Arbitration CAS 2006/O/1055 Del Bosque, Grande, Miñano Espín & Jiménez v. Beşiktaş, award of 9 February 2007

Panel: Mr Jean-Pierre Morand (Switzerland), President; Mr Michael Beloff QC (United Kingdom); Mr Bard Racin Meltvedt (Norway)

Football
Unilateral termination of the employment contract without just cause
CAS Jurisdiction
Res judicata
Damage mitigation
Burden of proof

1. **In the context of Art. 176 ff. PIL, mandatory provisions of foreign law providing for exclusive jurisdiction are, as a matter of principle, not applicable. The only exception would be in a situation where the application of foreign mandatory provisions is required from the point of view of public policy. There is no basis in Swiss public policy for CAS to decline jurisdiction based on the provision of Turkish law purporting to provide for mandatory jurisdiction of arbitral bodies established by the national football association, in particular in a situation where the arbitral proceedings imposed by these provisions do not appear to bring better guarantees of due process.**

2. **Arbitral panels have to observe former decisions which have *res judicata* status in respect of the issues submitted before them. However, a foreign decision can only have *res judicata* status in the above sense if the relevant decision can be recognised in Switzerland.**

3. **Art. 337c para. 2 CO, which sets forth the general principle of damage mitigation, is not a mandatory rule. The parties can agree that no deduction has to be effected. Therefore, if a clause of the employment contract expressly states that the compensation due in case of early termination shall *"under no circumstance"* be less than the amount as determined based on the rules set forth in the contract, it must be understood that the parties' agreement in connection with the determination of the compensations due was that no deduction would be applicable.**

4. **The party requesting a deduction in application of the general principle of damage mitigation bears the burden to establish the concrete elements which would have justified the application of the said deduction. To produce a newspaper article mentioning possible negotiations between the dismissed coach and a new club with a view to ask that the sums consequently earned be deducted from the compensation due clearly doesn't satisfy the party's burden of establishing factors justifying reduction of the compensation due to the dismissed coach.**

Mr Vicente Del Bosque González, Mr Antonio Grande Cereijo and Mr Francisco Jiménez Martin, of Spanish nationality, are professional coaches of football teams. Mr Francisco Javier Miñano Espín, who is also of Spanish nationality, is a professional physical trainer of football teams. All Claimants are presently resident in Spain.

Beşiktaş Futbol Yatirimlari San. VE TİC. A.Ş. ("Beşiktaş" or "the Respondent") is a football club with its registered office in Istanbul, Turkey. It is a member of the Turkish Football Federation ("TFA"), itself affiliated to the Fédération Internationale de Football Association ("FIFA") since 1923.

The contracts signed between the parties on 6 June 2004 (the "Private Contracts")

On 6 June 2004, Mr Vicente Del Bosque González entered a contract with the Respondent, which reads in pertinent parts:

*"**DECLARE***

That the Club and the Coach are interested in signing a contract for the football seasons 2004-2005 and 2005-2006, i.e from 6th June 2004 until 30th June 2006 and that the Club has an exclusive option to terminate the contract at the end of the first season.

Both parties fulfil the requirements and conditions to subscribe the present contract, and mutually agree to subscribe it under the following conditions.

CONDITIONS

***1.)** The Coach agrees to serve the Club faithfully and diligently to the best of his ability as coach on a full time basis for the period herein stipulated. In carrying out his duties, the Coach shall be responsible to the Board of directors of the Club (hereinafter referred to as "the Board") and the President.*

***2.) DURATION** - The contract will have a term of two seasons. It will be in force from 6th June 2004, until 30th June 2006. However, the Club has the exclusive option to terminate the contract at the end of the first season. In order to exercise this option, the Club must send a notification to the Coach's address in Turkey via notary by no later than 15th May 2005. If the club fails to do this, the contract will automatically expire on 30th June 2006. This contract is not subject to any try out period.*

3.) ECONOMICAL TERMS

A) NET SALARY

A1. For the season of 2004-2005

The Coach shall receive a yearly salary of net 1,750,000 Euro (One million and seven hundred and fifty thousand Euro).

The Coach shall receive his salary in the following instalments (…)

A2. For the season of 2005-2006, if the club does not use its option to terminate the contract

The Coach shall receive a yearly salary of net 2,250,000 Euro (Two million and two hundred and fifty thousand Euro).

The Coach shall receive his salary in the following instalments (…)

The payments mentioned in A1, A2 above are net amounts and free of any taxes.

B) BONUSES

The Club shall pay the Coach game net bonuses at a rate of 100%, established by the internal regulations of the club.

The Coach shall receive the following special bonuses:

Turkish League

- Winning the Championship of Turkey 300.000.- Euro net and free of any taxes

UEFA Cup

- Reaching the Semi Final 200.000.- Euro net and free of any taxes

- Reaching the Final 200.000.- Euro net and free of any taxes

- Winning the Final 300.000.- Euro net and free of any taxes

Champions' League

- Qualifying from the group stage 100.000.- Euro net and free of any taxes

- Reaching the Quarter Final 250.000.- Euro net and free of any taxes

- Reaching the Semi Final 500.000.- Euro net and free of any taxes

- Reaching the Final 1.000.000.- Euro net and free of any taxes

- Winning the Final 2.500.000.- Euro net and free of any taxes

(…)

C) TAX MATTERS

As a consequence of the payments (salary and bonuses) being free of taxes according to this agreement, the Club shall gross up the amounts to be paid taken into consideration the tax residence of the Coach.

In this sense:

C. 1) Considering the Spanish tax regulations, a tax rate of 45% shall be applicable to the net amounts fixed in paragraphs A) and B) to be paid during 2004. Consequently, the Club shall gross up the amounts stated in this agreement so that after deducting the tax rate of 45%, the net amounts fixed in paragraphs A) and B) are the result.

C. 2) The amounts fixed in paragraphs A) and B) to be paid during 2005 shall be calculated considering the tax regulations of Turkey, as the Coach will be considered as a tax resident of Turkey. Consequently, the Club shall gross up the amounts fixed in paragraphs A) and B) taken into consideration the tax rate stated in the applicable legislation in Turkey. The Coach will do his best efforts to be considered as tax resident in Turkey for the fiscal year 2005.

C. 3) The amounts fixed in paragraphs A) and B) to be paid during 2006 shall be calculated taken into consideration the tax rate of 45% as stated in the Spanish legislation. Consequently, the Club shall gross up the amounts fixed in paragraphs A) and B) taken into consideration the tax rate of 45% or the tax rate stated in the applicable legislation in Spain in 2006.

During 2004 and 2006, according to the Tax Treaty to avoid double taxation between Spain and Turkey, the Club shall withhold the non-residents tax and provide the Coach the documents certifying the withheld figure of this tax. As a consequence to the former the Club shall pay the Coach the net amounts agreed upon, plus the difference between the applicable Spanish tax rate (45%) and the tax rate applicable to the non-residents according to the Tax Treaty to avoid double taxation between Spain and Turkey.

Without prejudice to what is stated in this clause, the parties commit themselves to study other alternatives to structure and plan their respective tax obligations arising from this contract for a period of two (2) weeks from the date in which this contract is signed.

D) LABOUR AND SOCIAL SECURITY MATTERS AND OTHER EXPENSES

The Club shall be the sole responsible party for complying with all the labour obligations arising from this agreement. Under no event will the Club withhold any labour amounts to be paid to the competent labour authorities in Turkey from the Coach's salary and/or bonuses.

In the same sense, the Club will be the sole responsible party for any other expenses to be paid arising from this agreement, such as those resulting from the professional condition of the Coach in relation with the National Federations in Turkey or the Turkish National League.

The club shall provide the coach and his family a medical insurance.

E) OTHER BENEFITS

Appropriate housing: The Club shall provide the Coach during this contract a top level quality house. All the fixed expenses arising from the use of the house, such as insurance, taxes related to Real Estate and security, shall be paid by the Club.

Appropriate car: The Club shall provide the Coach during this contract a top level car. All the fixed expenses arising from the use of this car shall be paid by the Club, including insurances and maintenance costs.

4 return Business class flight tickets for the Coach and his family Istanbul - Madrid for each season.

Tuition fee of the school for the Coach's children.

A Turkish translator to Spanish shall be provided by the Club and shall pay all the expenses arising from this service.

F) COMPENSATION

3.F1. If the Club decides to terminate this contract before the termination of its duration, the Club shall pay the Coach all the salaries and bonuses pending at the date of termination. Under no circumstance, the amount resulting from the anticipated termination of this contract shall be under the figure that results from subtracting from 4,000,000 Euro net, the amounts paid by the Club until the date of this hypothetical termination. The amount to be paid resulting from the anticipated termination shall be paid taken into consideration the tax residence of the Coach at the moment of termination.

F2. If the Club uses its option to terminate the contract for the second season no later than 15th May 2005, the Club shall not pay the coach's salary for the second season. In this case, with respect to the agreed upon quantities for the 2004 - 2005 sport season, the Club shall do a recalculation of the amounts paid from the month of January 2005 always with the supposition that in this event the Coach should be considered as a tax resident in Spain, therefore applying a tax rate of a 45%.

F3. If the Coach resigns on his own reasons, he shall pay the outstanding salary for the period between the resigning date and the expiry date of the contract as a compensation to the Club.

G) BANK GUARANTEE

As a guarantee for the complying of the aforementioned obligations, the Club must submit to the Coach an autonomic bank guarantee before the 1st of July 2004 and must be executable at first request issued by an international, prestigious, renown entity for the maximum amount of 1,000,000 euros with a period of validity from the 1st of July of 2004 to the 30 of June of 2005. (…)

***6.)** The Coach shall be subject to the rules, regulations and by-laws of the Turkish Football Association, the Turkish Football League or successors or alternates thereto or any other organization of which these bodies or the Club is a member.*

***7.)** The Coach shall sign, each season, all the necessary documentation related to federative rights, federative card, and official agreement of the Turkish Football Association in order that the Turkish FA shall issue his license.*

8.) *Any disputes related to the actual contract should be submitted to the Court of Arbitration for Sports (CAS) in any cases of dispute/s, and will follow the Swiss legislation and the UEFA and FIFA regulations enforced at the time of any possible dispute. Both parties expressly renounce the submission of any dispute to any other governing body different from the CAS".*

On the same date and in parallel, each of the other Claimants also entered contracts with Respondent. These contracts have a content which is identical to the agreement with Mr Del Bosque, subject to the terms specific to each Claimant set forth below:

- The salary of Mr Antonio Grande Cereijo and Mr Francisco Javier Minano Espin for the seasons 2004-2005 and 2005-2006 amounts to EUR 260,000 net pro season. The salary of Mr Francisco Jiménez Martin amounts to EURO 130,000 net pro season.
- The bonus system is different.
- With regard to the other benefits, Mr Antonio Grande Cereijo is entitled to a high quality house and car.
- There is no bank guarantee.
- The minimum reference amount set forth in the second sentence of clause 3.F1 is EURO 520,000 in the case of Mr Antonio Grande Cereijo and of Mr Francisco Javier Minano Espin and EURO 260,000 in the case of Mr Francisco Jiménez Martin.

The contracts signed between the parties on 27 July 2004 (the "Single Type Contracts")

On 27 July 2004, each Claimant signed another agreement with the Respondent. The said document, which is the standard contract form of the TFA, contains the description of each Claimant's respective position with Beşiktaş and of their personal details.

The main characteristics of the Single Type Contract can be summarised as follows:

- It is a fix-term agreement for two years, effective until 31 May 2006. There is no express indication in connection with the consequences or the conditions of an early termination of the contract by either party. In particular, there is no direct reference to the exclusive option of Beşiktaş to terminate the contract for the end of the 2004-2005 season.
- It confirms the terms of the Private Contracts dated 6 June 2004 as regards the net amount of the Claimants' remuneration, bonuses and other benefits. Nonetheless, no mention is made regarding the calculation of the net amounts. The amounts of the monthly instalments were specified in an attachment to the Single Type Contract.
- The Single Type Contracts does not expressly address issues relating to labour and social security matters, to permits, to holidays or to commercial rights, contrary to the Private Contract.
- There is no mention of a bank guarantee.
- It contains the following provisions (as translated into English by the Respondent):

  "We, who signed the contract collectively declare and admit that we read the whole subject and terms written on the next page; know the other terms of the Instruction for Technical Manager and Trainer; will perform all duties

stipulated by Regulations; will comply with the Constitution, Rule and Regulations of Directorate of Football Federation of Turkey and the regulations to be in effect after executing this contract with all amendments to be made on Football Technical Manager and Trainer Instructions will be applied to us.

In case of a conflict, the decision to be made by Federation shall be solved by Arbitration Board. (…)

a) This single type contract which is a part of contracts to be made between the Club Representative and Technical Staff is prepared based on the terms of Football Technical Manager and Trainer Instruction. (…)

2. SPECIFIC TERMS

The Parties has declared as of 6/6/2004 that they executed a special contract in English arranging the rights and obligations arising from the contract made by and between the Technical Staff and the Club. This contract is in effect and valid with all legal consequences. If there is difference between the provisions of this contract and the special contract, the terms of the special contract will be held valid. Terms of the special contract is annexed (…)".

On 4 August, 1 September and 14 October 2004, the TFA approved and registered without reservation the Single Type Contracts signed by the parties.

The claimants' activities

Until 17 June 2004, the Claimants were living in Madrid, Spain, where they had their permanent home and where the centre of their vital interests was located. As a matter of fact, they all worked for the Real Madrid Football Club during season 1999/2000 to season 2002/2003. It is undisputed that during all those years, they carried out their work in Madrid, where they lived with their respective families.

On 17 June 2004, the Claimants moved from Spain to Turkey in order to provide their services as agreed with the Respondent.

On 27 January 2005, each Claimant received from the Respondent a letter stating the immediate termination of the employment contracts. No justification is given. The same day, the termination of the contracts as from 27 January 2005 was confirmed to the Claimants by a notary deed, which also does not mention any reasons for the termination.

The Respondent paid to the Claimants their net salaries from the month of July 2004 to the month of January 2005. The amounts paid as such take into account a gross up based on the Spanish tax rate of 45% ("the 45%-gross-up"). A 15% withholding tax was applied on the said gross amount.

At the date of the termination of the contracts, the net wages received by:

- Mr Vicente Del Bosque González amounted to EUR 750,000;
- Mr Antonio Grande Cereijo amounted to EUR 124,584;
- Mr Francisco Javier Miñano Espín amounted to EUR 124,584;
- Mr Francisco Jiménez Martin amounted to EUR 62,295.

On 14 April 2005, Mr Vicente Del Bosque González enforced the bank guarantee supplied to him by the Respondent. The guaranteed amount of EUR 1,000,000 was paid the next day.

Proceedings before the TFA and the FIFA

a) The conciliatory hearing before the TFA

By notary deed dated 9 February 2005 and notified to both Beşiktaş and the TFA, each of the Claimants requested the Respondent (as translated into English by the Claimants):

> "*to fully discharge and pay:*
>
> *1) The compensation contemplated for such event in clause 3.F.1 of the contract dated June 6, 2004 (…) and*
>
> *2) All the salaries and bonuses pending at the date of unilateral and without cause termination of the Contract dated June 6, 2004".*

In the same deed, each of the Claimants applied for the TFA to call a conciliatory hearing in the following terms (as translated into English by the Claimants):

> *"(…) for the sole purpose of instituting a conciliation procedure pursuant to the Establishment and Duties of the Turkish Football Federation Law No.3813, (…) [the Claimants] hereby formally serve notice of breach of the Federative Contract dated July 27, 2004 by the Club, to the Board of Directors of the Turkish Football Federation, requesting such body to adopt with urgency, all the appropriate measures arising from such breach of the Federative Contract dated July 27, 2004 by the Club. (…)*
>
> *Without prejudice of the foregoing, [the Claimants] hereby request the Board of Directors of the Turkish Football Federation to institute a conciliation hearing exclusively in order to reach an amicable settlement of the present dispute in the interest of both parties.(…)*
>
> *In case no amicable settlement is possible in the present dispute (…), [the Claimants] expressly reiterate the retain of [their] right to bring a complaint for breach of the contract dated June 6, 2004 by the Club before the Federation Internationale de Football Association (FIFA) and/or the body of arbitration that have cognizance for any litigation arising from the Contract dated June 6, 2004 pursuant to clause 8 of the Contract dated June 6, 2004, in other words, the Court of Arbitration for Sport".*

A hearing was held on 1 April 2005 in the presence of all the parties. No settlement was reached.

b) The proceedings before the FIFA

On 14 April 2005, the Claimants referred the case to the FIFA Players' Status Committee.

As regards Mr Francisco Javier Miñano Espín, FIFA confirmed on 20 May 2005 that the Players' Status Committee had no jurisdiction to deal with matters involving physical trainers.

Regarding Mr Vicente Del Bosque González, Mr Antonio Grande Cereijo and Mr Francisco Jiménez Martin, FIFA Players' Status Committee decided on 15 February 2006 *"that it is not competent to deal with the present affair and consequently, to abstain from taking a decision as to the substance in the matter at hand"*.

In the reasons for its decision, the FIFA Players' Status Committee clarified that it in fact it considered that the CAS had jurisdiction based on clause 2 of the Single Type Contracts read together with clause G81 of the Private Contracts.

c) The decisions of the TFA

On 25 July 2005, the TFA informed FIFA that:

- by signing the contract dated 27 July 2004, the parties expressly agreed to *"concede to the exclusive jurisdiction of the TFA in case of any dispute arising therefrom or in connection therewith. The parties to the dispute have further acknowledged that the Arbitration Committee under the TFA shall have exclusive jurisdiction to finally settle the dispute should any of the parties appeal against the decision of the TFA, as provided by the Employment Agreement"*. Moreover, and according to the TFA, its exclusive jurisdiction with regard to disputes arising from such Single Type Contracts is also given by the law No 3813 "*about the establishment and assignments of Turkish football federation"*.
- On 21 July 2005, based on the foregoing and on the request filed by the Claimants in their letter dated 9 February 2005, which the TFA interpreted as an implied submission to arbitration, the Board of Directors of the TFA examined and decided the dispute.

On 29 August 2005, the content of the decisions issued by the Board of Directors of the TFA on 21 July 2005 were communicated to the Claimants. The Board of Directors found that Beşiktaş had breached the employment contracts and that Mr Vicente Del Bosque González was entitled to EUR 738,098, Mr Antonio Grande Cereijo to EUR 93,169, Mr Francisco Javier Miñano Espín to EUR 93,169 and Mr Francisco Jiménez Martin to EUR 22,007.

In an allegedly timely manner, the Respondent initiated proceedings before the Turkish Football Federation Arbitral Tribunal and challenged the decision of the Board of Directors of the TFA regarding the compensation granted to Mr Vicente Del Bosque González.

It is undisputed that Mr Vicente Del Bosque González was not represented and did not take part in the proceedings before the Turkish Football Federation Arbitral Tribunal.

No appeal was filed with the said Arbitral Tribunal in connection with the decisions of the Board of Directors regarding the other Claimants.

On 5 January 2006, the Turkish Football Federation Arbitral Tribunal passed the following decision (as translated into English by the Respondent):

> *"In view of the foregoing reasons, it has been unilaterally resolved:*
>
> *a) To entertain the application filed by Besiktas A.S. and that Besiktas A.S. owes no further debts to Vicente Del Bosque Gonzales, the Technical Director; to partially diverse the resolution passed by TFF*

Board of Directors wherein the Board does not consider EURO 1,000,000.-, the amount of the letter of guarantee liquidated as a performance of the payment obligations required to be performed by Besiktas A.S. and ruling Besiktas A.S. to pay EURO 728,098. ;

b) To authorize Besiktas A.S. to claim the reimbursement of the payments made in excess to Vicente Del Bosque Gonzales; (…).

On 21 March 2006, the Claimants filed jointly a request for arbitration with the Court of Arbitration for Sport (the "CAS"). They submitted the following request for relief:

"A.- Upholds that the contracts executed between MR. VICENTE DEL BOSQUE GONZALEZ, MR. ANTONIO GRANDE CEREIJO, MR. FRANCISCO JAVIER MINANO ESPÍN AND MR. FRANCISCO JIMENEZ MARTIN and BESIKTAS FUTBOL YATIRIMLARI SAN VE TIC A.S. were unilaterally terminated without due cause by the Club.

B.- Upholds the right of each of my clients to collect the amount established as indemnity in Clause 3.F.A of the aforementioned Contract in the event of unilateral termination without due cause by the Club.

C.- Orders BESIKTAS FUTBOL YATIRIMLARI SAN VE TIC A.S. to pay:

(i) To Mr. VICENTE DEL BOSQUE GONZALEZ, the sum of € 5,909,090.91; less the € 1,000,000 received following enforcement of the bank guarantee, giving a total of € 4,909,090.91.

(ii) To Mr. ANTONIO GRANDE CEREIJO, the sum of € 718,938.18.

(iii) To Mr. FRANCISCO JAVIER MINANO ESPÍN, the sum of € 718,938.18.

(iv) To Mr. FRANCISCO JIMENEZ MARTIN, the sum of € 359,463.64.

D.- Also orders BESIKTAS FUTBOL YATIRIMLARI SAN VE TIC A.S. to pay, as indemnification for late payment, the statutory amount of interest on the amounts stipulated in section C and D from January 27, 2005 (date of the termination of the contracts without cause) until such date as they are paid.

E.- Also orders BESIKTAS FUTBOL YATIRIMLARI SAN VE TIC A.S. to pay all costs and expenses relating to the arbitration proceeding".

On 13 April 2006, the Respondent submitted to CAS the following prayers for relief:

"(…) the Respondent respectfully

ASKS

The Court of Arbitration for Sport (CAS) as follows

<u>Primarily</u>

I. To declare that the Court of Arbitration for Sport (CAS) is not competent to deal with the present arbitration proceedings due its lack of jurisdiction.

II. For the effect of the above, state that the Claimants shall be condemned to pay any and all costs of the present arbitration proceedings including, but not limited to the CAS administrative costs, the costs and fees of the arbitrators, the attorney fees, the eventual costs and expenses for witnesses and experts.

Only in the case that the above is rejected (counterclaim)

I. To declare that the "Request for Arbitration filed" by the Claimants is partially accepted as well as that the present "Counterclaim" filed by the Respondent against Mr. Vincente DEL BOSQUE GONZALES is fully accepted.

II. For the effect of the above:

a. to condemn the Respondent to pay respectively in favour of Mr. Antonio GRANDE CEREIJO the total amount of EUR 93,169.00, in favour of Mr. Francisco Javier MINANO ESPÍN the total amount of EUR 93,169.00 and in favour of Mr. Francisco JIMENEZ MARTIN the total amount of EUR 22, 007.

b. to condemn Mr. Vincente DEL BOSQUE GONZALES to return the Respondent the total amount of EUR 261, 902.00.

III. For the effect of the above, state that all costs of the present arbitration proceedings including, but not limited to, the CAS administrative costs, the costs and fees of the arbitrators, shall be borne by the Parties in equal shares as well as that each Party shall bear all its own legal expenses and other costs incurred in connection with the Present arbitration proceedings".

A hearing was held on 31 October 2006 at the CAS headquarters in Lausanne.

LAW

CAS Jurisdiction

1. The basis of the jurisdiction of CAS is clause 8 of the Private Contracts, which provides that *"Any disputes related to the actual contract should be submitted to the Court of Arbitration for Sports (CAS) in any cases of dispute/s, and will follow the Swiss legislation and the UEFA and FIFA regulations enforced at the time of any possible dispute. Both parties expressly renounce the submission of any dispute to any other governing body different from the CAS".*

2. Despite this express arbitration clause, Respondent disputes the jurisdiction of the CAS.

3. The Respondent in particular submits that the arbitration clause set forth in the Single Type Contracts and providing that *"[i]n case of a conflict, the decision to be made by Federation shall be solved by Arbitration Board"* took precedence over the arbitration clause of the Private Contracts providing for jurisdiction of the CAS.

4. The Respondent argues that, by signing the Single Type Contracts, the parties amended the Private Contracts so as to confer exclusive jurisdiction upon the competent bodies of the TFA.

5. The Single Type Contracts include a provision addressing the relationship of the two successive contractual documents executed by the parties which reads as follows:

"[t]he Party has declared as of 6/6/2004 that they executed a special contract in English arranging the rights and obligations arising from the contract made by and between the Technical Staff and the Club. This contract is in effect and valid with all legal consequences. If there is difference between the provisions of this contract and the special contract, the terms of the special contract will be held valid. Terms of the special contract is annexed (…)".

6. In view of the above, the Panel finds that the assumption that the parties would have had the intention to amend the content of the Private Contracts when they signed the Single Type Contracts is not only unsupported but in obvious contradiction with the intent clearly and expressly stated in the Single Type Contracts themselves.

7. Given the above, the facts, which the Arbitral Tribunal of the TFA regarded as relevant, namely that the Single Type Agreements are of a later date or that the jurisdiction clause is not crossed out, appear to be without relevance. The (later) Single Type Agreements themselves contain the rule giving precedence to the Private Contacts. Further, the existence of a precedence rule makes a precise physical suppression of provisions wholly unnecessary.

8. The Panel further finds that the submission to the conciliation procedure cannot in any way be interpreted as an implied submission to arbitration. On the contrary, in the notice dated 9 February 2005 addressed to the TFA, the Claimants insist on the fact that such is made for the sole purpose of conciliation and expressly reserve their right to file their claims in accordance with the arbitration clause set forth in the Private Contracts.

9. In conclusion, the Panel holds that its jurisdiction is established based on the arbitration clause set forth in the Private Contracts. Based on the express content of the Single Type Agreements, such clause prevails over the different solution provided for therein. Further, the submission to conciliation cannot be interpreted as an implied agreement to amend the existing agreement regarding arbitration, as arbitration in accordance with the Private Contracts Provisions is on the contrary expressly reserved in the submission.

10. The Panel further rejects the argument based on the fact that the arbitration clause of the Private Contracts could not be valid as it would be in contradiction with mandatory provisions of Turkish law. Allegedly, the exclusive competence of the jurisdictional bodies of the TFA would be established in the Law No 3813 *"about the establishment and assignments of Turkish football federation"*.

11. The argument raised concerns the arbitrability of the dispute in view of the existence of allegedly mandatory provisions of foreign law.

12. These arbitral proceedings are between parties with their domiciles, respectively their seat in foreign countries. They are accordingly subject to the provisions of Art. 176 ff. of the Swiss Federal Act on International Private Law (PIL).

13. Under PIL provision, the arbitrability of a dispute has to be assessed independently from the merits and specifically under Art. 177 PIL which provides that any claim of a patrimonial nature can be subject to arbitration.

14. In this context, mandatory provisions of foreign law providing for exclusive jurisdiction are, as a matter of principle, not applicable.

15. The only exception would be in a situation where the application of foreign mandatory provisions is required from the point of view of public policy. Reference is made in this respect to Art. 19 PIL which provides that a mandatory provision of another law than the one referred to in this Act may be taken into consideration, when interests that are legitimate and clearly preponderant according to the Swiss conception of law so require (Art. 19 para. 1 PIL, see DUTOIT B., Droit International Privé Suisse, Commentaire de la loi fédérale du 18 décembre 1987, Bâle 2005, p. 616).

16. The Panel observes first that the claims at stake are monetary claims and therefore are clearly of a patrimonial nature within the meaning of Art. 177 PIL.

17. Further, the application of the allegedly mandatory provisions reserving the exclusive jurisdiction of the jurisdictional bodies of the TFA does not raise an issue of public policy which could lead the Panel to decline jurisdiction.

18. First, the Panel notes that the text of the Law No 3813, the translation of which has been provided by the Respondent, does not even confirm the assertion that the alleged jurisdiction of the TFA jurisdictional bodies would be mandatory and could not be waived in favour of another jurisdictional solution. At the hearing, the Respondent indicated that the exclusive jurisdiction of the TFA judicial bodies only derived from constant domestic jurisprudence. The Respondent however did not produce any kind of authority to substantiate such allegation. Therefore, it is not established that the concerned provisions are indeed mandatory under Turkish law.

19. In any event, the Panel holds that, whether or not mandatory, the provisions at stake in this case, do not raise a relevant issue of public policy.

20. Indeed, these provisions do not even engage the jurisdiction of state courts but refer to arbitration by bodies established by the TFA – to which one of the parties is affiliated – i.e. in effect a process of arbitral or quasi-arbitral nature.

21. Assuming that the Board of Directors of the TFA and/or the Arbitral Tribunal of the TFA can be considered as having the necessary independence from the parties to be considered as a true arbitration body, which is put in doubt in the FIFA decision and is obviously not the case for the Board of Directors, the very fact that the law provides for an arbitral or similar process confirms in any event that the submission of the disputes at stake to arbitration does not constitute per se an issue of public policy under even Turkish law.

22. The Panel sees no basis in Swiss public policy to decline jurisdiction based on the provision of Turkish law purporting to provide for mandatory jurisdiction of the arbitral bodies established by TFA, in particular in a situation where the arbitral proceedings imposed by these provisions do not appear to bring better guarantees of due process.

23. In view of the above, the Panel holds that its own jurisdiction based on the arbitration clause set forth in the Private Contracts has to be affirmed.

Res Judicata

24. Based on the existence of the decisions issued by the TFA bodies, the Respondent raises the argument of *res judicata*.

25. It is correct that arbitral panels have to observe former decisions which have *res judicata* status in respect of the issues submitted before them (ATF 128 III 181).

26. However, a foreign decision can only have *res judicata* status in the above sense if the relevant decision can be recognised in Switzerland (ATF 124 III 83).

27. In respect to arbitral awards, the relevant text relating to the recognition of foreign arbitral awards is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (the "New York Convention") to which both Turkey and Switzerland are parties.

28. A fundamental condition for the recognition of an arbitral award is the fact that there was a proper agreement to arbitrate establishing the jurisdiction of the arbitration body which issued the decision.

29. As explained above in the discussion regarding jurisdiction, there is no such basis here. When properly construed, the provisions of the Single Type Agreements in fact confirm the prevalence of the provisions of the Private Contracts and therefore of the CAS arbitration clause.

30. Consequently, the jurisdiction of the TFA bodies does not have a basis in an existing arbitration agreement and *a fortiori* not one which could satisfy the requirements set forth in the New York Convention.

31. Given the above, the Panel notes that it is unnecessary to further examine whether the conditions related to proper notification and conduct of the proceedings were fulfilled. The Panel notes however that in the FIFA Decision serious issues were raised in that respect.

32. As a final comment, the Panel further observes that the proceedings before the Arbitral Tribunal involved only Mr Del Bosque but not the other Claimants. That would have raised another question in connection with the issue of *res judicata* if there was any *prima facie* justification for application of the doctrine. Indeed, it is clear that only the decision of the Arbitral Tribunal

could possibly qualify as a true arbitral award. The Board of Directors of the TFA obviously lacks the necessary independence to qualify as an arbitral court issuing awards representing true arbitral awards. For that reason also, no issue of *res judicata* could technically be raised in respect of the decisions concerning all Claimants but Mr Del Bosque.

Law Applicable to the Merits

33. Art. R45 of the Code of Sports-related Arbitration (the "Code") provides *"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"*.

34. Pursuant to clause 8 of the Private Contracts, the rules of law chosen by the parties are *"the Swiss legislation and the UEFA and FIFA regulations enforced at the time of any possible dispute"*.

The Merits

A. Termination without cause

35. It is undisputed that that the Respondent terminated the contracts entered into between the parties unilaterally and without a just cause as from 27 January 2005.

36. The agreements at stake are employment contracts of fixed duration.

37. The Claimants base their claims on Clause 3.F1 of the Private Contracts which provides essentially that, in the event of anticipated termination, the Respondent has to pay to the Claimants the full fixed amounts due to the Claimants until the end of the agreements, i.e. the end of season 2005-06.

38. The Panel notes that this contractual regulation is in line with the one set forth in Art. 337c CO, which provides that in case of termination without cause of an employment contract of set duration, the employer must, in principle, pay to the employee everything which the employee would have been entitled to receive until the agreed conclusion of the agreement.

39. The Respondent does not challenge its obligation to pay the compensation due to the Claimants until the end of the season 2004-05.

40. The Respondent however argues that no compensation is due in respect of the season 2005-06.

41. The Respondent develops its arguments in this respect on two different bases:

- The termination should be considered as an exercise of its contractual option set forth in Clause 3.F1 to terminate the contract for the second season.
- Even if the above contractual option was not applicable, Clause 19 of the TFA Technical Manger and Trainer Guide, which the Respondent considers as mandatory and overriding

any contrary contractual provision, would in any event set a limit on the compensation to be paid in case of termination without just cause. In such a case, the compensation would be limited to the compensation owed until the end of the current season.

a) Option to terminate the contract for the second season

42. The parties accepted to be contractually bound from 6 June 2004 until 30 June 2006. The consequences of an early termination of the employment agreements by the Respondent are exhaustively covered under clause 3.F1 and clause 3.F2 of the Private Contracts.

- The already mentioned Clause 3.F1 sets out a general rule: if the Respondent decides to put an end to the contract before 30 June 2006, it shall pay to the Claimants a compensation corresponding to the salaries that they would have earned if the employment relationship had not been interrupted before its fixed term.
- Clause 3.F2 addresses a specific situation where the Respondent decides to put an end to the contracts with effect after the first season. In such case, "If the Club uses its option to terminate the contract for the second season no later than 15th May 2005, the Club shall not pay the coach's salary for the second season".

43. On 27 January 2005, the Respondent wrote to each Claimant the following (as translated into English by the Claimants):

"(…) We would inform you that we have cancelled the Contract signed with you as from 27.01.05.

Yours faithfully".

44. The Respondent argues that, by so doing, it exercised in fact the option provided in clause 3.F2. The financial situation and compensation due to the Claimants should therefore be the same as if it had formally executed the option instead of dismissing the Claimant with immediate effect.

45. The Panel finds however that the termination with immediate effect issued by the Respondent cannot be considered as an exercise of the option provided in Clause 3.F2 but that Clause 3.F1 is applicable.

46. Clauses 3.F1 sets out expressly the general principles applicable in case of termination by the Respondent before the end of duration, i.e. payment of the full fixed compensation under deduction of amounts paid. It must be noted that Clause 3.F1 expressly refers to the amount corresponding to the full contractual duration.

47. Clause 3.F2 provides for a rule different from the one set forth in Clause 3.F1 in one specific situation, i.e. one where the Club terminates the agreement with effect for the second season before 15May 2005.

48. Clause 3.F2 is an exception to the application of Clause 3.F1. In effect, it corresponds to a reduction of the contractual duration to one season.

49. The Panel finds that Clause 3.F2 was obviously meant to apply to a situation of "regular" termination at the end of the season 2004-05 which is a "natural" ending date for contracts in the field of football, except for countries in which the season starts and ends in the same year.

50. In terms of effect on the concerned persons, such a termination represents a regular end of co-operation. It represents the application of a contractual modality and has as such no negative meaning.

51. A dismissal with immediate effect in the course of the season is of a different nature. Such dismissal implies failure by the concerned persons to perform their functions satisfactorily, if not a breach of their contractual obligations. It has a completely different impact on the concerned persons.

52. In this respect, the Panel notes Mr Del Bosque's testimony at the hearing, according to which the Claimants had agreed to clause 3.F2 bearing in mind that, if the Respondent were to decide to put an end to the employment agreements after the first year of contracts, such termination should not occur before the end of the season. The Panel indeed accepts that in terms of publicity, media coverage and direct as well as indirect repercussions, an immediate layoff indisputably has a much more negative impact than the non-continuation of an employment contract finishing in an orderly manner at the end of a season. It is therefore reasonable to assume that the possibility contemplated by Clause 3.F2 to shorten the agreement was only agreed upon on the basis that it would correspond to ending it at a "regular" termination point.

53. It is notable that the Respondent itself did not refer to or purport to rely upon the option when it terminated the agreement, nor did it then effectively continue to pay the compensations until the end of the season 2005, including in this case applicable bonuses, if any.

54. The Panel accordingly finds that the immediate termination issued by the Respondent on 25 January 2005 cannot be considered as an exercise of the option set forth in Clause 3.F2. As effected, the termination represents a breach of the agreement by the Respondent and, in such a case, the general rule set forth in Clause 3.F1 is applicable.

55. Given the above, it does not appear necessary to examine further, or to determine whether the option to shorten the agreement would have been considered as valid under the applicable provisions of Swiss law.

56. We note, however, pursuant to art. Art. 335a CO, *"Notice periods shall not differ for the employer and the employee. In case of an agreement to the contrary, the longer period shall be valid for both parties"*. This provision is mandatory (ATF 108 II 115; WYLER R., Droit du Travail, Berne 2002, p. 322; ATF 123 III 246; TERCIER P., Les Contrats Spéciaux, 3ème édition, 2003, N. 3312, p. 482).

57. Therefore, the validity of the unilateral option allowing the Respondent to terminate the agreement after one year, while the Claimants were bound for the full contractual term would have been questionable in any event.

b) Article 19 of the TFA Technical Manager and Trainer Guide

58. According to Art. 19 of the TFA Technical Manager and Trainer Guide (as translated into English by the Respondent), *"When clubs terminate the duty of Technical Staff appointed for Professional Teams in an unfair and one sided way, they are obliged to fulfil the financial obligations of Technical staff written in the agreement until the end of the season"*.

59. The Respondent understands the quoted provision as limiting the financial obligations of the Club to a maximum compensation corresponding to what would have been due pursuant to the agreement until the end of the season even if the concerned agreement had been entered for a longer term or had included a longer notice. The Respondent further holds that this provision is applicable by incorporation and is mandatory.

60. The Panel finds that the arguments of the Respondent have to be rejected for the following reasons:

- First the Panel cannot accept the interpretation given to Article 19 by the Respondent. In fact, the logical interpretation of this provisions seems rather to consider it as a minimum protection of the Technical staff against lay offs during the course of a season even when they are not protected by their contracts, because it may be difficult to find a new employment during a season and there even appears to be restrictions on doing so. To give Article 19 a meaning protecting the clubs against any claims going beyond the season end, even if the agreements at stake provided for longer terms or notice periods seems to turn the logical meaning of Article 19 on its head.
- The Panel further observes that the application of the solution of Article 19, as interpreted by Respondent and therefore in contradiction with the content of the Private Contracts, would also be in contradiction with the prevalence rule set forth in Art. 8 of the Single Type Agreements. If it is different from the provisions of the Private Contracts, then the contractual stipulation is precisely that the provisions of the Private Contracts shall prevail, which leaves no room for the application of the solution of Article 19 as interpreted by the Respondent.
- Finally, the argument that Article 19 would be mandatory is of no relevance. If anything and as interpreted by the Respondent, the regulation set forth in Article 19 is itself in clear contradiction to mandatory rules of the applicable Swiss law, including in particular Art. 337c and 362 CO providing that the rules regarding compensation due in case of termination without just cause by the employer cannot be altered to the detriment of the employee.

61. It follows that the Respondent cannot rely upon Art. 19 of the TFA Technical Manager and Trainer Guide in order to escape from its obligation to pay compensation for season 2005-2006.

B. Calculation of compensations to be awarded

62. The compensations due to the Claimants has to be calculated according to the Clause 3.F1 of the Private Contracts.

63. It is not disputed that the Respondent has paid the Claimants the compensations due until termination.

64. Further Mr Del Bosque received the amount of the guarantee amounting to one million euros.

65. As far as Mr Vicente Del Bosque González is concerned, Clause 3.F1 of the Private Contract reads as follows:

"If the Club decides to terminate this contract before the termination of its duration, the Club shall pay the Coach all the salaries and bonuses pending at the date of termination. Under no circumstance, the amount resulting from the anticipated termination of this contract shall be under the figure that results from subtracting from 4,000,000 Euro net, the amounts paid by the Club until the date of this hypothetical termination. The amount to be paid resulting from the anticipated termination shall be paid taken into consideration the tax residence of the Coach at the moment of termination".

66. Clause 3.F1 of the agreements concerning the other Claimants is identical, except for the overall net amount from which are deducted the monies paid by the Club until the date of the termination, which is EUR 520,000 for Mr Antonio Grande Cereijo, EUR 260,000 net for Mr Francisco Jiménez Martin and EUR 520,000 for Mr Francisco Javier Miñano Espín.

67. Under such clause 3.F1, the amount due to the Claimants must be a "net amount", on the one hand and, on the other hand, *"The amount to be paid resulting from the anticipated termination shall be paid taking into consideration the tax residence of the Coach at the moment of termination".*

68. The Private Contracts include complex regulations regarding tax, depending on assumed tax residencies at the moment of payment.

69. The overall intent is however clear: the contractual amounts were to represent "net" amounts, i.e. amounts after application of the personal income tax rate.

70. The reference to the *"tax residence of the Coach at the moment of termination"* has no other meaning.

71. This general unspecific reference is logical in the context of a clause, which by definition is not meant to apply at a moment which can be determined in advance, in contrast to the detailed regulation in respect of the regular payments under the agreement which is based on an assumed planned evolution of tax residence of the Claimants.

72. The reference to the moment of termination assumes that the compensation would have been paid immediately. This could have raised a problem of interpretation in case of delay in payment, if the tax residence of the Claimants had changed since the date of termination.

73. As it stands, all Claimants were all resident in Spain at the time of termination and are still all resident in the same country.

74. The tax rate applicable in Spain is 45 %. This is the rate which is referred to in the agreements. In addition, the expert-witness heard at the hearing confirmed that this had been and still was the tax-rate applicable in Spain.

75. Consequently, the rate to be taken into consideration for the gross-up to be effected on the net amounts due to the Claimants shall be 45 %.

76. Further, at the hearing, the Respondent confirmed that no taxes would have to be withheld or paid to the Turkish tax authorities in connection with compensations which would be awarded to the Claimants.

77. Based on the foregoing, the Panel finds that the amount due to the Claimants shall be the net sums due in application of Clause 3.F1 increased by a 45 % gross-up.

a) Compensation for Mr Vicente Del Bosque González

78. *"Under no circumstance, the amount resulting from the anticipated termination of this contract shall be under the figure that results from subtracting from 4,000,000 Euro net, the amounts paid by the Club until the date of this hypothetical termination"*. At the date of the termination of the contracts, the net salaries already received by Mr Vicente Del Bosque González amounted to EUR 750,000. The net amount due is therefore EUR 3,250,000.

79. After application of the 45 % gross-up, the compensation due to Mr Vicente Del Bosque González amounts to EUR 5,909,090.90 (= 3,250,000 x 100/55).

80. The amount of EUR 1,000,000 already received by Mr Del Bosque based on the bank guarantee shall of course be deducted. Mr Vicente Del Bosque González is therefore entitled to receive a balance of EUR 4,909,090.90.

b) Compensation for Mr Antonio Grande Cereijo

81. *"Under no circumstance, the amount resulting from the anticipated termination of this contract shall be under the figure that results from subtracting from 520,000 Euro net, the amounts paid by the Club until that date"*. At the date of the termination of the contracts, the net salaries already received by Mr Antonio Grande Cereijo amount to EUR 124,584. The net amount due is therefore EUR 395,416.

82. After application of the 45 % gross-up, the compensation to be awarded to Mr Antonio Grande Cereijo amounts to EUR 718,938.18 (= 395,416 x 100/55).

c) Compensation for Mr Francisco Javier Miñano Espín

83. *"Under no circumstance, the amount resulting from the anticipated termination of this contract shall be under the figure that results from subtracting from 520,000 Euro net, the amounts paid by the Club until that date".* At the date of the termination of the contracts, the net salaries received by Mr Francisco Javier Miñano Espín amounted to EUR 124,584. The net amount due is therefore EUR 395,416.

84. After application of the 45 % gross-up, the compensation to be awarded to Mr Francisco Javier Miñano Espín amounts to EUR 718,938.18 (= 395,416 x 100/55).

d) Compensation for Mr Francisco Jiménez Martin

85. *"Under no circumstance, the amount resulting from the anticipated termination of this contract shall be under the figure that results from subtracting from 260,000 Euro net, the amounts paid by the Club until that date".* At the date of the termination of the contracts, the net salaries already received by Mr Francisco Jiménez Martin amounted to EUR 62,295. The net amount due is therefore EUR 197,705.

86. After application of the 45 % gross-up, the compensation to be awarded to Mr Francisco Jiménez Martin amounts to EUR 359,463.63 (= 197,705 x 100/55).

C. No adjustment

87. None of the Claimants were involved in any remunerated professional activities until the end of the formal duration of their contracts with the Respondent, namely until 30 June 2006. At the hearing, the Claimants confirmed that they had actively looked for new contracts but only had informal negotiations, which did not lead to any concrete agreements. At the time of the hearing most of the Claimants including Mr Del Bosque were still looking for fresh employment.

88. The Respondent argues that the Claimants, and in particular Mr Del Bosque, could or should have taken another work and the sums consequently earned should be deducted from the compensation due to them.

89. Art. 337c para. 2 CO sets forth the principle that any amount which the employee saved, earned or intentionally failed to earn further to termination can be deducted in mitigation of the amount of the compensation. This reflects the general principle of damage mitigation.

90. However, art. 337c para. 2 CO is not a mandatory rule (see art. 361 and 362 CO). Therefore the parties can agree that no deduction has to be effected (see ATF of 5 January 1995, JAR 1996, p. 195 and 197).

91. Clause 3.F1 of the Private Contracts provides expressly that the compensation due shall *"under no circumstance"* be less than the amount as determined based on the rules set forth therein.

92. The Panel therefore holds that the parties' agreement in connection with the determination of the compensations due based on Clause 3.F1 was that no deduction would be applicable.

93. The Panel notes that, even if such a deduction would not be excluded in principle, the Respondent in any event failed to establish the concrete elements which would have justified the application of a deduction and for which it bore the burden of proof.

94. The only material adduced by the Respondent is a newspaper article produced at the hearing and mentioning possible negotiations between a club and Mr Del Bosque. Mr Del Bosque denied that there had been any effective discussion with the mentioned club.

95. The Respondent did not adduce any other material in regard to Mr Del Bosque and none at all in connection with any of the other Claimants. This clearly would not satisfy the Respondent's burden of establishing factors justifying reduction of the compensations due to the Claimants.

96. It follows that there is no reason to adjust the compensation determined above.

Conclusion

97. Based on the foregoing, the Panel concludes that the compensation to be awarded to:
    - Mr Vicente Del Bosque González shall be an amount of EUR 4,909,090.90;
    - Mr Antonio Grande Cereijo shall be an amount of EUR 718,938.18;
    - Mr Francisco Javier Miñano Espín shall be an amount of EUR 718,938.18;
    - Mr Francisco Jiménez Martin shall be an amount of EUR 359,463.63.

98. The Claimants have applied for the payment of interests. In the absence of a specific contractual rate, the legal interest rate set forth in Art. 104 CO (i.e. 5 %) is applicable.

99. In accordance with art. 339 para. 1 CO, all claims arising from an employment relationship become due upon its termination. Therefore, the interest of 5% applies from the date of the dismissal of the Claimants (ATF 103 II 274; ATF 4C.321/2005 of 27 February 2006), that is from 27 January 2005.

Confidentiality

100. Art. R43 of the Code provides as follows:

"Proceedings under these Procedural Rules are confidential. The parties, the arbitrators and the CAS undertake not to disclose to any third party any facts or other information relating to the dispute or the proceedings. Awards shall not be made public unless the award itself so provides or all parties agree".

101. By their respective communications of 23 November 2006 and 7 February 2007, the Respondent and the Claimants have confirmed that the award could be made public. The award will therefore provide accordingly.

The Court of Arbitration for Sport rules that:

1. Beşiktaş Futbol Yatirimlari San. VE TİC. A.Ş. is ordered to pay to Mr Vicente Del Bosque González the amount of EUR 4,909,090.90 (four million nine hundred and nine thousand ninety Euro and ninety cents), plus interest at 5% (five percent) as from 27 January 2005.

2. Beşiktaş Futbol Yatirimlari San. VE TİC. A.Ş. is ordered to pay to Mr Antonio Grande Cereijo the amount of EUR 718,938.18 (seven hundred eighteen thousand nine hundred and thirty-eight Euro and eighteen cents), plus interest at 5% (five percent) as from 27 January 2005.

3. Beşiktaş Futbol Yatirimlari San. VE TİC. A.Ş. is ordered to pay to Mr Francisco Javier Miñano Espín the amount of EUR 718,938.18 (seven hundred eighteen thousand nine hundred and thirty-eight Euro and eighteen cents), plus interest at 5% (five percent) as from 27 January 2005.

4. Beşiktaş Futbol Yatirimlari San. VE TİC. A.Ş. is ordered to pay to Mr Francisco Jiménez Martin the amount of EUR 359,463.63 (three hundred fifty-nine thousand four hundred sixty-three Euro and sixty-three cents), plus interest at 5% (five percent) as from 27 January 2005.

5. All other claims and counterclaims are dismissed.

(…)

8. The present award shall be made public.