4A 370/2007

Judgement of February 21, 2008

First Civil Law Court

Federal Judge CORBOZ, Chairman
Federal Judges KOLLY and KISS
Clerk of the Court M. CARRUZZO

X. _____,
Appellant, represented by Mr. Cédric AGUET, attorney

V.

A. _____ Association,
SASP B. _____[1],
Respondents, both represented by Mr. Guy-Philippe RUBELI, attorney

Facts:

A.

A. a X. _____ is a French soccer player born on May 28, 1986. He is presently playing as a professional for the Y. _____ Club in the English Premier League championship.

A. b On March 29, 2003 X. _____ and his legal representative signed a "training convention" with B. _____, a French soccer club in which X. _____ had been playing since the 1997/1998 season. The aforesaid contract was concluded for a three years period, from July 1, 2003 to June 30, 2006, as provided by French law, which imposes the conclusion of such contracts with the players integrated into a certified training center operated by one of the clubs. Its object was to define how the beneficiary would be trained for the game along with a training for a profession,

[1] Translator's note : The original of the decision is in French. In keeping with the system of the Swiss Federal Tribunal, the names of the parties have been omitted. Quote as X._____ v. A._____ Association and SASP B._____, 4A 370/2007.

in a school or at university. The contract obliged the beneficiary to sign his first professional player contract after his training with the club which had trained him, the duration of such a first employment contract being not in excess of three years. If he refused to do so and concluded an employment contract as a professional player with another club within three years after the training contract expired, the beneficiary would have to pay to the club such training expenses as would be calculated according to the (French)[2] Charter of professional soccer ("The Charter"). The same would happen if the beneficiary were to unilaterally terminate the contract for other reasons than those provided therein and if he were to sign a contract of employment as a professional soccer player with another professional sport group within a period of three years. It was anticipated that any dispute relating to the non performance of the training contract would be submitted to (French)[3] professional soccer league ("PSL"). On the same date, the aforesaid parties concluded an "aspiring player" contract for one season, *i.e.* from July 1, 2003 until July 30, 2004. B. _____ undertook to give or to cause to be given to X. _____ professional training as an aspiring player and to pay him a monthly salary.

Also on March 29, 2003, the same parties signed a document entitled "Special provisions" in order to define their financial and contractual relationship. Among other things, the club undertook to propose a contract as an apprentice player for two seasons to the player, in April 2004, followed in April 2006 by a contract as a professional player for three years if the beneficiary's results on the field would so justify.

A.c The aspiring player contract expired on June 30, 2004 as anticipated. Previously, on March 1, 2004, B. _____ proposed to X. _____ the execution of a new contract as apprentice player and the extension of the duration of the training contract for two additional years. The proposal remained without effect.

On July 15, 2004, X. _____ did not appear when training was reconvened at the training center. In the beginning of August 2004, he concluded an employment contract as a professional soccer player with the (English)[4] club of Y. _____. Invited by the English Soccer Federation ("FA") to issue an international certificate for the player's transfer, the French Soccer Federation ("FFF") refused to do so, holding that B. _____'s opposition to the transfer was justified.

[2] Translator's note
[3] Translator's note
[4] Translator's note

B.

B.a On August 31, 2004, SASP B. _____ and A. _____ Association (hereafter collectively B. _____) filed a claim against Y. _____ Club with the Dispute Resolution Chamber of FIFA, seeking among other things a finding that B. _____ and X. _____ were bound contractually and that the latter was under a duty to sign a contract as a player with B. _____, with a moratorium on any professional soccer activity by that player, issued immediately, until he would be returned to the aforesaid club.

On September 2, 2004, an official of the Players' Status Committee, acting on behalf of the Dispute Resolution Chamber ("DRC") decided to authorize the registration of X. _____ with the English Federation provisionally, as a player for Y. _____. However, on October 6, 2004, that decision was stayed by the Court of Arbitration for Sport ("CAS") upon an appeal by B. ___ until the DRC issued a decision on the merits.

On October 5, 2004, X. _____ sent FIFA a letter in which he set forth the circumstances of his transfer to Y. ____ and asked for a confirmation that he was entitled to play for a non French club without exposing himself or the club to any sanctions. The DRC issued a first decision on November 2, 2004. B. ____ was mentioned as a Claimant and X. ____ as a Respondent, with Y. ____ as an intervening party. The decision set a time limit for the parties to attempt to resolve the dispute amicably. Should the negotiations fail, a time limit to November 25, 2004 was given to B. ____ to quantify its damages relating to the breach of the training contract and to X. _____ to advise the DRC as to "the amount considered appropriate to compensate B. ____ for the breach of the training contract".

The negotiations between the two clubs and the player failed and B. _____ advised the DRC in a letter of November 25, 2004 as to the amount it considered it could claim as compensation for its damages should the player fail to return immediately to its training club. In B. _____'s opinion the FIFA Regulation for the Status and Transfer of Players ("the FIFA Regulation") had to be taken into account to assess the amount of damages, which consisted in compensation for the training as provided by Art. 15 of the aforesaid Regulation, estimated at EUR 300'000.-- and in an unquantified compensation for unilateral breach of the contract within the meaning of Art. 21 ff of the same Regulation relating to maintaining contractual stability within soccer. Y. _____ offered EUR 100'000.-- as compensation for the entire damages undergone by the club. X. _____ held the view that B. ____ was not entitled to claim anything from him personally.

On November 26, 2004, the DRC issued a second decision. With regard to the training contract, it found that it had no jurisdiction to decide the consequences of its violation, if any, because the training contract was not an employment contract between a player and a club belonging to an

association and the DRC's jurisdiction was limited to the disputes arising from such an employment contract. As to the aspiring player contract, on which it had jurisdiction, the DRC held that it had been terminated on June 30, 2004 so that, from that date, there was no longer any legal relationship of employment between B. ____ and X. ____. The latter may have been in breach of the obligation imposed on him by the Charter in connection with the aforesaid contract, namely to conclude a new contract as an apprentice player which the club had proposed to him. However, the only sanction contained in the Charter in such a case was the prohibition for the player to sign in another club of the French League. Hence, nothing would preclude X. ____ from concluding an employment contract with an English professional club. From that, the DRC deducted that the player was under no duty to return to the club B. _____. Neither did he have to sign a contract with that club and he could accordingly be registered with Newcastle (FN)[5] with the English Federation. However, since X. ____ was not 23 years old when he contracted with the English club, the latter was held to owe EUR 300'000.-- to B. _____ as compensation for training pursuant to Art. 17 of the FIFA Regulation. Moreover, the DRC rejected the other submissions by B. _____ and advised that they could appeal to the CAS according to Art. 60 (1) of the FIFA Statutes.

B.b On December 22, 2004, B. ____ appealed to the CAS, mentioning FIFA only as respondent. In its appeal brief, filed on January 4, 2005, he submitted that the November 26, 2004 decision of the DRC should be overturned and asked for a finding that there was a contractual relationship between X. ____ and the club, the latter being ordered to sign a player's contract with B. ____ whilst being immediately suspended until he returned to the club, with "financial and other sanctions imposed on all those concurring in inciting to the breach of the training contract binding X. _____ to B. _____".

In a letter of January 5, 2005, X. _____ requested and obtained the possibility to intervene in the proceedings as a party. On February 21, 2005, he submitted an answer to the appeal, in which he invited the CAS, among other things, to reject the appeal entirely and to confirm the decision of the DRC, to the extent that it had authorized the registration of his contract as a professional player with Y. ____. Also, it should be said that the financial and other sanctions requested by B. ____ were of no concern to him. Y. _____ also intervened in the appeal proceedings in a brief of February 21, 2005, submitting that the decision under appeal should be confirmed. FIFA made the same submission in a brief dated February 15, 2005.

[5] Translator's note : left in the original French text.

In a Procedural order of May 31, 2005, the CAS found that its jurisdiction derived from Art. 59 ff of the FIFA Statutes and from R47 of the Arbitration Code for Sport ("The Code") it took notice of the fact that the parties agreed to submit their dispute to the CAS and pointed out that it would be decided by a panel of three members, who's names were given. X. ____ signed the procedural order "for agreement".

On October 27, 2005, the CAS issued a "partial arbitral award". Holding that the decision was capable of appeal, it partially granted the appeal and reversed the November 26, 2004 decision to the extent that the DRC had denied jurisdiction to decide the respective rights and obligations of X. _____ and B. _____ under the training contract. The CAS also found that the player had violated his contractual obligation towards that club and stated that the parties would soon be invited to take a position in writing on the possible additional compensation owed to B. ____ within the meaning of the reasons of the award. Moreover, the CAS confirmed FIFA's decision and rejected all other submissions.

The reasons of the award may be summarized as follows:

Pursuant to Art. 42 and 43 of the FIFA Regulation, the DRC had to assess X. ____'s obligations towards B. ____ and the consequences of a possible violation, taking into account the specificities of the French training system for soccer players and all the agreements between the club and the player, including the training contract. Therefore, the DRC was wrong to deny jurisdiction on the possible consequences of a breach of that contract. Its appreciation of the situation was incomplete and made only in part. However, the submission to the CAS by the parties prevented the CAS from reviewing the monetary award against Y. _____. Also, the time elapsed no longer allowed for the player to return to his training club, neither could he be compelled to conclude a new contract as an apprentice with that club. However, considering the French training system in its entirety, the fact that X. _____ violated his contractual obligations by unilaterally breaching the training contract could justify other consequences in terms of damages in B. _____'s favour in addition to the compensation already recognized by the DRC. Thus, a possible application to the case of the specific sanctions in the training contract and - or those contained in the FIFA Regulation to maintain contractual stability in soccer - had to be considered and, if necessary, their scope as well. For that reason, the decision under appeal was to be partially overturned and the parties had to be invited to present their arguments and submissions as to the possible monetary consequences that had to be deducted from the facts of the case.

The Secretary of the CAS opened an exchange of pleadings in this respect. In its brief of February 17, 2006 B. _____ submitted, among other things, that X. _____ should be ordered to

pay damages in an amount between EUR 3'700'000.-- and EUR 4'260'000.-- and that Y. _____ should guarantee that claim.

X. _____ and Y. _____ submitted that all requests by B. _____ should be rejected.

B.c The CAS issued its final award on July 17, 2007. It ordered X. _____ to pay to B. _____ a total amount of EUR 545'812.-- with interest at 5% yearly since August 1, 2004 and rejected all other submissions. The arbitration costs were divided between the parties by half and no legal costs were granted.

The aforesaid award substantially relied on the following reasons:

According to Art. 60 (1) of the FIFA Statutes, the CAS was the higher jurisdictional authority in charge of deciding on appeal whether the decision by the DRC on November 26, 2004 was justified or not in the dispute between B. _____ and X. _____. In that procedural framework, the CAS could review freely both facts and law and it could not only overturn the decision under appeal, but also substitute it with its own decision. By addressing the issue of the possible monetary consequences of a breach of the training contract by X. ____ already submitted to the DRC, the CAS was only exercising its power of full jurisdiction. Since B. _____, in its appeal brief of January 4, 2005, had reserved the possibility to advance monetary claims against all those having acted within the framework of the unjustified breach of the aforesaid contract, these were not new claims within the meaning of Art. R56 of the Code. Moreover, it was upon invitation by the CAS that B. _____ had quantified its monetary claims against Y. _____ and X. _____ in its brief of February 17, 2006. The CAS could therefore not decide *ultra petita* if it ordered one of the Respondents to pay additional compensation to the Appellant. Moreover, the dispute having an international character, the CAS was empowered to decide all the questions involved. Thus, the Respondents, who had acknowledged this by participating to the proceedings in front of the DRC, were wrong to claim that the French Courts or the French League had exclusive jurisdiction.

The monetary claims by B. _____ were to be adjudicated under Art. 59 of the FIFA Statutes, the application of which was directly or indirectly accepted by all parties. According to the second paragraph of that provision, the CAS could also apply Swiss law, specifically Art. 42 (2) and 43 of the Code of Obligations ("CO") in connection with Art. 99 (3) CO, to assess the amount of compensation resulting from the contractual breach. The CAS would also determine on a case by case basis to what extent French law should be taken into account, but such a possibility would not imply the duty for the CAS -or, previously, for the DRC – to apply the rules of the internal

(French)[6] law exclusively when such rules existed. The compensation owed to B. _____ as a consequence of X. _____'s violation of his obligations towards his training club must be decided only on the basis of the rules relating to maintaining contractual stability in soccer, as spelled out at Art. 21 ff of the FIFA Regulation. Art. 22 of that Regulation indeed grants priority to the specific provisions that the contract breached may contain in this respect. However, Art. 10.1 of the training contract, which was dispositive of the issue, was not applicable in the case, because it applied only nationally. Yet, the player involved was contractually bound to an English club. Under such conditions, the CAS was to assess the compensation owed to B. _____ by seeking a fair proportion between the contractual breach and the amount awarded, according to the principles of Art. 42 and 43 CO. The damage undergone by B. _____ was that it had been prevented from using the services of a player that the club should have had under contract during at least two years and it had not been in a position to negotiate the transfer of the player to another club. On the first count, damages could be set at EUR 195'812.-- in view of the amount of the salaries X. _____ would have received as an apprentice during the contract he had been proposed (EUR 19'812.--) as well as the other benefits the player would have received for his training if he had remained within the club for two additional seasons (EUR 176'000.--). The second count of damages could be set at EUR 350'000.-- under all the circumstances of the case, considering the wide discretion of the CAS. Thus, global compensation was at EUR 545'812.-- with interest at 5% since August 1, 2004, in addition to the compensation for training of EUR 300'000.-- to be paid by Y. _____ - as provided by Art. 22 of the FIFA Regulation. X. _____ only was to pay that additional amount, as there was no foundation for any liability by Y. _____ in this respect.

C.

On September 14, 2007, X. _____ ("the Appellant") filed a Civil Law Appeal with the Federal Tribunal seeking the annulment of the aforesaid award and a finding that the CAS had no jurisdiction to decide the disputed claims for damages. The Appellant also applied for a stay, which was granted *ex parte* by the Presiding Judge on September 24, 2007.

B. _____ ("the Respondent") and the CAS submitted that the appeal should be rejected.

[6] Translator's note

Reasons:

1.

The final award was issued on July 17, 2007, namely after the entry into force of the Statute on the Federal Tribunal ("LTF"; RS 173.110) on January 1, 2007. To the extent that it challenges the aforesaid award, this appeal is therefore governed by the new law (Art. 132 (1) LTF).

2.

In international arbitration, Civil Law Appeals are possible against the awards of Arbitral Tribunals as provided by Art. 190 to 192 PILA[7] (Art. 77 (1) LTF).

2.1 The seat of the CAS is in Lausanne. At least one of the parties - in this case both - was not domiciled 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 concerned by the award under appeal, because the latter ordered him to pay an important amount of money to the Respondent. He therefore has a personal interest, present and legally protected, to ensure that the award was not issued in violation of the guarantees arising from Art. 190 (2) PILA and he therefore has standing to appeal (Art. 76 (1) LTF).
Filed within the time limit of Art. 100 (1) LTF in connection with Art. 46 (b) LTF in the legal format (Art. 42 (1) LTF), the matter is capable of appeal. Whether or not some of the points raised are capable of appeal is reserved.

2.3 The matter at hand is particular to the extent that before the award a so called "partial" award was issued on October 27, 2005, *i.e.* before the entry into force of the new law.

2.3.1 An actual partial award or partial award *stricto sensu*, mentioned at Art. 188 PILA is that by which the Arbitral Tribunal decides a limited part of the claims submitted to the arbitrators or one of the various claims in dispute (ATF 128 III 191 at 4a p. 194). It is distinguished from the interlocutory award, which decides one or several preliminary issues, whether procedural or on the merits (case quoted *ibid.*). According to case law, a partial award may be appealed immediately as a final award would be because, as the former, it constitutes an award falling within the scope of Art. 190 (1) and (2) PILA (ATF 130 III 755 at 1.2.2 p. 761). With legal writers, it must be

[7] Translator's note : PILA is the abbreviation for the Swiss federal statute on Private International Law of December 18, 1987.

stated that partial awards must be appealed within thirty days after they are notified, under penalty of forfeiting the right to appeal. Allowing an appellant to appeal a partial award within the framework of an appeal against the final award would indeed be contrary to the very purpose of the immediate appeal against a partial award, which is to put a definitive end to part of the dispute (Sébastien Besson, La recevabilité du recours au Tribunal Fédéral contre les sentences préjudicielles, incidents ou partielles rendues en matière d'arbitrage international [hereafter "La recevabilité"] in Jusletter of April 18 2005 ; the same, Le recours contre la sentence arbitrale internationale selon la nouvelle LTF (aspect procéduraux) [hereafter « Le recours »], in Bulletin de l'Association uissse de l'arbitrage [ASA] 2007, p. 2 ff,. 9 n. 19 ; Gabrielle Kaufmann-Kohler/Antonio Rigozzi, Arbitrage international, éd. Weblaw 2006, n. 720 with other citations at p. 309, footnote 340 ; Bernhard Berger/Franz Kellerhals, Internationale und interne Schiedsgerichtsbarkeit in der Schweiz, n. 1530).

Pursuant to Art. 190 (3) PILA, interlocutory awards may be appealed only for the grounds set forth at Art. 190 (2)(a) PILA (irregular composition of the Arbitral Tribunal) and (b) (jurisdiction of the Arbitral Tribunal or lack thereof) (ATF 133 III 755 at 1.2.2 p. 162). Actually, this is not only a possibility given to the parties, but a real obligation sanctioned by forfeiting the right to appeal (ATF 130 III 66 at 4.3 p. 75; 121 III at 6d p. 502 and cases quoted). Under the old Statute Organising Federal Courts, it was decided that an immediate appeal had to be made not only when the interlocutory award dealt with jurisdiction or the Arbitral Tribunal being regularly constituted, but also when it decided another interlocutory issue; in that case, indeed, the Arbitral Tribunal implicitly assumes jurisdiction and that it is regularly composed (ATF 130 III 76 at 3.2.1 p. 80, 2nd section and quoted judgment; in the same sense, cf. Besson, Le recours, p. 10, n. 21; Berger/Kellerhals, *op. cit.,* n. 1535; Kathrin Klett, Commentaire bâlois, n. 4 at Art. 77 LTF).

2.3.2 The October 27, 2005 award is a hybrid. At numbers 1 and 2 of its holding, it held that the decision issued on November 26, 2004 by the DRC was capable of appeal by the Respondent and it granted the appeal partially, overturning the decision under appeal to the extent that the DRC denied jurisdiction to decide the claims arising from the training contract; in this respect, it was an interlocutory award deciding procedural issues. The same applies to the postponement of the decision on the costs of the Arbitration until the final award, as done at number 7 of the aforesaid award. To the extent that it held that the Appellant was in breach of his contractual obligations towards the Respondent and stated that the parties would soon be invited to state their position in writing with regard to the possible additional compensation owed to the Respondent (numbers 3 and 4 of the holding), the October 27, 2005 award decided a preliminary

issue on the merits - the player's contractual liability towards his training club – and issued a procedural directive based on the answer given to that question; on the first count, it was an interlocutory award. Moreover, the award under appeal confirmed items 2, 3 and 4 of the decision under appeal, rejecting all other submissions by the parties (numbers 5 and 6 of the holding). In that way, it first approved FIFA's refusal to compel the Appellant to go back to his training club and to sign a contract with the latter; second, the authorization given to the Appellant to register as a player of Y. _____ was approved; third, the obligation imposed to that club to pay to the Respondent the amount of EUR 300'000.-- as compensation for the training was approved; with regard to these counts, it was an actual partial award.

Having failed to appeal the October 27, 2005 award immediately, the Appellant, for the reasons mentioned above (see at 2.3.1), is no longer entitled to challenge numbers 5 and 6 of the holding of the award within the framework of his appeal against the final award of July 17, 2007, to the extent that he may still have an interest in doing so. However, he retains the right to appeal the other items of the holding in the same award to the extent that they belonged to an interlocutory award.

At this point, the question is whether or not the Appellant is entitled to challenge the jurisdiction of the CAS in his appeal against the final award, notwithstanding the existence of the partial award of October 27, 2005. The question will be dealt with hereunder at 4.2.

2.4 The appeal may be made only for one of the reasons 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 only reviews the grounds for appeal invoked and argued by the Appellant (Art. 77 (3) LTF). He must state his grounds for appeal in accordance with the strict requirements as to reasons established by case law interpreting Art. 90 (1)(b) OJ (ATF 128 III 50 at 1c) which remain valid under the new Federal Procedural Law.

The Federal Tribunal decides the matter on the basis of the facts established by the Arbitral Tribunal (Art. 105 (1) LTF). It may not rectify or supplement the factual findings of the arbitrators *ex officio* even when the facts were established in a manifestly inaccurate manner or in violation of the law (see Art. 77 (2) LTF which rules out the applicability of Art. 105 (2) LTF). However, as was already the case under the Federal Statute Organising Courts (ATF 129 III 727 at 5.2.2; 128 III 50 at 2a and the cases quoted), the Federal Tribunal retains the faculty to review the facts upon which the award under appeal was based if one of the grounds for appeal at Art. 190 (2) PILA is raised against the findings of facts or if some new facts or evidence are exceptionally taken into account within the scope of the Civil Law Appeal (Art. 99 (1) LTF;

Bernard Corboz, Introduction à la nouvelle loi sur le Tribunal fédéral, in SJ 2006 p. 320 ff, 345; Besson, Le recours, p. 2 ff, 24 to 26, n. 55 to 59).

3.
In a chapter entitled "Essential facts" of its brief to the Federal Tribunal (p. 3 to 11), the Appellant stated his own version of the circumstances of the case. He made assertions, some of which departed from the factual findings of the CAS, without invoking one of the exceptions mentioned above, even stating that he was "mistreated" by the Respondent club, which would have permanently refused to give him his chance (par. 18). Moreover, far from limiting himself to stating the facts bearing on the issue at hand, he interjected various criticisms pertaining to the application of the law in his brief, particularly with regard to the jurisdiction of the CAS (see for instance par. 41 to 43 and 53 to 60). Proceeding in such a manner is inconsistent with the nature of the Civil Law Appeal against an international arbitration award and with the scope of the review allowed to the Federal Tribunal in this field. Such an alleged reminder of the decisive facts shall accordingly be omitted herein.

4.
In a first ground for appeal, based on Art. 190 (2)(b) PILA, the Appellant blamed the CAS for wrongly assuming jurisdiction to order him to pay damages to the Respondent.

4.1 Seized for lack of jurisdiction, the Federal Tribunal freely reviews the legal issues, including preliminary issues, which determine the jurisdiction or the lack of jurisdiction of the Arbitral Tribunal. However, it reviews the statement of facts upon which the award was based – even when jurisdiction is involved – only if one of the grounds for appeal at Art. 190 (2) PILA is raised against the aforesaid statement of facts or if some new facts or evidence (Art. 99 (1) LTF) are exceptionally taken into account within the framework of the Civil Law Appeal (ATF 129 III 727 at 5.2.2; 128 III 50 at 2a and the cases quoted).

4.2 The first issue is the one reserved above at 2.3.2 last paragraph, namely whether the matter is capable of appeal for lack of jurisdiction or not. It must be noticed in this respect, that in the interlocutory and partial award issued on October 27, 2005, the CAS clearly stated its intent to examine whether or not the player's breach of his contractual obligations towards his training club may justify the award of financial sanctions, by way of damages to be paid to the aforesaid club and, if so, to what extent. It is indeed for that reason that the CAS invited the parties to

express their views in writing on that issue. Contrary to what he is claiming, the Appellant, assisted by counsel, could not in good faith consider on the basis of the reasons of the award that the CAS would deny jurisdiction in its final award as to the claims for damages that the Respondent may raise against the Appellant in its written pleadings to be filed. In other words, nothing allowed the Appellant to consider that the October 27, 2005 award purported to limit the number of potential debtors towards the Respondent how could be the object of a monetary award in the final award and to exclude the Appellant there from. Thus, the Appellant should have immediately appealed the first award, on the basis of Art. 85 (c) OJ, under penalty of forfeiting the right to appeal if he meant to deny to the CAS the jurisdiction to order him personally to compensate the Respondent. Having failed to do so, he is no longer allowed to raise the alleged lack of jurisdiction of the Arbitral Tribunal in the framework of his Civil Law Appeal against the final award of July 17, 2007.

The matter is accordingly not capable of appeal to the extent that the Appellant seeks to demonstrate the lack of jurisdiction of the CAS *ratione personae*, since the issue of jurisdiction was already implicitly decided in the award of October 27, 2005.

5.

The Appellant subsidiarily claims that the award under appeal violated public policy within the meaning of Art. 190 (2)(e) PILA in several respects. Before reviewing the Appellant's criticism in support of this ground of appeal, it is appropriate to restate the contents of the concept of public policy within that provision.

5.1 An award is incompatible with public policy when it denies the essential and largely recognized values which, according to the concepts prevailing in Switzerland, should be the basis of any legal order (ATF 132 III 389 at 2.2.3). Material public policy must be distinguished from procedural public policy. In its most recent case law, the Federal Tribunal defined both concepts as will be restated hereunder (same case at 2.2.1). Procedural public policy guarantees to the parties the right to an independent judgment on the submissions and the facts presented to the Arbitral Tribunal in a manner consistent with applicable procedural law; procedural public policy is violated when some fundamental and generally recognized principles were violated, leading to an untenable contradiction with the sentiment of justice, so that the decision appears incompatible with the values recognized in a state ruled by laws. An award is contrary to material public policy when it violates some fundamental principles of the law on the merits to an extent that it is no longer consistent with the legal order and the determining system of values; amongst

such principles are contractual trust, abiding by the rules of good faith, the prohibition of abuse of rights, the prohibition of discriminatory or confiscatory measures, as well as the protection of incapable persons.

5.2

5.2.1 Firstly, the Appellant claims that the matter was not arbitrable because its object was the damage claims against a French soccer player who terminated without reasons the ad-hoc contract binding him to a training club in France in order to enter into an employment contract with a foreign soccer club. Such claims could in no way be submitted to arbitration. Indeed, resolving the dispute in that way would violate the jurisdictional clause in favour of the French authorities of the game – *i.e.* the French Federation – inserted in the training contract and this would be mandatory under French public law in order to protect the interests of minors.

5.2.2 Contrarily to what the Appellant stated at page 19 of its brief, the lack of arbitrability of the dispute may not be raised "at all times". It was decided long ago that the defence of lack of arbitrability of the dispute abides by the same rule as the objection against jurisdiction and that, as the latter (Art. 186 (2) LDIP), it must be raised before any defence on the merits (ATF 119 II 271 at 5, unpublished, quoted by Berger/Kellerhals, op. cit., n. 247). However, the Appellant did not establish that he did so in front of the arbitral jurisdiction. Therefore, the matter is not capable of appeal from that point of view. Additionally, the arbitrability is a condition of the validity of the arbitration clause and accordingly, of the arbitrators' jurisdiction (ATF 118 II 353 at 3a p. 355 and the cases quoted; also see ATF 133 III 139 at 5 p. 141). Hence, the corresponding ground for appeal falls within Art. 190 (2)(b) PILA. Accordingly, the matter is not capable of appeal on the basis of Art. 190 (2)(e) PILA (incompatibility with public policy). Had it been formulated correctly within the challenge to the jurisdiction of the CAS, it should be rejected, because *mutatis mutandis*, the Appellant forfeited his right to appeal for the reasons explained above (see 4.2).
The ground for appeal under review appears unfounded anyway. According to Art. 177 (1) PILA, any dispute of financial interest may be arbitrated. That the present dispute, which relates to the award of damages for a breach of contract is of such nature is not questionable, neither is it questioned. It is true, that in its aforesaid seminal decision, the Federal Tribunal considered the possibility to deny the arbitrability of such claims as might have been exclusively reserved to a state jurisdiction by provisions having to be taken into consideration as a matter of public policy (ATF 118 II 353 at 3c p. 357). However, in this case, the Appellant failed to substantiate his peremptory allegation that the claims in dispute arising from the training contract would fall

within the exclusive jurisdiction of the French League – an organism which incidentally is not a state court – on the basis of mandatory French public law. Moreover, as the CAS stated in its answer to the appeal, the Appellant was a fully capable adult when he acknowledged the jurisdiction of the CAS by signing the May 31, 2005 Procedural order. It hardly needs to be emphasised that the same applied when he seized the DRC (August 31, 2004). It is therefore not to be seen why on the basis of the requirement of protection for minors, the arbitrability of a dispute between a training club and an adult player should be denied. And if the Appellant meant to avail himself of such a ground to challenge the validity of the training contract, he would also deprive his principal argument of any basis as it relied on the jurisdictional clause contained in the aforesaid contract.

5.3

5.3.1 According to the Appellant, the award under review would also violate the prohibition of forced labour as contained at Art. 4 (2) ECHR[8], thereby contradicting the essential principles contained at Art. 190 (2)(e) PILA. Indeed, ordering a player to pay exorbitant damages to his training club on the basis of his refusal to abide by a carrier plan imposed by a soccer club to an amateur player aged 16 would be tantamount to making it impossible to terminate an agreement which it mandatorily ought to be possible to terminate in order to comply with public policy.

5.3.2 The European Convention on Human Rights is not directly applicable to arbitration (Kaufmann-Kohler/Rigozzi, op. cit., n. 64). Indeed, the violation of the Convention is not included among the grounds for appeal limitatively set forth at Art. 190 (2) PILA. However, it should not be ruled out completely that the principles underlying the provisions of the Convention should be taken into account. To that extent, it may be accepted, with the Appellant, that an award which would harm, even indirectly, as fundamental a principle as the prohibition of forced labour would be contrary to the concept of material public policy as understood by Swiss law.

5.3.3 At paragraph 66 of its award of October 27, 2005, the CAS stated that it was not to "appreciate the validity" of the French system for training soccer players, which it reviewed at numbers 58 to 65, specifically not with regard to EU law. The Arbitral Tribunal therefore, whether rightly or not, denied jurisdiction to review the compatibility with existing law of the system of training of young players instituted by France, particularly at the European level.

[8] Translator's note : European Convention on Human Rights of November 4, 1950.

However, the Appellant does not claim that the CAS did not address that issue, but he seeks to demonstrate why the award, according to him, produced a result which did not take into account the incompatibility of such a system with existing law, namely the European Convention on Human Rights. In so doing, the Appellant loses sight of the fact that a lower court, whether State or Arbitral, may not be blamed for incorrectly addressing an issue which that jurisdiction did not address because it denied jurisdiction to do so and its decision was not appealed on that basis. The ground for appeal derived from Art. 4 (2) ECHR is accordingly not capable of appeal.

5.4 The CAS is also blamed for creating an unacceptable discrimination with regard to compensation owed to the training club between players who became professionals in France and those who would join a foreign professional club. An act, a measure or a decision is discriminatory when it illicitly violates the personality rights of the person involved, because it was issued exclusively as a consequence of That person's sex, race, health condition, sexual preference, religion, citizenship or political opinions (judgment 4P. 12/2000 of June 14, 2000, at 5a/aa). Such a definition of discrimination given by case law obviously does not embrace the measure which the Appellant claims was discriminatory.

5.5 The award under appeal would also disregard the principle of contractual trust according to the Appellant. Indeed, the CAS would have ordered the Appellant to pay damages to the Respondent without realising that the training contract did not provide for that type of compensation, although the CAS held it to be binding for the parties. Contractual trust is among the principles which constitute material public policy (ATF 128 III 191 at 6b p. 198; 120 II 155 at 6a p. 166 and cases quoted). The rule of *pacta sunt servanda*, in the restrictive meaning it has according to case law based on Art. 190 (2)(e) PILA is violated only if the Arbitral Tribunal refuses to apply a contractual clause whilst admitting that it binds the parties or, conversely, if it imposes on them to comply with a clause which it considers as not binding. In other words, the Arbitral Tribunal must have applied or refused to apply a contractual provision in a way that contradicts its own interpretation as to the existence or the contents of the legal instrument in dispute. However, the process of interpretation itself and the legal consequences logically derived from it are not governed by the principle of contractual trust and they are not capable of appeal for violation of public policy. This Court repeatedly emphasized that almost the entire realm of contractual breaches is excluded from the area protected by the principle of *pacta sunt servanda*. It must be added that within its review of an alleged violation of public policy as defined by Art. 190 (2)(e) PILA, the Federal Tribunal does not have to review whether or not the arbitrator gave

a correct interpretation of a contract provision. In the case under appeal, under the disguise of a violation of the principle of *pacta sunt servanda*, the Appellant actually seeks to substitute his own legal analysis of the pertinent facts to that which was held by the CAS and, whether it is sustainable or not, it is not to be reviewed by the Federal Tribunal. It is appropriate to point out that in the final award (par. 70 ff), the CAS considered, whether rightly or not, that to the extent that the Appellant had not contracted with a French club after terminating his training contract, but with a foreign club, the basis of his duty to compensate the training club and the amount of compensation owed to the latter were to be found in the provisions of the FIFA Regulation seeking to maintain contractual stability and not in the training contract, as nothing was specified there. On that basis, the CAS then applied the legal provisions to which the Regulation referred in order to calculate the amount of damages owed by the Appellant. In doing so, the CAS did not draw any consequences which would be inconsistent with its own interpretation of the training contract. The ground of appeal under review must therefore fail.

5.6 In a last ground for appeal, the Appellant claimed that the CAS decided the matter *ex aequo et bono* in disregard of applicable French law and although the requirements of French law for the award of damages were not met. It is not certain that usurping the power to decide *ex aequo et bono* would be contrary to public policy as defined by Art. 190 (2)(e) PILA (see Berger/Kellerhals, op. cit., n. 1603 p. 562; Corboz, op. cit., p. 30 in limine), at least when the award did not produce a result inconsistent with public policy (ATF 116 II 634 at 4a p. 637) The issue is disputed (see Kaufmann-Kohler/Rigozzi, op. cit., n. 651). It may remain undecided in this case.
Indeed, the CAS did not issue its decision *ex aequo et bono* within the meaning of Art. 187 (2) PILA without due authorization from the parties. The CAS applied Art. 42 (2) and 43 CO as supplementary law, in conformity with Art. 59 (2) of the FIFA Statutes. The first of the two aforesaid provisions provided for equitable determination of damages. In other words, far from disregarding applicable law, the CAS relied on the applicable law to issue an award inspired by the equitable considerations that the latter imposed upon the CAS. Accordingly, the Appellant's attempt to demonstrate the gap between the solution adopted by the CAS and that to which the applicability of French law would have led is in vain. Moreover, when seized of an alleged incompatibility of the award with public policy, the Federal Tribunal may not review the manner in which the CAS computed the damages awarded to the Respondent pursuant to an application of Swiss law as supplementary law.
The last ground of appeal formulated by the Appellant is therefore also to be denied.

6.
This being so, this appeal must be rejected with costs (Art. 66 (1) and 68 (2) LTF) to the extent that the matter is capable of appeal.

For the aforesaid reasons, the Federal Tribunal pronounces:

1.
The appeal is rejected to the extent that the matter is capable of appeal.
2.
The judicial costs, set at CHF 15'000.--, shall be born by the Appellant.
3.
The Appellant shall pay to the Respondents, severally, an amount of CHF 17'000.-- for legal costs.
4.
This judgment shall be notified to the representatives of the parties and to the Court of Arbitration of Sport (CAS).

Lausanne, February 21st 2008

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

The Presiding judge:	The Clerk:
CORBOZ	CARRUZZO