Arbitration CAS 2009/A/1991 Kuwait Sporting Club v. FC Flora Tallinn & Fédération Internationale de Football Association (FIFA), award of 14 June 2010

Panel: Mr Lars Hilliger (Denmark), President; Mr Michele Bernasconi (Switzerland); Mr Rui Botica Santos (Portugal)

Football
Breach of a loan agreement validly concluded
FIFA standing to be sued
Interpretation of a contractual clause
Contractual clause relating to the player's health
Inducement to enter into an agreement by the deceptive conduct of the counterparty and burden of proof
Compensation for breach

1. **If submissions filed by an appellant contain a specific request against FIFA and FIFA filed an answer in the proceedings asking the CAS panel to reject the appeal and to uphold the decision of its body, and, furthermore, FIFA signed the order of procedure whereby it accepted the CAS jurisdiction and was present at the hearing, where it fully exercised its right to be heard, then FIFA should be considered as a respondent in the procedure.**

2. **When the interpretation of a contractual clause is in dispute, the judging body seeks the true and mutually agreed upon intention of the parties, without regard to incorrect statements or manner of expressions used by the parties by mistake or in order to conceal the true nature of the contract (Art. 18 par. 1 of the Swiss Code of Obligations, CO). When the mutually agreed real intention of the parties cannot be established, the contract must be interpreted according to the requirements of good faith. The judging body has to seek to determine how a declaration or an external manifestation by a party could have been reasonably understood depending on the individual circumstances of the case. The requirements of good faith tend to give the preference to a more objective approach. The emphasis is not so much on what a party may have meant but on how a reasonable man would have understood his declaration.**

3. **A provision whereby a club lending a player to another club undertakes that the physical condition of said player is fit does not mean that the club is responsible for any *"chronic injury"* which could possibly affect the player and which could be revealed by a more detailed medical examination than the one positively performed in the context of an employment contract to be signed between the new club and the player. It is the responsibility of the new club to organise the medical examination it would have deemed appropriate as soon as possible. Under the circumstances and considering the signature of the employment contract between the player and the new club, the latter should be considered as having accepted that the loan agreement was validly conducted**

and in full force. The new club cannot shift the consequences of its own negligence and carelessness to its contractual counterparty.

4. **According to article 28 para. 1 CO, to scholars and to the jurisprudence of the Swiss federal Court, the intention to deceive the other contracting party is a key factor in the legal definition of *"wilful fraud"*. It requires that the deceiver is fully aware that its actions will lead the deceived party to enter into the envisaged contract based on some mistake, lie or error that has been contrived by the deceiving party. The actual deception appears in many different shapes and forms. It can be an outright untruth or it can also involve the employment of an artifice planned to prevent inquiry or escape investigation and to mislead or hinder the acquisition of information. With regard to the burden of proof, it is the duty of the party alleging a fraud – such as a misinformation about a player's good health – to objectively demonstrate the existence of what it alleges (art. 8 of the Swiss Civil Code). It is not sufficient for it to simply assert a state of fact for the panel to accept it as true.**

5. **When a loan agreement is legally binding between the parties and when there is no just cause or reason to rescind such contract, the party that duly executed its side of the loan agreement, is entitled to be placed in the position that it would have had if the contract had been performed properly by its counterparty.**

Kuwait Sporting Club is a football club with its registered office in Kaifan, Kuwait. It is a member of the Kuwait Football Association, itself affiliated to the Fédération Internationale de Football Association since 1964.

FC Flora Tallinn is a football club with its registered office in Tallinn, Estonia. It is a member of the Estonian Football Association, itself affiliated to the Fédération Internationale de Football Association since 1923.

The Fédération Internationale de Football Association (FIFA) is the world governing body of Football and has its registered office in Zurich, Switzerland.

Z. (the "Player") is a professional footballer player. He was born in 1982 and is of Estonian nationality.

On 1 January 2007, FC Flora Tallinn signed with the Player a fix-term employment contract, effective from 1 January 2007 to 30 November 2009.

On 26 January 2007, FC Flora Tallinn entered into an agreement with Kuwait Sporting Club for the temporary loan of the Player (the "Loan Agreement"). The main characteristics of the Loan Agreement can be summarised as follows:

- FC Flora Tallinn accepted to loan the Player to Kuwait Sporting Club from 26 January to 30 July 2007.

- In exchange, Kuwait Sporting Club agreed to pay to FC Flora Tallinn USD 100,000 on 1 February 2007, USD 100,000 on 1 March 2007 and USD 80,000 on 1 April 2007.
- Among other obligations, Kuwait Sporting Club also committed itself to sign a labour agreement with the Player as from the signing of the contract until 30 July 2007 and, for the same period, to pay him a monthly salary of USD 20,000 net, to provide him with a free apartment, local transportations and one return flight ticket (Tallinn – Kuwait – Tallinn) for him and his family.
- Article 2.2 of the Loan Agreement states that *"FC Flora Tallinn undertakes that the Physical Condition of the said player is fit, and he is not suffered from any chronic injury"*.
- According to article 4.2 of the Loan agreement, *"The Loan agreement comes to force after player Z. has passed the medical-examinations"*.
- Furthermore, according to the Loan Agreement Kuwait Sporting Club was granted the option to unilaterally decide to enter into a labour agreement with the Player for the period running after 30 July 2007. If it wanted to exercise this option, it had to do so before 15 June 2007 and pay to FC Flora Tallinn a further transfer fee of USD 1,000,000.

On 26 January 2007, the Player underwent a medical examination arranged by Kuwait Sporting Club and conducted by the club's doctors and was found to be in good health.

The same day, the Player entered into a labour contract with Kuwait Sporting Club, effective from 26 January until 31 July 2007 (the "Labour Agreement"). His wages were in accordance with the terms of the Loan Agreement signed between the two clubs.

During the first couple of weeks of his contractual relationship with Kuwait Sporting Club, the Player took part in at least two friendly matches and attended several training sessions after which the Player started to complain about some pain in his knees.

On 8 February 2007, Kuwait Sporting Club referred the Player to the Hadi Clinic, in Hawally, Kuwait, where a magnetic resonance imaging test ("MRI") was carried out on his left leg. The Player was diagnosed as suffering from a *"Chronic recurrent complex tear of the posterior horn of medial meniscus. Thickness tear of the reconstructed ACL and inflammatory reaction. Significant Achilles tendonitis"*.

On or about 9 February 2007, Kuwait Sporting Club apparently requested the Player to sign another contract for a trial period of three weeks, during which he had to prove himself to be a good scorer, failing which he would be sent back to FC Flora Tallinn. Furthermore, Kuwait Sporting Club warned the Player that, should he refuse to sign this contract, it would consider the Loan and Labour Agreements as null and void. The Player did not accept the new deal.

On 10 February 2007 (by means of faxes dated 8 February), Kuwait Sporting Club notified the Player as well as FC Flora Tallinn of the fact that it considered the Loan and the Labour Agreements as null and void.

Since February 2007, the Player did not play for any other club until he resumed his duty with FC Flora Tallinn on 31 July 2007. He presently plays in the Portuguese Liga, for the football club União Desportiva de Leiria.

It is not contested that since July 2007, when the Player resumed his duties with the FC Flora Tallinn, the Player has always been fit to play.

On 16 February 2007, the Player initiated proceedings with the FIFA Dispute Resolution Chamber (DRC) to order Kuwait Sporting Club to pay in his favour an amount of EUR 120,000 as compensation for the unilateral termination of the Labour Agreement without just cause.

Before the DRC, Kuwait Sporting Club contended that both the Loan and the Labour Agreements were signed on 26 January 2007, which was only five days before the end of the registration period in Kuwait (i.e. 31 January 2007). According to Kuwait Sporting Club, the parties to the various contracts knew that it could materially not submit the Player to a complete medical check-up before 31 January 2007, when the registration period (transfer window) would close in Kuwait, and, therefore, accepted to insert articles 2.2 and 4.4 in the Loan Agreement, in order to preserve the rights of Kuwait Sporting Club, in case a *"chronic injury"* would be revealed by a subsequent examination to be performed more thoroughly on the Player. Kuwait Sporting Club claimed that if it had had the time to refer the Player to a fully equipped medical establishment before the end of the said registration period, the Player's *"chronic injury"* would had been detected and, consequently, the litigious Labour Agreement would not had been signed. Kuwait Sporting Club deemed that articles 2.2. and 4.4 of the Loan Agreement had been breached, respectively by FC Flora Tallinn and by the Player. As a result, it was of the opinion that it had a just cause to put an immediate end to both contracts.

On 15 February 2008, the DRC accepted the claim of the Player notably on the following grounds:

- The Labour Agreement was validly concluded for a period of 6 months.
- Pursuant to article 18.4 of the applicable FIFA Regulations on the Status and Transfer of Players, clubs cannot submit the validity of an employment contract to the positive results of a medical examination. Hence a prospective club needs to undertake all necessary research and to take all appropriate steps before concluding a contract. Once an employment contract has been signed, the employee involved can rely in good faith on it being respected and enforced.
- On 26 January 2007, at the moment of the signature of the Labour Agreement, the Player had been examined by the doctor of Kuwait Sporting Club and found to be physically fit. From that moment, the employment contract was in full force.
- The MRI test had been performed on the Player on 8 February 2007, which is after the signature of the Labour Agreement.
- The Loan Agreement and the Labour Agreement signed on 26 February 2007 are two distinct and independent contracts. Consequently, the alleged contractual commitments taken by FC Flora Tallinn in the Loan Agreement could not be used as an argument against the Player in any manner.

In view of the above, the DRC held that Kuwait Sporting Club breached the Labour Agreement without just cause. Based on article 17.1 of the applicable FIFA Regulations on the Status and Transfer of Players, it decided that Kuwait Sporting Club had to pay to the Player the amount of EUR 120,000 as compensation. This amount corresponded to the salaries that the club failed to pay to the Player. In accordance with article 17.4 of the said FIFA Regulations, the DRC also banned Kuwait Sporting Club from registering players, either nationally or internationally, for two registration periods.

On 30 December 2008, the Court of Arbitration for Sport (CAS) upheld the decision passed by the DRC on 15 February 2008 and confirmed that Kuwait Sporting Club had breached the Labour Agreement without just cause (CAS 2008/A/1593).

In particular the CAS confirmed the following (par. 108 and 109).

> *"(…) the insertion of a clause in the Employment Contract which subjected the transfer to a successful medical examination is illegal and contrary to article 18.4 of the FIFA Regulations. The Club cannot therefore justify its termination of the Employment Contract on the basis of an illegal clause contained under the same Employment Contract or in a contract that the Player was not party to.*
>
> *The Loan Agreement and the Employment Contract are completely autonomous and independent contracts, which have no relation to each other. The agreements under the Loan Agreement cannot be applied or invoked to the Employment Contract and vice versa. The Clubs´ arguments in self defence that they were justified in terminating the Employment Contract on the basis of FC Tallinn's false contractual declarations under the Loan Agreement are therefore rejected".*

It is undisputed that, to date, Kuwait Sporting Club complied with the above decisions of the CAS and of the DRC.

On 13 February 2007, FC Flora Tallinn lodged a complaint before FIFA against Kuwait Sporting Club claiming that the latter had breached the Loan Agreement. It requested FIFA to order Kuwait Sporting Club to pay in its favour the complete loan fee, as provided under the said contract.

On 2 February 2009, Kuwait Sporting Club confirmed to FIFA the position it held before the DRC during the proceedings initiated by the Player. It insisted on the fact that it signed the Labour Agreement based on FC Flora Tallinn's incorrect information about the Player's exact health condition. Furthermore, it claimed that article 18.4 of the FIFA Regulations on the Status and Transfer of Players was only applicable to employment contracts signed between a club and a player and, therefore, was of no relevance in the contractual relationship between two clubs. As a result, it asserted that the validity of the Loan Agreement could very well be made subject to a positive medical examination of the Player. Furthermore, Kuwait Sporting Club lodged a counterclaim against FC Flora Tallinn requesting that the latter should be held responsible for any amount that Kuwait Sporting Club might be ordered to pay by CAS to the Player.

On 25 June 2009, the FIFA Single Judge of the Players' Status Committee passed a decision in which he came to the conclusion that Kuwait Sporting Club was indeed contractually bound to FC Flora Tallinn by a valid Loan Agreement. He found that the Player successfully passed the medical examination arranged by Kuwait Sporting Club and, therefore, was in good physical health when he signed the Labour Agreement. The FIFA Single Judge of the Players' Status Committee held that the

requirements set under article 2.2 of the Loan Agreement were fulfilled and that Kuwait Sporting Club did not establish that FC Flora Tallinn *"was aware of any injury of the player and that, by means of incorrect declarations and information, it would have intentionally deceived and induced [Kuwait Sporting Club] to conclude the relevant [Loan Agreement]".*

As a result, the FIFA Single Judge of the Players' Status Committee decided the following:

"1. The claim of (…) FC Flora Tallinn, is accepted.

2. [Kuwait Sporting Club] has to pay, ***within 30 days*** *as from the date of notification of this decision, to (…) FC Flora Tallinn, the amount of USD 280,000 as well as 5% interest per year due as follows:*
- *5% interest on the amount of USD 100,000 as from 1 February 2007,*
- *5% interest on the amount of USD 100,000 as from 1 March 2007,*
- *5% interest on the amount of USD 80,000 as from 1 April 2007.*

until the date of the effective payment.

3. The counterclaim of [Kuwait Sporting Club] is rejected.

4. The costs of the proceedings in the amount of CHF 20,000 are to be paid by [Kuwait Sporting Club] ***within 30 days*** *of notification of the present decision to the following bank account (…).*

5. [FC Flora Tallinn] is directed to inform [Kuwait Sporting Club] immediately and directly of the account number to which the remittance is to be made (…)".

On 16 October 2009, the Parties were notified of the decision issued by the FIFA Single Judge of the Players' Status Committee (the "Appealed Decision").

On 5 November 2009, Kuwait Sporting Club filed a statement of appeal with the CAS. On 16 November 2009, it submitted an appeal brief, containing a statement of the facts and legal arguments accompanied by supporting documents. It challenged the above mentioned Appealed Decision with the following requests for relief:

"(…)

(i) That it be considered that FC Flora Tallinn breached clause 2.2 of the Loan Agreement and that the same agreement did not enter into force on the terms of clause 4.2;

(ii) That Kuwait Sporting Club shall not be held liable to pay any compensation to FC Flora Tallinn;

(iii) Kuwait Sporting Club has been induced by F.C. Flora Tallinn's wrongful act/false information about the player's physical conditions to enter into both the loan agreement and the employment contract with Z.;

(iv) That the Respondent FC Flora Tallinn shall be considered liable to reimburse the Appellant for any and all amounts paid by him in connection with the claim proposed by the player Z. in connection with his employment contract, amounting USD 120.000,00 and CHF 41.500,00, as described by item III of this appeal;

(v) That the Respondent FC Flora Tallinn shall be considered liable to reimburse the Appellant for its own legal and other expenses amounting USD 15.000,00 in connection with Z.'s claim, as described in item III of the present appeal;

(vi) That the Respondent FC Flora Tallinn shall be considered liable to reimburse the Appellant for its own legal and other expenses amounting USD 10.000,00 in connection with Flora Talinn's claim, as described in item III of the present appeal;

(vii) That the Respondent club shall bear the administrative costs in connection with the proceedings before the Players' Status Committee, amounting CHF 20.000,00 as determined in FIFA's decision;

(viii) That the respondent FC Flora Tallinn shall be considered liable to pay a compensation amount to be determined ex-aequo et bono in connection with the financial aspects of the sportive damages suffered by the ban on registering players for two transfer periods;

(ix) That the Respondent club shall bear all arbitration and legal costs incurred by the Appellant Kuwait Sporting Club in connection with the proceedings before FIFA and the CAS".

On 9 December 2009, FC Flora Tallinn filed an answer, submitting the following requests for relief:

"[FC Flora Tallinn] requests that the Panel:

1. Confirms the decision of the FIFA DRC decision (sic) of November 16 2009 (sic) between Kuwait SC and FC Flora Tallinn.

2. Condemn [Kuwait Sporting Club] to the payment of the whole CAS administration costs and Panel fees;

3. Condemn [Kuwait Sporting Club] to the payment of 5% annual interest on the amount awarded by FIFA in their 16 November 2009 decision (sic) from the date of the breach in accordance to Swiss Law.

4. Fix a sum, to be paid by the Appellant to the Respondent in order to cover its defence fees and costs in a sum of CHF 20,000".

On 17 December 2009, FIFA filed an answer, with the following requests for relief:

"(…)

1. To exclude FIFA from the present procedure due to its lack of standing to be sued.

Alternatively/Additionally:

2. To reject the present appeal as to the substance and to confirm, in its entirety, the decision passed by the Single Judge of the Players' Status Committee on 25 June 2009.

3. To order [Kuwait Sporting Club] to cover all legal expenses of [FIFA] related to the present procedure.

4. To order [Kuwait Sporting Club] to bear all procedural costs generated by the present proceedings".

A hearing was held on 4 May 2010 at the CAS premises in Lausanne.

LAW

CAS Jurisdiction

1. The jurisdiction of CAS, which is not disputed, derives from articles 62 ff. of the FIFA Statutes and article R47 of the Code of Sport-related Arbitration ("Code"). It is further confirmed by the order of procedure duly signed by the Parties.

2. It follows that the CAS has jurisdiction to decide on the present dispute.

3. Under article R57 of the Code, the Panel has the full power to review the facts and the law.

Applicable law

4. Article R58 of the Code provides the following:

   "The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

5. Pursuant article 62 par. 2 of the FIFA Statutes *"[t]he provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".*

6. Regarding the issue at stake, the Panel is of the opinion that the parties have not agreed on the application of any specific national law. It is comforted in its position by the fact that, in their respective submissions, the Parties refer exclusively to FIFA's regulations and to Swiss Law. As a result, subject to the primacy of applicable FIFA's regulations, Swiss Law shall apply complementarily.

7. The relevant contracts at the basis of the present case were signed after 1 July 2005, which is the date when the revised FIFA Regulations for Status and Transfer of Players (i.e. the edition 2005) came into force (the *"FIFA Regulations"*). The case at hand was submitted to the FIFA Single Judge of the Players' Status Committee before 1 January 2008, which is the date when the amendments of the said FIFA Regulations came into force. Pursuant to article 26 par. 1 and 2 of the FIFA Regulations, the case shall be assessed according to the FIFA Regulations, notwithstanding the amended provisions.

Admissibility

8. The appeal was filed within the deadline provided by the FIFA Statutes and stated in the Appealed Decision issued by the FIFA Single Judge of the Players' Status Committee on 25 June 2009. It complied with all the other requirements of article R48 of the Code.

9. It follows that the appeal is admissible.

Standing of FIFA to be sued

10. On the one hand, Kuwait Sporting Club applied that FIFA be joined as a respondent in these proceedings. It claimed that FIFA had an interest to be a party as the club was contesting the fact that it had to bear the costs amounting to CHF 20,000 and related to the proceedings before the FIFA Single Judge of the Players' Status Committee.

11. On the other hand, FIFA requested to be excluded from the proceedings because it was of the opinion that the dispute at stake was exclusively in connection with the contractual relationship between two clubs and did not concern FIFA. Moreover, FIFA also stressed that its Single Judge of the Players' Status Committee acted in his role as the competent deciding body of the first instance and was not a party to the dispute. Finally, FIFA emphasized that the Appealed Decision was not of any disciplinary nature and that, as a result, there was no legal reparation which the CAS could grant Kuwait Sporting Club against FIFA, because FIFA had no connection and/or relationship with the Loan Agreement.

12. The Panel notes that the submissions filed by Kuwait Sporting Club contain a specific request against FIFA and that FIFA filed an answer in the proceedings asking the Panel to reject the appeal and to uphold the decision of the Single Judge of the Players' Status Committee. Furthermore, FIFA signed the order of procedure whereby it accepted the CAS jurisdiction and was present at the hearing held in Lausanne, where it fully exercised its right to be heard.

13. For these reasons, the Panel decides that FIFA should be considered as a respondent in this procedure, in accordance with its intervention in the proceedings, which became effective when Kuwait Sporting Club reiterated its will to address the appeal against FIFA and FIFA, in its answer, formally requested that CAS reject the appeal and confirm the decision of his Single Judge of the Players' Status Committee.

Merits

14. It is undisputed that the contractual relationship between the two clubs was prematurely terminated without any mutual agreement. Both clubs are of the view that the other party must take responsibility for the breach of the Loan Agreement and both assert to be entitled to compensation.

15. In the view of the above, the main issues to be resolved by the Panel are:

- How must article 2.2 of the Loan Agreement be interpreted?
- Was Kuwait Sporting Club induced to enter into the Loan Agreement by the deceptive conduct of FC Flora Tallinn?
- What are the financial consequences of the breach of the Loan Agreement?

A. How must articles 2.2 of the Loan Agreement be interpreted?

16. Obviously, the Parties disagree as to the interpretation of article 2.2 of the Loan Agreement according to which *"FC Flora Tallinn undertakes that the Physical Condition of the said player is fit, and he is not suffered from any chronic injury"*.

17. Kuwait Sporting Club is of the opinion that, with this provision, FC Flora Tallinn agreed to take responsibility for any *"chronic injury"* which could possibly affect the Player and which could be revealed by a more detailed medical examination to be conducted after the end of the registration period in Kuwait. Conversely, FC Flora Tallinn claims that, by means of the said article 2.2, it only meant to guarantee that on or before the moment of the signature of the Labour Agreement, the Player was fit to play football.

18. When the interpretation of a contractual clause is in dispute, the judging body seeks the true and mutually agreed upon intention of the parties, without regard to incorrect statements or manner of expressions used by the parties by mistake or in order to conceal the true nature of the contract (Art. 18 par. 1 of the Swiss Code of Obligations). When the mutually agreed real intention of the parties cannot be established, the contract must be interpreted according to the requirements of good faith (ATF 129 III 664; 128 III 419 consid. 2.2 p. 422). The judging body has to seek to determine how a declaration or an external manifestation by a party could have been reasonably understood depending on the individual circumstances of the case (ATF 129 III 118 consid. 2.5 p. 122; 128 III 419 consid. 2.2 p. 422).

19. The requirements of good faith tend to give the preference to a more objective approach. The emphasis is not so much on what a party may have meant but on how a reasonable man would have understood his declaration (ATF 129 III 118 consid. 2.5 p. 122; 128 III 419 consid. 2.2 p. 422).

20. In the present case, the following facts are not disputed:

- Chronologically, on 26 January 2007, the clubs signed the Loan Agreement before the Labour Agreement and before the medical examination arranged by Kuwait Sporting Club.
- The Player successfully passed the said medical examination which was performed by the doctor of Kuwait Sporting Club. The said examination was performed in the context of an employment contract to be signed between a club and a football player.

- There was five days between the moment the Player signed the Labour Agreement and the end of the registration period in Kuwait.
- The Player has been able to play in several friendly games and to take part in training sessions without any problems or symptoms being detected, between 26 January and 8 February 2007.

21. The Panel observes that in Kuwait, the working week is mostly from Saturday to Wednesday, with Thursday and Friday making up a weekend. The 26 January 2007 was a Friday and the 31 January 2007 was a Wednesday. In other words, Kuwait Sporting Club had a whole standard workweek to submit the Player to the medical examination it deemed appropriate before the end of its registration period.

22. If Kuwait Sporting Club's interpretation of article 2.2 of the Loan Agreement was to be validated, it certainly cannot mean that FC Flora Tallinn left it to the discretion of the Kuwaiti club to decide when the Player should undergo a more complete medical examination. This is especially true since Kuwait Sporting Club chose to field the Player in friendly games and to make him take part in training sessions, exposing him to physical injuries.

23. It was the responsibility of Kuwait Sporting Club to organise the medical examination it would have deemed appropriate as soon as possible. In the present case, Kuwait Sporting Club did not explain how many days it needed to arrange the alleged complete medical examination. It did not even establish that it tried to make an appointment with a fully equipped medical institution before 8 February 2007. In this regard, the Panel notes that the MRI test was carried out on the Player's left leg in one day, on Thursday 8 February 2007, i.e. thirteen days after the signature of the Loan and Labour Agreements. Kuwait Sporting Club has not given any explanation on when it made the appointment for the said MRI test and in particular if the said appointment was organised shortly after the signature of the litigious contracts. In other words, there is no indication that Kuwait Sporting Club actually had the intention to have another medical examination carried out on the Player.

24. In other words, there is absolutely no evidence that Kuwait Sporting Club was not in the position to organise a *"complex"* medical examination before the end of the registration period in Kuwait and that it actually planned to conduct a more detailed examination on the Player after the signature of the contracts.

25. Under such circumstances and given that a) the doctors of Kuwait Sporting Club tested the Player and found him in good physical condition, b) the Labour Agreement was signed and c) the Player was selected for friendly games and training sessions after 26 January 2007, the Panel comes to the conclusion that Kuwait Sporting Club accepted that the Loan Agreement was validly conducted and in full force. Taking into consideration the significant transfer fee and salaries at stake, Kuwait Sporting Club obviously had the means to organise the appropriate medical examination it deemed appropriate within a working week. Hence, it was its responsibility to take the necessary measures to organise the appropriate medical tests before the signature of the Labour Agreement.

26. As conclusion, the Panel finds that article 2.2 of the Loan Agreement cannot be interpreted as allowing Kuwait Sporting Club to shift the consequences of its own negligence and carelessness to its contractual counterparty and therefore, the submissions of Kuwait Sporting Club related to the interpretation of the said contractual provision must be dismissed without further consideration.

B. Was Kuwait Sporting Club induced to enter into the Loan Agreement by the deceptive conduct of FC Flora Tallinn?

27. Kuwait Sporting Club claimed that basically it was the victim of a contractual fraud. It alleged that FC Flora Tallinn intentionally misinformed it about the Player's good health and, as a result, it was induced to enter into the Loan and the Labour Agreements. Based on article 28 CO, it was of the opinion that it cannot be expected to execute the obligations resulting from the said contracts.

28. Pursuant to article 28 par. 1 CO, *"If a party has been induced to enter a contract by the wilful fraud of the other party, the defrauded party is not bound by the contract, even though the misrepresentation was not material"*.

29. The intention to deceive the other contracting party is a key factor in the legal definition of *"wilful fraud"*. It requires that the deceiver is fully aware that its actions will lead the deceived party to enter into the envisaged contract based on some mistake, lie or error that has been contrived by the deceiving party. The actual deception appears in many different shapes and forms. It can be an outright untruth or it can also involve the employment of an artifice planned to prevent inquiry or escape investigation and to mislead or hinder the acquisition of information (VICKERS P.-J., Wilful Fraud in Contractual Relations, in MBR News Bulletin 01/07; SCHMIDLIN B., Des obligations résultant d'un contrat, in Commentaire Romand, Code des obligations I, Bâle, 2003, ad art. 28, N. 2 et seq. p. 179 and 181; decision of the Swiss Federal Court of 22 November 2000, 4C.257/2000, consid. 2 b).

30. With regard to the burden of proof, it is the duty of Kuwait Sporting Club to objectively demonstrate the existence of what it alleges (article 8 of the Swiss Civil Code, ATF 123 III 60 consid. 3a) ATF 130 III 417 consid. 3.1.). It is not sufficient for it to simply assert a state of fact for the Panel to accept it as true.

31. In the present case, Kuwait Sporting Club's allegations are not based on any established facts and consist of mere general assertions. The latter club did not file any documentary evidence to support its allegations according to which it had been deceived by FC Flora Tallinn. Above all, it has not established that the Player had suffered from any *"chronic injury"* on or before 26 January 2007 or that he had ever missed any game or had to put his career on hold because of his physical condition. Kuwait Sporting Club also did not make plausible in any manner that FC Flora Tallinn knew that the Player's health condition was possibly not compatible with the specific duties of a professional footballer. In addition, the Panel observes that if FC Flora Tallinn was aware of the Player's supposed health condition, it is unlikely that it would have

accepted to insert article 2.2 in the Loan Agreement, for fear that the Player might fail to pass the medical examination to be performed on the same day or subsequently.

32. Based on the foregoing and on the evidence submitted, the Panel has no reason to cast doubt on the good faith of FC Flora Tallinn and cannot accept the position of Kuwait Sporting Club, according to which it was deceived by any means. In other words, the Panel finds that article 2.2 of the Loan Agreement had not been breached by FC Flora Tallinn.

C. What are the financial consequences of the breach of the Loan Agreement?

33. After careful analysis of the facts and evidence submitted to it by the Parties, the Panel must conclude that the Loan Agreement was legally binding and that Kuwait Sporting Club had no just cause or reason to rescind such contract.

34. From the moment the Loan and Labour Agreements were signed and the Player was transferred to Kuwait Sporting Club, FC Flora Tallinn was not able to benefit from the Player's services during the period of the loan. It was also not in the position to register the Player back before July 2007 as the requirements of article 6 of the FIFA Regulations were not met, which all the Parties acknowledged at the hearing. In addition, Kuwait Sporting Club did not explain why or on what basis FC Flora Tallinn could be expected to take the Player back in its squad before the end of July 2007.

35. FC Flora Tallinn duly executed its side of the Loan Agreement. As a consequence, it is entitled to be placed in the position that it would have had if the contract had been performed properly by Kuwait Sporting Club.

36. Hence and in accordance with the terms of the Loan Agreement, Kuwait Sporting Club shall pay the total amount of EUR 280,000 plus 5% interest per year, calculated as follows:

- 5% interest on the amount of USD 100,000 as from 1 February 2007,
- 5% interest on the amount of USD 100,000 as from 1 March 2007,
- 5% interest on the amount of USD 80,000 as from 1 April 2007.

37. 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.

The Court of Arbitration for Sport rules:

1. The appeal filed on 5 November 2009 by Kuwait Sporting Club is dismissed.

2. The decision issued on 25 June 2009 by the FIFA Single Judge of the Players' Status Committee is confirmed.

(…)

5. All other and further claims or prayers for relief are dismissed.