4A_458/2009[1]

Judgement of June 10, 2010

First Civil Law Court

Federal Judge KLETT (Mrs), Presiding,

Federal Judge CORBOZ,

Federal Judge ROTTENBERG LIATOWITSCH (Mrs),

Federal Judge KOLLY,

Federal Judge KISS (Mrs),

Clerk of the Court: Mr CARRUZZO.

Adrian Mutu,

Appellant,

Represented by Mr François CARRARD and Mr Edgar PHILIPPIN

v.

Chelsea Football Club Ltd,

Respondent,

Represented by Mr Stephan NETZLE and Mr Bernhard BERGER

Facts:

A.

A.a Adrian Mutu is a professional Romanian football player born on January 8, 1979.

Chelsea Football Club Ltd (hereafter: "Chelsea") is a London football club playing the Premier League Championship under the aegis of the English Football Association

[1] Translator's note: Quote as Adrian Mutu *v.* Chelsea Football Club Ltd, 4A_458/2009. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch.

(FA), which is affiliated to the Fédération Internationale de Football Association (FIFA).

A.b On August 11, 2003, Adrian Mutu and Chelsea entered into an employment contract governed by English law valid for five years, namely until June 30, 2008. Pursuant to that contract, the player was to receive a yearly salary of 2'350'000 sterling pounds (GBP), a sign-up bonus of GBP 330'000.-, payable in five instalments, as well as some bonuses pursuant to the conditions contained in the *ad hoc* regulation of the club.

The following day, Adrian Mutu was transferred to Chelsea from the Italian club AC Parma, with which he had a contract. The English club paid a transfer fee of EUR 22'500'000.- to the Italian club.

On October 1st, 2004, the FA carried out a specific anti-doping test which showed the presence of cocaine in the sample collected from Adrian Mutu.

On October 28, 2004 Chelsea terminated the employment contract without notice.

In a decision of November 4, 2004 the Disciplinary Commission of the FA suspended Adrian Mutu from any competition for seven month as from October 24, 2004. The Disciplinary Committee of FIFA extended that sanction to the entire world on November 12, 2004.

In January 2005, Adrian Mutu left for Italy. Once no longer suspended he played for Juventus Turin before being transferred to Fiorentina in July 2006, where he presently plays.

B.

B.a At the end of January, 2005, the Parties agreed to submit to the Football Association Premier League Appeals Committee (FAPLAC) the issue as to whether or not the player had unilaterally breached the contract without cause or without sporting

cause within the meaning of Art. 21 to 23 of the FIFA Regulations for the Status and Transfer of Players in its version of July 5, 2001 (hereafter: the 2001 Regulation).

On April 20, 2005 FAPLAC resolved the issue in the affirmative.

Seized of an appeal against that decision by the Player, the Court of Arbitration for Sport (CAS), in a composition chaired by German advocate Dirk-Reiner Martens rejected the appeal in an award of December 15, 2005. Whilst Adrian Mutu had admitted a serious breach of his contractual obligations by taking cocaine, he claimed that he had not taken the initiative to terminate the employment contract, thus making the specific provisions of the 2001 Regulation not applicable to the case. Rejecting that argument, the CAS held that the words "unilateral breach[2]" at Art. 21 of the 2001 Regulation undeniably referred to a breach of the employment contract and not to its termination. Moreover, the CAS refused to follow the Appellant's opinion that a player abandoning his club should be treated differently from the one committing a serious breach of his contractual obligations, for instance by taking cocaine.

B.b On May 11, 2006, Chelsea turned to FIFA with a view to obtaining damages as a consequence of the contractual breach by Adrian Mutu.

In a decision of October 26, 2006, the Dispute Resolution Chamber (DRC) denied jurisdiction in the matter.

Seized by the English club, the CAS, in a new composition, annulled the decision in an award of May 21, 2007 and sent the matter back to the DRC to issue a decision on the merits.

B.c In front of the DRC, Chelsea sought the payment of compensation of at least GBP 22'661'641.-. For his part, Adrian Mutu submitted that the claim should be entirely rejected. On May 7, 2008, the DRC ordered Adrian Mutu to pay an amount of EUR 17'173'990.- to Chelsea within 30 days from receipt of its decision, failing which

[2] Translator's note: In English in the original text.

the amount would bear interest at 5 % yearly and the matter would be referred to the FIFA Disciplinary Committee.

B.d Adrian Mutu appealed to the CAS on September 2, 2008 against that decision, notified to the parties on August 13, 2008, with a view to the claim being totally rejected. He chose the French advocate Jean-Jacques Bertrand as arbitrator.

For its part, Chelsea submitted that the appeal should be rejected and appointed the aforesaid Dirk-Reiner Martens as arbitrator on September 12, 2008. On September 22, 2008, Adrian Mutu challenged this arbitrator. On January 13, 2009, the Board of the International Council of Arbitration for Sport (ICAS) rejected the challenge.

On January 14, 2009, the CAS informed the parties that the Arbitral tribunal would be composed with the two aforesaid arbitrators and Professor Luigi Fumagalli, a Milan advocate, as chairman.

FIFA expressly renounced participating in the appeal proceedings.

In a final award of July 31, 2009, the CAS rejected the appeal and ordered Adrian Mutu to pay an amount of EUR 17'173'990 to Chelsea with interest at 5 % yearly as from September 12, 2008.

The costs of the arbitration and a share of the costs of the English club amounting to CHF 50'000.- were to be borne by the player.

In short, the CAS found that it had jurisdiction, which had not been challenged, to review freely as to facts and law the appeal at hand. In its opinion, the matter was to be decided pursuant to English law and to the 2001 Regulation applied concurrently. For the CAS, in view of the fact that the two awards already issued in this matter were in force, the only issue still in dispute was that of the amount of damages due by the player to the English club. According to the arbitrators, that amount could be assessed in conformity with case law relating to Art. 22 of the 2001 Regulation and with English

law, by reference to the unamortized share of the acquisition costs of the player, computed as follows: EUR 16'923'060.- for the transfer fee paid to AC Parma, EUR 150'436.- for the fee paid to an agent in connection with the transfer, GBP 99'264.- for the sign-up bonus paid to Adrian Mutu, EUR 761'552.- for a solidarity contribution paid to the training clubs, GBP 272'580.- for a transfer charge paid by the English club and EUR 1'278'640.- for the fees paid by the latter to its own agents in connection with the transfer. This amounted to a total of EUR 19'113'688.- and GBP 371'844.-. However, to comply with the rule of *ne eat judex ultra petita partium*[3] the CAS reduced these amounts to that awarded by the DRC, namely EUR 17'173'990.-. The CAS then explained why it felt that the pertinent provisions of the 2001 Regulation, as applied in the case, did not violate either EU law or the principles of English law relied upon by the Appellant. The arbitrators added that the award duly took into account the specificity of the sport and in particular the interest of the players, of the clubs and of the entire football community.

C.

On September 14, 2009, Adrian Mutu (hereafter the Appellant) filed a Civil law appeal with the Federal Tribunal with a view to obtaining the annulment of the July 31, 2009 award and Chelsea being ordered to pay the entire costs of the arbitral proceedings. The Appellant also sought a stay of enforcement. The request was granted by a decision of the Presiding Judge of October 19, 2009.

In its answer of November 6, 2009, Chelsea (hereafter the Respondent) mainly submits that the matter is not capable of appeal and alternatively that the appeal should be rejected. As to the CAS, which filed an answer on November 11, 2009, it too submits that the appeal should be rejected.

On February 2, 2010 counsel for the Respondent added to the file two press articles concerning the Appellant. In a letter of February 3, 2010, the latter's counsel opined that these documents should not be taken into consideration by the Federal Tribunal.

[3] Translator's note: In Latin in the original text.

Reasons:

1.

According to Art. 54 (1) LTF[4] the Federal Tribunal issues its decision in an official language[5], as a rule in the language of the decision under appeal. When the decision is in another language (in this case English), the Federal Tribunal uses the official language chosen by the parties. In front of the CAS, they used English. In the briefs sent to the Federal Tribunal, they used French (the Appellant) and German (the Respondent). According to its practice, the Federal Tribunal will adopt the language of the appeal and consequently issue its decision in French.

2.

In the field of international arbitration, a Civil law appeal is admissible against the decisions of arbitral tribunals pursuant to the requirements of Art. 190 to 192 PILA[6] (Art. 77 (1) LTF).

2.1 The seat of the CAS is in Lausanne. At least one of the parties (in this case both) did not have its domicile in Switzerland at the pertinent time. The provisions of chapter 12 PILA are accordingly applicable (Art. 176 (1) PILA).

2.2 The Appellant is directly affected by the award under review as it orders him to pay an important amount of money to the Respondent. Thus he has a personal, present and legally protected interest to ensure that the award was not issued in violation of the guarantees contained at Art. 190 (2) PILA, which gives him standing to appeal (Art. 76 (1) LTF).

Timely filed (Art. 100 (1) LTF in connection with Art. 46 (1) (b) LTF) and in the legally prescribed format (Art. 42 (1) LTF), the matter is capable of appeal. A review of the grievances it contains is reserved.

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[4] Translator's note: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.

[5] Translator's note: The official languages of Switzerland are German, French and Italian.

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

2.3

2.3.1 The appeal may be made only for one of the grounds exhaustively set forth at Art. 190 (2) PILA (ATF 128 III 50 at 1a p. 53; 127 III 279 at 1a p. 282; 119 II 380 at 3c p. 383). The Federal Tribunal reviews only the grievances raised and reasoned by the appellant (Art. 77 (3) LTF). The latter must therefore formulate his grievances according to the strict requirements set forth by case law relating to Art. 90 (1) (b) OJ[7] (see ATF 128 III 50 at 1c), which remain in force under the aegis of the new federal law of procedure.

The appeal may only seek the annulment of the decision (see Art. 77 (2) LTF ruling out the application of Art. 107 (2) LTF). The Federal Tribunal issues its decision on the basis of the facts found by the arbitral tribunal (Art. 105 (1) LTF). The Court may not rectify or supplement *ex officio* the factual findings of the arbitrators, even if the facts were established in a manifestly inaccurate way or in violation of the law (see Art. 77 (2) LTF ruling out the application of Art. 105 (2) LTF). However, as was already the case under the aegis of the previous statute organizing federal courts (see ATF 129 III 727 at 5.2.2; 128 III 50 at 2a and cases quoted), the Federal Tribunal retains the faculty to review the facts on which the award under appeal is based if one of the grievances mentioned at Art. 190 (2) PILA is raised against the factual findings or when some new facts or evidence are exceptionally taken into account in the framework of the Civil law appeal proceedings (see Art. 99 (1) LTF).

2.3.2 In the light of the aforesaid principles, the Appellant's submission as to the costs of the arbitration proceedings, which is not substantiated and does not seek a mere annulment, is not capable of appeal.

Besides, this Court will not take into account the two press clips filed by the Respondent, which are new evidence and as such inadmissible in this appeal.

[7] Translator's note: OJ is the French abbreviation of the previous statute organizing Swiss courts.

3.

In a first grievance, based on Art. 190 (2) (a) PILA, the Appellant argues that the CAS which issued the award under appeal was irregularly composed. He claims that Arbitrators Luigi FUMAGALLI and Dirk-Reiner MARTENS should not have been part of the Arbitral Tribunal.

3.1 Akin to a state court, an arbitral tribunal must present sufficient guarantees of independence and impartiality (ATF 125 I 389 at 4a; 119 II 271 at 3b and cases quoted). The violation of this rule leads to irregular composition as stated in the aforesaid legal provision (ATF 118 II 359 at 3b). In order to determine whether an arbitral tribunal presents such guarantees or not, reference must be made to the constitutional principles developed with regard to state courts (ATF 125 I 389 at 4a; 118 II 359 at 3c p. 361). However, the specificities of arbitration and in particular those of international arbitration must be taken into account when examining the circumstances of the case at hand (ATF 129 III 445 at 3.3.3 p. 454). In this respect, sport arbitration as instituted by the CAS has some particularities which have already been outlined elsewhere (ATF 129 III 445 at 4.2.2.2), such as a closed list of arbitrators. These should not be disregarded even though they do not justify *per se* to be less demanding as to sport arbitration than as to commercial arbitration (see ANTONIO RIGOZZI, L'arbitrage international en matière de sport, 2005, n. 950; GABRIELLE KAUFMANN-KOHLER/ANTONIO RIGOZZI, Arbitrage international, 2006, n. 368).

According to Art. 30 (1) Cst[8], anyone whose case must be adjudicated by judicial proceedings is entitled to see his case brought in front of a court established by law, having jurisdiction, independent and impartial. This guarantee authorizes the challenge of a judge whose situation or behavior is such as to give rise to doubt as to his impartiality (ATF 126 I 68 at 3a p. 73); it purports in particular to avoid that some circumstance alien to the case may influence the decision in favor or against a party. It does not require the replacement of a judge only when an actual bias is established, as an internal disposition on his part can hardly be proved; it is sufficient for the circumstances to give the appearance of a bias and to justify doubts that the magistrate's

[8] Translator's note: Cst is the French abbreviation for the Swiss Constitution.

activity may be biased. Only the circumstances objectively noticed must be taken into consideration. Purely individual impressions of a party to the trial are not decisive (ATF 128 V at 2a p. 84 and cases quoted).

3.2

3.2.1 The Appellant claims that on September 1st, 2009 his English counsel received an anonymous e-mail substantially advising him that the Milan law firm in which Prof. Fumagalli works represented the interests of Roman Abramovitch, an important Russian businessman who controls the Respondent, a circumstance that the Chairman of the Arbitral Tribunal had failed to disclose in his statement of independence.

On October 13, 2009, Luigi Fumagalli filed a detailed written statement attached to the CAS answer, in which he vigorously denies the Appellant's allegations drawn from that anonymous e-mail. The aforesaid statement was communicated to the Appellant, who did not deem useful to refute its contents and abstained from filing a brief in reply.

3.2.2 As the Appellant claims to have become aware of the ground for revision upon receipt of the September 1st, 2009 e-mail, namely before the time to appeal expired, he was right to raise that argument in this appeal in connection with the Arbitral Tribunal being irregularly composed (Art. 190 (2) (a) PILA) and not by seeking revision (judgment 4A_234/2008 of August 18, 2008 at 2.1).

This being said, the Appellant himself concedes in his appeal (§ 58 and 62) that he is not in a position to verify the accuracy of the information he was given anonymously and that the facts mentioned in the aforesaid e-mail would constitute ground for a challenge only if they were established. Indeed the Chairman of the Arbitral Tribunal refutes item by item all allegations challenging his independence as to the Respondent. He has not been contradicted and his presence in the Arbitral Tribunal which issued the award under appeal does not appear irregular at all, so that the Appellant has no title to complain about it *a posteriori*.

3.3

3.3.1 The Appellant also challenges the independence of arbitrator Dirk-Reiner Martens, chosen by the Respondent, because that arbitrator presided the arbitral tribunal which issued the first award in favor of the English club in the dispute between the Parties. In this respect, the Appellant refers to the IBA Guidelines on Conflicts of International Arbitration [9] approved on May 22, 2004 («http://www.ibanet.org/publications/Publications_home.cfm»; hereafter: the Guidelines; as to them, see judgment 4A_506/2007 of March 20, 2008 at 3.3.2.2 and the legal writers quoted). According to him, the circumstance alleged would fall within paragraph 2.1.2 of the Guidelines, relating to when "the arbitrator has previous involvement in the case" [10], as circumstance falling within the so-called "waivable red list"[11] dealing with situations in which the arbitrator must withdraw unless the parties expressly consent (§ 2 of Part II of the Guidelines). According to the Appellant, the aforesaid circumstance could also fall within paragraph 3.1.5 of the orange list (intermediary situations which must be disclosed but do not necessarily justify a challenge, which apply to "the arbitrator who participates or has participated as arbitrator during the previous three years to another arbitration proceeding in a related case implying one of the parties or an entity affiliated to one of the parties" [12]). The appointment of Dirk-Reiner Martens as arbitrator by the Respondent would, according to the Appellant, show a gesture of appreciation of the party which prevailed in the first case opposing the same parties (appeal § 75 *in fine*).

3.3.2 On September 22, 2008, the Appellant, in conformity with the provisions of Art. R34 of the Sport Arbitration Code (hereafter: the Code) also challenged arbitrator Martens with the ICAS. The Board of that body rejected the challenge in a decision of January 13, 2009.

Issued by a private body, that decision, which could not be directly appealed to the Federal Tribunal (ATF 118 II 359 at 3b) does not bind this Court. This Court may accordingly review freely whether or not the circumstance invoked to justify the

[9] Translator's note: In English in the original text.
[10] Translator's note: In English in the original text.
[11] Translator's note: In English in the original text.
[12] Translator's note: In English in the original text.

challenge is such as to establish the grievance that the composition of the CAS containing the arbitrator under challenge was irregular (ATF 128 III 330 at 2.2 p. 332).

3.3.3

3.3.3.1 Irrespective of what the Appellant claims, it is far from sure that the two rules of the Guidelines he invokes would apply in this case.

The first one supposes that the Arbitrator was previously involved in the case (paragraph 2.1.2); this implies the same dispute on the basis of the title of the heading where that rule appears ("2.1 Relationship of the arbitrator to the dispute"[13]). From that point of view and on the basis of a purely formal criterion, this case is not the same as the one which produced the first award dated December 15, 2005. Evidence of that is the fact that the two cases were registered under different docket numbers by the CAS Secretariat (CAS 2005/A/876 for one, CAS 2008/A/1644 for the other). A third case was initiated and disposed of in the meantime through an award of May 21, 2007 issued by three other arbitrators (CAS 2006/A/1192).

As to the second rule, also taking it to the letter, it deals with cases where the arbitrator acts, or has acted during the three previous years, as arbitrator in another arbitration concerning one of the parties or an entity affiliated to one of the parties but not both of them as is the case here. Moreover that rule is in the orange list and its violation does not justify the automatic replacement of the arbitrator falling within it.

This being said, the weight of these formal arguments should not be overestimated. Indeed, one should not forget that the Guidelines, admittedly a precious working instrument, do not have legislative value. Hence the circumstances of the case at hand and the case law of the Federal Tribunal in this field will ever remain decisive to dispose of the issue of a conflict of interest (aforesaid judgment 4A_405/2007).

3.3.3.2 The fact that a judge already acted in a case may give rise to a suspicion of bias. Acting in both cases is therefore admissible only if the judge, by participating in

[13] Translator's note: In English in the original text.

previous decisions concerning the same case, has not already taken a position as to certain issues for which he no longer appears to be free from any bias in future and accordingly the fate of the case appears already sealed. To decide that issue, the facts, the procedural specificities and the specific issues raised at the various stages of the proceedings must be taken into account (ATF 126 I 168 at 2 and cases quoted). The same applies to the field of arbitration. An arbitrator's behaviour during the arbitral proceedings may also cast doubt on his independence and impartiality. However, the Federal Tribunal requires a strong showing of a risk of bias. Thus, case law states that procedural measures, whether right or inaccurate, are not sufficient *per se* to justify objective suspicion of bias of the arbitrator who issued them (ATF 111 Ia 259 at 3b/aa p. 264 and cases quoted).That remark also applies to the arbitrator who actively participated in a partial award, albeit an erroneous one (ATF 113 IA 407 at 2a p. 409 i.f.). In this case, the task entrusted to the CAS in the composition which issued the first arbitral award with Arbitrator Dirk-Reiner Martens as chairman was clearly circumscribed. Indeed, in front of that appeal body, the Appellant no longer denied having committed a serious breach of his contractual obligations by taking cocaine. However he argued that to the extent that the initiative of termination of the employment contract for that reason had been taken by the Respondent, he could not be blamed for a "unilateral breach of the contract without cause or without sporting cause" within the meaning of Art. 21 of the 2001 Regulation and accordingly he could not be ordered to compensate his former employer. The Arbitrators' task was therefore only to interpret the words "unilateral breach"[14] in the English version of Art. 21 of the 2001 Regulation. The CAS decided that issue of principle by finding that the aforesaid wording referred to the breach of an employment contract and not to its termination. Moreover it rejected a second argument according to which the Appellant wished a difference made between the player abandoning his club without cause and the one seriously breaching his contractual obligations.

In that pronouncement, the CAS indeed issued an award in the Respondent's favour as it rejected a major objection by the party from whom the former sought damages. However, besides the fact that the Appellant never challenged the first award, and

[14] Translator's note: In English in the original text.

unless one wishes to assume a bias of Arbitrator Martens, it is not possible to find objectively that by deciding the two aforesaid issues, essentially of a theoretical nature, the arbitrator would have behaved in a manner which could cast doubt on his impartiality and give credence to the idea that he had already chosen the Respondent's side. Moreover it does not appear from the December 15, 2005 award that the CAS would have prejudged in any way the issue of the amount of compensation due by the Appellant. It must also be emphasised that this case involves three awards issued in the same matter, materially speaking, and that could have been issued by the same arbitral tribunal, as the case may be, the first two being interlocutory to the third one, namely the final award presently under appeal. As a matter of principle, in exceptional circumstances, it is not admissible to challenge *a posteriori* the regularity of the composition of the arbitral tribunal which issued the final award simply because its members already decided the matter by participating in interlocutory or partial awards. Allowing this would be tantamount to a death warrant for such awards, the usefulness of which however, is no longer to be demonstrated. The Appellant invokes no such circumstances. Consequently, the doubts he casts retrospectively as to the independence and impartiality of Arbitrator Martens are not justified.

3.4 Accordingly the grievance drawn from Art. 190 (2) (a) PILA fails both with regard to Chairman Fumagalli and Arbitrator Martens.

4.

In a second grievance, divided in several chapters, the Appellant claims that the award under appeal violates material public policy within the meaning of Art. 190 (2) (e) PILA in several respects. Before reviewing if the matter is capable of appeal in this respect – and the Respondent challenges that – as well as the merits of the criticism raised in support, it is appropriate to restate the scope of the concept of public policy pursuant to that provision.

4.1 An award is inconsistent with public policy if it disregards the essential and broadly recognized values which according to prevailing concepts in Switzerland, should be the basis of any legal order (ATF 132 III 389 at 2.2.3). Procedural public policy must be

distinguished from material public policy. In its most recent case law, the Federal Tribunal defined that concept as follows (same decision at 2.2.1).

An award is contrary to material public policy when it violates some fundamental principles of material law to such an extent that it is no longer consistent with the determining legal order and system of values; among such principles are in particular the observance of contracts, the rules of good faith, the prohibition of abuse of rights, the prohibition of discriminatory or spoliative measures as well as the protection of incapables.

As the wording "in particular" shows without ambiguity, the list of examples thus set forth by the Federal Tribunal to describe the contents of material public policy is not exhaustive, although it is consistently expressed in case law relating to Art. 190 (2) (e) PILA. Incidentally it would be delicate and even dangerous to try to set forth all the fundamental principles, which should undeniably be included as one or the other may be omitted. It is therefore preferable to leave the list open. Moreover the Federal Tribunal already included some other fundamental principles in it, such as the prohibition of forced labour (judgment 4A_370/2007 of February 21, 2008 at 5.3.2) and this Court would not hesitate to sanction as a violation of a material public policy an award that would disregard the fundamental principle of the respect of human dignity, even though that principle is not expressly mentioned in the aforesaid list. If it is not easy to define material public policy positively or to determine its scope precisely, it is easier to exclude some elements from it. Such exclusion particularly concerns the entire process of interpreting a contract and the legal consequences logically drawn therefrom, as well as the interpretation by an arbitral tribunal of the statutory provisions of a private law body (the aforesaid judgment 4A_370/2007 at 5.6). Similarly, in order to find incompatibility with public policy, a concept more restrictive than that of arbitrariness, it is not sufficient for the evidence to have been wrongly assessed, for a factual finding to be manifestly inaccurate or for a rule of law to have been clearly violated (judgment 4P.71/2002 of October 22, 2002 at 3.2 and cases quoted).

4.2

4.2.1 At paragraph 126 of its award, the CAS emphasises that the calculation of the compensation due to the Respondent on the basis of the unamortized share of the expenses for acquiring the Appellant is certainly consistent with English law. It deducts from that that if the 2001 Regulation, established by FIFA, should be found contrary to EU law, the amount of damages to be paid by the Appellant pursuant to English law would not be modified.

In order to dispute that the matter is capable of appeal in this respect, the Respondent points out that the Appellant devotes his entire argument to showing why the system arising from Art. 22 of the 2001 Regulation, as applied in this case, or even in itself, would be contrary to material public policy, yet without saying anything as to a possible incompatibility of the award with that public policy to the extent that it relies on English law. According to the Respondent, the grievance would accordingly not be capable of appeal on the basis of case law concerning dual reasons of the decision under appeal.

4.2.2 When a decision relies on two independent reasons, the Appellant must point out why each reason violates the law, under penalty of the matter not being capable of appeal (ATF 133 IV 119 at 6.3 p. 121). This rule applies also in the field of international arbitration (judgment 4P.168/2004 of October 20, 2004 at 2.2.2). In this case, the Respondent has an excessively formalistic view of the appeal brief to conclude that only one of the two alternate reasons has been challenged by the Appellant. From reading the developments in the aforesaid brief, it is quite clear that the Appellant describes as inconsistent with public policy the system, common to English law and to the rules adopted by FIFA, of allowing a claim against the terminated player for the reimbursement of the unamortized share of the expenses that the club underwent for his acquisition. In other words, by challenging the system as such, the Appellant, whilst doing so with a view to the specific provisions governing the sport he practices, *ipso facto* criticizes the equivalent system established by English law.

Hence, the matter is capable of appeal as to the grievance derived from the violation of public policy.

4.3 At paragraph 105 of the award the CAS states that it may not review the issues already decided in the first two awards in this case as they are in force. The Appellant challenged none of the two awards when they were issued. Neither does he do so in this appeal and accordingly he does not argue that the first award would be a preliminary award addressing the material conditions of the damage claim brought against him by the Respondent (on that concept see ATF 130 III 755 at 1.2.1 p. 757), which could be appealed with the appeal against the final award (Art. 93 (3) LTF in connection with Art. 77 (2) LTF *a contrario*).

At this stage of the proceedings it must accordingly be considered as established that the Appellant seriously breached his contractual obligations by consuming cocaine; that such a violation was tantamount to a unilateral breach of the contract without cause or without just sporting cause; that the Respondent was therefore entitled to terminate the fixed term employment contract even without the Appellant's agreement; that, finally, the club could seek compensation from its former player and seize the DRC to have the amount adjudicated. Hence any attempt by the Appellant to reopen today, albeit indirectly, these issues already disposed of for good would be bound to fail.

4.4

4.4.1 To substantiate his argument of a violation of material public policy, the Appellant firstly argues that the CAS would have applied a system that would violate his personality rights and thus breach the principle of human dignity; in this context he invokes successively Art. 39 of the Treaty instituting the European Community (EC), Art. 4 and Annex I of the Swiss – EU Bilateral Agreement on the Free Movement of Persons (RS 0.142.112.681), Art. 27 (2) CC[15], Art. 20 CO[16], Art. 7 Cst, Art. 4 (1) and (2) ECHR, Art. 163 (3) CO, Art. 337 (d) CO, Art. 160 (3) CO as well as Art. 8 and 6 ECHR (appeal § 86 to 104). Secondly the Appellant claims that the CAS disregarded the concept of damage by ordering him to compensate the Respondent for what was

[15] Translator's note: CC is the French abbreviation for the Swiss Civil Code.
[16] Translator's note: CO is the French abbreviation for the Swiss Code of Obligations.

not damage (appeal § 105 to 114). Thirdly he deplores that the Arbitrators ignored the principle of adequate causality (appeal § 115 to 121). Fourthly the Appellant argues that the clauses in Regulation 2001 are abusive, particularly in light of Art. 8 LCD[17] (appeal § 122 to 126). Fifthly he denounces the award as having a spoliative effect (appeal §127 to 129) and argues sixthly that the latter upheld an inadmissible hindrance to his economic future (appeal §130 to 132) and seventhly claims that the award relies on an abuse of rights by the Respondent (appeal § 133 to 137). Eighthly and lastly the Appellant argues that the rules on the burden of proof were violated (appeal § 138 to 140).

4.4.2 Simply quoting such grievances demonstrates that the Appellant confuses the Federal Tribunal with a court of appeal, which would oversee the CAS and freely review the accuracy of the international arbitral awards rendered by that private jurisdictional body. This however is not the role of the Supreme Judicial Authority of the land when seized of an appeal within the meaning of Art. 77 (1) LTF in which it is claimed that the award under appeal is inconsistent with public policy, as is clear from the definition of that concept (see hereabove at 4.1). Thus the matter is not capable of appeal in this respect to the extent that it is merely sought to establish that the award under appeal is contrary to various provisions of Swiss law, whether constitutional or statutory, or to the European law invoked by the Appellant. The same remark may be made as to the grievances concerning the alleged disregard by the CAS of the concepts of damage, adequate causality and burden of proof germane to Swiss law. Such means are even less admissible because the employment agreement between the Parties was governed by English law. Yet one must reserve the possibility, induced by the very definition of public policy, to take into account, as the case may be, some pertinent provisions and general principles of Swiss law as to compensation of the aggrieved party by its contractual counterpart, provided that one may see there an expression of essential and broadly recognised values which "according to prevailing concepts in Switzerland" (ATF 132 II 389 at 2.2.3), should constitute the basis of any legal order.

Moreover, the Appellant's criticism calls for the following few remarks.

[17] Translator's note: LCD is the French abbreviation for the Swiss Unfair Competition Law.

4.4.3

4.4.3.1 The Appellant's reference to EU law (judgment of the Court of Justice of the European Union [CJEU] of December 15, 1995 C-415/93 Union royale belge des sociétés de football association contre Jean-Marc Bosman, Rec. 1995 I-4921)is not appropriate. In the case quoted by the Appellant, the CJEU held contrary to that law the rule according to which a professional football player citizen of a member state could not be employed after the contract with his club had expired by a club of another member state unless the latter had paid a transfer fee to the former (paragraph 114). The Appellant's reference to the judgment of June 15, 1976 in the matter of Servette Football Club v. Perroud (ATF 102 II 211) is not more pertinent; in that case the Federal Tribunal sanctioned a regulation which allowed a club that terminated a player's employment contract to refuse to issue a letter of release to the latter, without which he could not obtain his transfer to another club.

This case is different from the matters which gave rise to the two precedents quoted, to the extent that the employees' freedom of movement, invoked by the Appellant, was not hindered at the end of the employment contract since after his suspension the player found a new employer in Italy, his immediate termination notwithstanding, without the new club having to pay a transfer fee to the Respondent.

4.4.3.2 The explanations given in the same context by the Appellant with reference to Art. 27 CC and 20 CO are not convincing either.

According to case law, a violation of Art. 27 CC is not automatically contrary to public policy; it must be a clear and serious breach of a fundamental right (judgment 4P.12/2000 of June 14, 2000 at 5b/aa and references). Yet a contractual restriction of economic freedom is held as excessive for the purposes of Art. 27 (2) CC only if the obligee is given over to his contractual counterpart's arbitrariness, supresses his economic freedom or restricts it in such a way that the basis of his economic existence is jeopardized; Art. 27 (2) CC also refers to commitments that are excessive due to their object, namely those concerning certain personality rights, the importance of which is

such that a person cannot commit himself for the future in this respect (ATF 123 III 337 at 5 p. 245 and cases quoted). The same remark may be made *mutatis mutandis* with regard to Art. 20 (1) CO.

There is none of that in this case. The Appellant undertook to work for the Respondent during five years against payment of a confortable salary. By doing so he did not enter into an excessively long commitment (cf. THOMAS GEISER, Fussballspieler als Sacheinlage?, in REPRAX 2001 p. 37 ff, 44 n. 4.11 with a reference to Art. 334 (3) CO authorising the conclusion of an employment contract for ten years without any possibility of ordinary termination) neither did he submit to his employer's arbitrariness.

4.4.3.3 Art. 7 Cst sets forth the principle that human dignity must be respected and protected. This provision means that human dignity must be the basis of any state activity and that it constitutes the fundament of personal freedom which is one of its materializations and for the interpretation of which it must be used (ATF 132 I 49 at 5.1 p. 54; 127 I 6 at 5b p. 14). As to Art. 4 (1) and (2) ECHR it outlaws slavery and forced labour. The Appellant invokes these provisions, which unquestionably fall within the concept of public policy within the meaning of Art. 190 (2) (e) PILA. However he stops there and does not even attempt to demonstrate how they would have been disregarded in this case.

As to Art. 6 and 8 ECHR, which guarantee the right to a fair trial and the right to private and family life, the Appellant admittedly invokes them, yet without demonstrating how these two guarantees, which mainly protect the individual against the state, would be part of material public policy. Moreover, as to the former, he only quotes it without indicating why it would not have been complied with in this case. As to the latter, he sees its violation in the fact that the award under review would restrict his right to carry out his professional activity. Yet, as was already pointed out above, that assumption is mistaken (see at 4.4.3.1 and 4.4.3.2).

4.4.3.4 Finally, a possible violation by the CAS of Art. 160 (3) CO, Art. 163 (3) CO and 337 (d) CO, provisions which, incidentally, are not applicable as such in this case, could not be held to be inconsistent *per se* with public policy.

4.4.4 The arguments developed in the appeal brief as to the concept of damage, incidentally of an appellate nature, do not belong as such in an argument of violation of material public policy. Indeed taking them into account would broaden the definition of that concept. It must be recalled here that according to well established case law, almost the entire scope of disputes relating to breaches of contract is outside the scope of the principle of *pacta sunt servanda*, which constitutes one of the various elements of material public policy (judgment 4A_370/2007 of February 21, 2008 at 5.5). In other words, when seized of a grievance based on Art. 190 (2) (e) PILA in a case involving the contractual liability of a party, the Federal Tribunal does not review in what way the arbitral tribunal applied the concept of damage in the case at hand as it flows from the rules of the law or from the principles to be taken into consideration; accordingly this Court may not annul an arbitral award for violating public policy simply because it seriously disregarded that concept. The same applies to the field of international sport arbitration (judgment 4A_506/2007, quoted above, at 4.2).

4.4.5 The foregoing remarks also apply to the claim that the CAS would have ignored the principle of adequate causality (see judgment 4P.71/2002 of October 22, 2002 at 3.3). In this respect the Appellant really seeks to challenge indirectly the reasons contained in the first arbitral award, now in force, as to the nexus between the contractual breach held against him and the damage undergone by the Respondent, which is not admissible.

4.4.6 The Appellant furthermore seeks to establish that the pertinent clauses of the FIFA Regulation would be abusive in the light of Art. 8 LCD particularly. However he does not explain why that provision would apply to an employment contract governed by English law, neither does he spell out how its requirements, which he does not mention, would be met in this case. Furthermore the Appellant does not demonstrate how a possible violation of the aforesaid provision would *per se* be contrary to material

public policy within the meaning of Art. 190 (2) (e) PILA. The few general remarks and those relating to economics which he puts forward in this context do not suffice to justify his thesis.

4.4.7 According to the Appellant, the award under review would have a spoliative effect.

Confiscations, expropriations or nationalisations without compensation are considered spoliative (judgment 4P.280/2005 of January 9, 2006 at 2.2.2; judgment 4P.12/2000, quoted above, and references). This definition is obviously not applicable to an award concerning the amount of damages in a civil law dispute. Consequently it is in vain that the Appellant invokes that part of the concept of material public policy to substantiate his argument.

4.4.8 The Appellant argues furthermore that the award under review upholds an inadmissible hindrance to his economic future as it could cause his suspension from any activity relating to football, thus seriously jeopardizing the basis of his economic existence.

However it must be clearly seen that it is not the award itself which could cause this, since it foresees no sanction should the debtor fail to pay timely the amount awarded to the creditor. Yet it is the award, and only the award, which is the object of this appeal, not a possible sanction eventually pronounced for that reason by the competent FIFA body.

4.4.9 According to the Appellant the award under review would also uphold an abuse of right to the extent that it would allow termination of the employment contract manifestly disproportionate compared to the inconvenience the terminated person may undergo.

The prohibition of abuse of right is part of material public policy. The rules relating thereto must be understood in the light of case law relating to Art. 2 CC (judgment

4A_600/2008 of February 20, 2009 at 4.1). That case law considers the manifest disproportion of the interests involved as one of the typical instances of abuse of right falling within Art. 2 (2) CC (ATF 135 III 162 at 3.3.1 p. 169).

It remains that to raise such an argument at this stage in the proceedings, as the Appellant does, implies an inadmissible calling into question of the first award, although it is in force, which established once and for all the Respondent's right to terminate the employment contract without notice due to the serious contractual breach committed by its employee. Thus the matter is not capable of appeal in this respect.

4.4.10 Finally, the Appellant claims a violation of the rules on the burden of proof and specifically of the principle contained at Art. 8 CC, according to which each party must prove the facts it alleges to deduct its right. Such rules do not belong to material public policy. Moreover the CAS reached a decision as to the amount of damages after assessing the evidence in front of it. Hence the issue as to the burden of proof is no longer in discussion (ATF 132 III 626 at 3.4 p. 634).

4.5 Consequently the award under appeal is not inconsistent with material public policy within the meaning of Art. 190 (2) (e) PILA, irrespective of how one looks at it.

5.
At the end of this review the appeal must be rejected. The Appellant will accordingly pay the costs of the federal proceedings (Art. 66 (1) LTF) and compensate the Respondent (Art. 68 (1) and (2) LTF).

Therefore, the Federal Tribunal pronounces:

1. The appeal is rejected.

2. The judicial costs, set at CHF 65'000.- shall be borne by the Appellant.

3. The Appellant shall pay to the Respondent an amount of CHF 80'000.- for the federal proceedings.

4. This judgment shall be notified to the representatives of the Parties and to the Court of Arbitration for Sport (CAS).

Lausanne, June 10, 2010

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

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