/or of the FIFA relevant bodies and authorities for the respective competence, in connection with any controversy arising out of or related in any way to the Agreement, and agree not to bring any action or proceeding arising out of or relating to this Agreement in any other court".* This clause is valid according to the criteria of Art. 178 PILA and the matter is capable of arbitration, within the meaning of Art. 177 PILA.

70. In addition, none of the parties raised any objection regarding the jurisdiction of the CAS to decide on the prayers for relief submitted to it.

71. In conclusion, the Panel finds that it has jurisdiction to rule upon the present dispute.

B. APPLICABLE LAW

72. According to Article R45 of the Code, *"The Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The parties may authorize the Panel to decide* ex aequo et bono*".*

73. In the case under scrutiny, Art. VII c) of the Contract provides: *"This Agreement shall be governed by and construed in accordance with the FIFA Regulations and the laws of Switzerland also due to the fact that the CAS Court Arbitral of Sport* [sic] *and FIFA bodies and authorities have seat in Switzerland."*

74. Accordingly, the Panel shall apply the Regulations of FIFA (in particular the Regulations on the Status and Transfer of Players version 2010, "RSTP") and Swiss law.

C. MERITS OF THE CASE

75. Given the parties' submissions, the Panel shall answer the following main questions: a) Did Mr Ferrari terminate the Contract based on Art. III b) of the Contract and/or for just cause? b) Based on the answer to the first question, does either of the parties owe compensation to the other and, if so, in which amount?

a) Did Mr Ferrari terminate the Contract based on Art. III b) of the Contract and/or for just cause?

76. The Contract between the parties was concluded for a fixed term and ought to have lasted until 31 May 2013. Such a contract may only be terminated upon expiry of the term of the contract or by mutual agreement (Art. 11 RSTP), unless a termination for just cause is possible (Art. 14 RSTP).

77. The RSTP does not define the notion of "just cause". For that reason, whether or not there was just cause is a matter that "*shall be established in accordance with the merits of each particular case*", with a certain "level" of breach being necessary to justify a termination.[2] Or, as determined in Art. 337 §2 of the Swiss Code of Obligations ("CO"): "*In particular, good cause is any circumstance which renders the continuation of the employment relationship in good faith unconscionable [unreasonable] for the party giving notice*" (§2). In other words, good (or "just" or "due") cause exists when the breach of the contract is of a certain severity, so that indeed in good faith a party cannot reasonably be expected to continue the relationship.

78. For instance, the non payment or late payment of remuneration constitutes a just cause for termination, under the condition that the outstanding amount may not be insubstantial or completely secondary and that the employee has given a warning to the employer, arguing a breach of contract.[3]

79. Furthermore, a just cause for termination by a player may also be admitted in a case where a professional player is excluded from the first squad for good, without a reasonable decision and the coach calls him in the media an "idiot" and a "betrayer". Further, a professional sportsman, such as a professional football player, has a particular interest in continuing to train in order to keep his value on the labour market, so that his future is not jeopardized.[4]

80. In the case at hand, the Claimant terminated the Contract before its term. The Panel shall therefore determine whether he did so with or without just cause.

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[2] FIFA Commentary on the RSTP, art. 14 N 2.
[3] CAS 2006/A/1180, marg. no. 8.4; CAS 2006/A/1100, marg. no. 8.2.5 *ff.*
[4] Decision of the SFT of 28 April 2011, in the case "Neuchâtel Xamax vs E. Barea", case no. 4A_53/2011, published in: ATF 137 III 303, § 2.1.2.

81. It is undisputed that on 30 June 2011 Besiktas owed Mr Ferrari an amount of EUR 1'505'000 as salaries, along with several additional amounts due as tax reimbursements and medical costs, as detailed in Mr Ferrari's letter dated 30 June 2011. At the time, Besiktas never contested any of these amounts.

82. Therefore, Besiktas was late in paying a substantial amount of remuneration, thus violating one of its main contractual obligations.

83. Before June 2011, Mr Ferrari gave numerous warnings to Besiktas in his successive letters and the Respondent did some partial payments in the course of time. In the last letter concerning remuneration, dated 30 June 2011, Mr Ferrari's lawyer wrote: "*This is our last notice; we warn you that if your Club does not pay the due amounts within 15 days after receiving this notification, Mr Ferrari reserves to exercise his right related to the termination of the Contract and will act in front of the FIFA relevant bodies without further notice*".

84. The Panel is therefore satisfied that the Claimant gave enough warning to the Respondent and clearly demonstrated that he did not agree with the delay in receiving his salary. The Panel is also of the view that the amounts due were substantial enough to justify a termination.

85. The conditions for a termination for just cause were therefore fulfilled and Mr Ferrari had the right to terminate the Contract with immediate effect.

86. Contrary to Besiktas' opinion, Mr Ferrari also respected the conditions set by the Contract. Indeed, based on Art. III b) of the Contract, Mr Ferrari could terminate the Contract, but had first to notify Besiktas in writing regarding the delay "*and if the Club does not pay the due amount within 15 days after receiving this notification, the present Agreement shall automatically terminate for just cause (...)*".

87. Mr Ferrari indeed sent a written notification on 30 June 2011. Contrary to Besiktas' opinion, Mr Ferrari did not have to wait until the end of the 15 days period fixed by this letter, given the new facts which occurred between that date and 7 July 2011.

88. Indeed, upon his arrival in Istanbul on 30 June 2011, Mr Ferrari was excluded from his team and forced to train with only one other player, in conditions unworthy of a professional football player of his level. In the meanwhile, the rest of the team travelled to Austria for a training camp, from which the Claimant was also omitted.

The Respondent did not give any valid reasons for these measures and did not properly inform the Claimant about his future at Besiktas. Rather, the Claimant had all reasons to believe that Respondent was neither contemplating his services any longer nor ready to fulfil the Contract. In fact, Besiktas did not show any intention of paying the outstanding remuneration, neither during nor after the 15 days period starting on 30 June 2011. In fact, Respondent never paid those amounts. Accordingly, on 11 July 2011, Claimant in good faith did not have any reason to expect Respondent to be willing, all of a sudden, to comply fully with the contractual obligations. Under such circumstances, Claimant was entitled to anticipate Respondent's non-compliance with its duties.

89. This makes unnecessary for the Panel to decide whether the exclusion itself from the training with the first squad and from the summer camp can be considered by itself an additional valid reason for an immediate termination of the Contract.

90. The Claimant was entitled to put an end to the Contract with immediate effect. He did so through the Notice of Termination dated 11 July 2011, in which he not only raised the issue of unpaid salaries, but also the unjustified negative measures taken against him by his employer.

91. Finally, Mr Ferrari terminated the Contract without undue delay. Indeed, he acted as soon as he realised that the situation in Istanbul would not change and had become unbearable. He returned to Italy on Thursday 7 July 2011, consulted with his lawyers, who immediately sent the Notice of Termination on the following Monday, the 11 July 2011.

92. Under these circumstances, Besiktas' argument according to which the Claimant would have abused of his right to terminate the Contract and that the termination would be invalid, cannot be followed.

93. In its submissions, Besiktas explains that Mr Ferrari had several injuries or relapses and would not have been fit to play in July 2011. Besiktas also criticises Mr Ferrari's behaviour under a private and a professional point of view. However, the Respondent does not draw a clear consequence from these facts in legal terms. In any case, according to Art. VII a) of the Contract, the Respondent must also pay the Claimant's salary in case of injury or illness contracted during football related activities such as matches or trainings. In the present case, Mr Ferrari was injured and followed a

treatment and a rehabilitation program first at the end of the year 2010, then from April to beginning of June 2011. Based on Art. VII a), he was nonetheless entitled to his salary also during these periods.

94. In view of the above, the Panel holds that the Claimant terminated the Contract on 11 July 2011 for just cause.

b) Does one of the parties owe compensation to the other and in which amount?

i) Is any compensation due?

95. Given the above conclusion, Claimant did not breach the Contract when sending his Notice of termination. Consequently, Besiktas' counterclaim is unfounded and must be rejected.

96. On the contrary, it is Besiktas that must indemnify Mr Ferrari. According to Art. 17 para. 1 RSTP, if a contract is terminated without just cause, "*the party in breach shall pay compensation*". Same applies basically under Art. 337b §1 CO: "*Where the good cause for terminating the employment relationship with immediate effect consists in breach of contract by one party, he is fully liable in damages with due regard to all claims arising under the employment relationship*".

97. In the present case, the parties agreed on a specific regime in case of termination based on Art. III b) of the Contract, which provides that in case he terminates the Contract Mr Ferrari is entitled to receive the total amounts still due as salaries "*until the natural term of the Agreement or until the date of signature by the Player of another employment contract*".

98. Based on the above, the Panel is satisfied that the regime agreed by the Parties must be interpreted as giving to the employee the possibility to receive all outstanding monies, unless under a new contract the employee receives an additional compensation. In such a case, the amount received in the same contractual period shall be deducted from the compensation due.[5]

[5] CAS 2003/O/540, Karlen v/ China Chongqing Lifan FC, sec. V.3, with reference to art. 337b of the Swiss Code of Obligations.

ii) Salaries and Compensation for loss of earnings

99. Mr Ferrari is entitled to receive the overdue salaries at the date of termination, i.e. EUR 1'490'500. Indeed, nothing has been submitted to make the Panel believe that this amount was already paid or not due.

100. Because of the breach of the Contract, Besiktas must also compensate the Player for the amount Claimant would have earned had the Contract ended at its natural term on 31 May 2013, i.e. EUR 5'000'000.

101. From these amounts, the Panel shall deduct Mr Ferrari's earnings since the year 2012. Mr Ferrari will earn USD 130'000 during the year 2012 based on his contract with the Canadian club Montreal Impact. Based on the information submitted to the Panel, the Panel holds that it is reasonable to estimate that this contract will continue until the end of the current year and will be renewed in 2013. Therefore, Mr Ferrari will earn USD 240'000 per annum in 2013, as provided in the contract with Montreal Impact. Thus, until the end of May 2013, Mr Ferrari will earn USD 100'000. Therefore, Mr Ferrari's total earnings from his contract with Montreal Impact will be of USD 230'000 and, therefore, of estimated EUR 176'000.

102. The Panel shall use this estimate based on Art. 42 CO, which provides that "*Where the exact value of the loss or damage cannot be quantified, the court shall estimate the value at its discretion in the light of the normal course of events and the steps taken by the injured party*".

103. Contrary to Besiktas' opinion, the Panel does not see any reason to deduct the fine of EUR 225'000 from this amount. Indeed, the Respondent did not prove that Mr Ferrari would have received notification of this fine. Also, no evidence or even argument was submitted to deduct from the above amount other savings made by the Player or other earnings received by Claimant from any other third party.

104. Thus, as a first, interim conclusion, Besiktas shall pay to Mr Ferrari an amount of EUR 6'314'500 (i.e. EUR 6'490'500 – EUR 176'000).

iii) Medical costs

105. In addition to remuneration, Mr Ferrari also claims for medical costs of EUR 5'803,62. This amount was duly proven through documents and, based on Art. V c),

Besiktas must reimburse it. Despite the Respondent's criticism, it is irrelevant that the invoices presented by Mr Ferrari are addressed to the Claimant and not to Besiktas. Given the fact that these invoices were already paid by the Claimant, Besiktas' duty to reimburse is toward him and not toward the medical professionals who issued the invoices. Besiktas must therefore pay EUR 5'803,62 to Mr Ferrari.

iv) Indemnification for moral tort

106. The Claimant also requested an indemnification for moral tort, initially without substantiating his request, though. He argued only that Besiktas breached Art. V c) of the Contract, as well as his personality rights, through its conduct in June and July 2011, in particular the fact of not letting him train in regular conditions and of having excluded him from the training camp in Austria.

107. Mr Ferrari based his request on the combination of Art. 49 CO, which provides at its §1: "*Any person whose personality rights are unlawfully infringed is entitled to a sum of money by way of satisfaction provided this is justified by the seriousness of the infringement and no other amends have been made*" and Art. 328 §1 CO, which has the following content: "*Within the employment relationship, the employer must acknowledge and safeguard the employee's personality rights, have due regard for his health and ensure that proper moral standards are maintained. In particular, he must ensure that employees are not sexually harassed and that any victim of sexual harassment suffers no further adverse consequences*".

108. The Claimant added in his subsequent submissions a reference to Art. 337c §3 CO, which provides: "*The court may order the employer to pay the employee an amount of compensation determined at the court's discretion taking due account of all circumstances; however, compensation may not exceed the equivalent of six months' salary for the employee*". Mr Ferrari than specified at the hearing that the amount he claimed for moral compensation was equivalent to six months of his salary.

109. Based on the evidence at hand, the Panel holds that Besiktas' behaviour, although in serious breach of the Contract, does not amount to a violation of Mr Ferrari's personality rights. In particular, the Claimant did not prove how Besiktas' acts would have influenced his reputation or what moral suffering he endured in concrete terms. The Panel considers therefore this claim as not sufficiently substantiated and rejects it.

110. Finally, the Claimant did not ask for any additional compensation under the title of specificity of sport, nor did he make reference to any provisions of any law of any country concerned, nor to any other objective criteria which, under art. 17 RSTP, may be taken into consideration by a panel when calculating the compensation due. [6] Therefore, in lack of a request, and keeping in mind that art. 17 RSTP asks a panel to duly consider any relevant objective criteria "unless otherwise provided for in the contract", it is not necessary for the Panel to establish whether the indemnification regime set out by the Parties in the Contract is of such exclusive nature or not.

v) Taxes

111. The Claimant requests payment of several amounts in connection with his duty to pay taxes in Italy. He bases his claim basically on Art. V a) of the Contract and on the obligation of Besiktas contained in that contractual provision to pay to Claimant a remuneration for his work "free from any and all taxes".

112. First, Claimant requests reimbursement of an amount of EUR 276'390,53. He argues that this amount was paid by him for the Italian taxes in 2009. The Panel notes that in the Settlement Agreement of 31 March 2011, Respondent confirmed that it had to pay to Claimant the amount of EUR 276'390,53 "*as reimburse* [sic] *of the taxes paid by you to the Italian Tax Authority, in accordance with art. V of the Agreement*". No evidence has been submitted to the Panel to show that such amount had been reimbursed to Claimant in the meantime. Further, the Panel is satisfied that the meaning of the Contract is clear, as it was acknowledged by the Parties in the Settlement Agreement, and that therefore Respondent has to reimburse the amount of EUR 276'390,53 to Claimant.

113. Second, Claimant requests a further reimbursement of an amount of EUR 664'558,28. This amount refers to the Italian taxes 2010 and roughly corresponds to the amount resulting out of the declaration made by Claimant to the Tax Authorities and submitted, in copy, to the Panel (Claimant Exhibit 12); however, the amount contained in such declaration is of EUR 659'947,80 only. Further, it is only the latter amount that the Player requested with his letter to Respondent of 30 June 2011 (Claimant Exhibit 12). Respondent acknowledged in the Settlement Agreement of 31 March 2011 the obligation to reimburse also the amount relating to the taxes 2010: "[...] *and we will consequently pay to you the due amount for taxes related to the season 2010/2011*

[6] CAS 2008/A/1519 and CAS 2008/A/1520, N 152 et seq.

[...]". On one hand, the Respondent has not provided the Panel with evidence that would either confirm that such amount has been in the meantime paid to Claimant or that would put in question the tax declaration filed by the Claimant and the calculations contained therein. On the other hand, the Claimant was not able to provide the Panel with convincing evidence based on which the amount of EUR 659'947.80 shall be increased to EUR 664'558,28. Also upon review of the Charts submitted by Claimant and prepared by his accountant (Claimant Exhibit 60) the Panel is not satisfied that the higher of the two amounts is due. Therefore, the Panel is satisfied that the Respondent has to reimburse to Claimant the amount of EUR 659'947,80.

114. Third, the Claimant asks for a payment of an undetermined amount "*for the amounts due, in accordance with Contract's clause V a), for the taxes due by the Player to Italian Tax Authority related to season 2011-2012 and 2012-2013*" (Statement of Claim, p. 31 et seq.).

115. In relation to this claim the Panel first notes that as mentioned above the request of the Player are explicitly limited to "*amounts due, in accordance with Contract's clause V a), for the taxes due by the Player to Italian Tax Authority related to season 2011-2012 and 2012-2013*"; accordingly, there is no request concerning any amounts that Player may have to pay to the Italian tax authorities in relation to the previous football seasons, other than those dealt with by the Panel in N 112 and N 113 above. Therefore, the Panel is of the view that he has to take into consideration only those amounts, if any, due in relation to the two football seasons 2011/2012 and 2012/2013.

116. Respondent disputes the obligation to pay any amount to the Player for taxes relating to the two football seasons 2011/2012 and 2012/2013. In particular, relying on a written note dated 31 May 2012 and prepared by the Istanbul branch of the company Ernst & Young, Respondent argues that if a compensation is paid to the Player, such payment is not treated as employment income "*but rather* [as] *an indemnification*" and that "*there should be no tax obligation of Mr Ferrari in Italy for his income to be derived after he left Turkey* [...]" (Note Ernst & Young, lit. C.b). The witness Mr Paolo Casarini, called by Claimant and responsible for the filing of tax returns of the Claimant in Italy, confirmed at the hearing that whether or not a certain payment would be subject to taxation in Italy depends on the nature of such payment. He further explained that a compensation for damages, due because of a breach of an

agreement, is normally qualified as indemnity and is not subject to taxation as if it was a salary.

117. Based on the above, the Panel is satisfied that the evidence submitted by the Parties confirms that any amount to be paid by Respondent to Claimant because of the breach of the Contract (*i.e.* the amount of loss earnings as per N 100 et seq. and the amount for medical expenses as per N 105 above) will not be treated by the Italian tax authorities as if it was salary. In any event, no convincing evidence was submitted to substantiate sufficiently a claim for a reimbursement on those other amounts. Therefore, the Panel is of the view that there is no obligation of Respondent to reimburse Claimant for an amount (i) which has been claimed on the basis of a rather abstract calculation, (ii) which has not been proven and (iii) which, according to the evidence submitted, will not be taxed as if it was salary.

118. Therefore, and without any need to analyze whether Claimant has sufficiently determined this part of his claim, the request of Claimant to be reimbursed for taxes on the amounts due to him by Respondent for the two football seasons 2011/2012 and 2012/2013 other than those indicated under N 112 (taxes 2009) and 113 (taxes 2010) shall be rejected. Of course, this does not mean that Claimant shall pay any taxes that may be due in Turkey on future payments. Rather, the Panel is satisfied that as in the past the obligation to pay Turkish taxes will weigh on the Respondent only. However, taking in consideration the requests of the Parties, the Panel does not see any reason to take a formal position on the (future) payment by the Respondent of any Turkish taxes.

vi) Summary

119. Taking in due consideration all the evidence submitted, and based on the above considerations, Respondent shall pay to Claimant an amount of EUR 7'256'641.95 (i.e. EUR 1'490'500 + 5'000'000 + 5'803,62 + 276'390,53 + 659'947.80 – 176'000).

vii) Late payment interests

120. The Claimant requested interest of 5% *per annum* on all amounts granted by the Panel. According to him, the interest should run from the date of termination, *i.e.* 11 July 2011.

121. According to Art. 339 CO "*When the employment relationship ends, all claims arising therefrom fall due*". Further, if some claims were already due before the end of the employment relationship, interest runs from that earlier date.

122. As soon as the claims fall due, according to Art. 104 §1 CO, the "*debtor in default on payment of a pecuniary debt must pay default interest of 5% per annum even where a lower rate of interest was stipulated by contract*".

123. In the case at hand, several categories of claims could be distinguished, with some claims that may have become due even before the termination of the Contract. However, Claimant asked for interests "*starting from 11 July 2011*" on all his claims. Therefore, since the Panel cannot go further than Mr Ferrari's claim, who requested interest to start running on 11 July 2011, the interest of 5% shall run from 11 July 2011 on all amounts due by Respondent.

viii) Further prayers and requests

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

III. COSTS

125. Pursuant to Article R64.4 of the Code, the CAS Court Office shall determine the final amount of the costs of arbitration.

126. Article R64.5 of the Code provides: "*the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the outcome of the proceedings, as well as the conduct and the financial resources of the parties*".

127. As to the legal costs, the Panel notes that Mr Ferrari prevails on nearly all his claims and that the proceedings were rather long, with several written submissions and a hearing. The Panel also takes into account the fact that Besiktas deliberately refused to pay Mr Ferrari's salary during several years, despite the fact that it recognised that

substantial amounts were due. By way of consequence, the Panel will grant Mr Ferrari a contribution to his legal fees and other expenses of CHF 25'000.

128. Having given due consideration to the circumstances of the present case and given its outcome, the Panel takes the view that the Respondent shall pay the costs of the proceedings. The costs of the present arbitration, which shall be determined and separately communicated to the parties by the CAS Court Office (Article R64.4 of the Code), shall be borne by Besiktas.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The request for arbitration filed by Mr Matteo Ferrari on 3 August 2011 is partially upheld.

2. Besiktas Futbol Yatirimlari San. Ve Tic. A.S. is ordered to pay to Mr Matteo Ferrari the amount of EUR 7'256'641.95 upon notification of this award, with interest of 5% per annum running from 11 July 2011 until full payment.

3. The costs of the present arbitration, which shall be determined and separately communicated to the parties by the CAS Court Office, shall be borne by Besiktas Futbol Yatirimlari San. Ve Tic. A.S.

4. Besiktas Futbol Yatirimlari San. Ve Tic. A.S. is ordered to pay the amount of CHF 25'000 as a contribution to Mr Matteo Ferrari's legal and other costs incurred in connection with this arbitration.

5. All other or further claims are dismissed.

Lausanne, 16 October 2012

THE COURT OF ARBITRATION FOR SPORT

Michele **Bernasconi**
President of the Panel

Efraim **Barak**
Arbitrator

Lucio **Colantuoni**
Arbitrator

Nora **Krausz**
Ad hoc clerk