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TRANSFERS OF FOOTBALL PLAYERS
A Practical approach to implementing FIFA rules

Michele Colucci and Ornella Desirée Bellia (eds.)

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PART I

INTERNATIONAL TRANSFERS OF PLAYERS

A. Antonini, B. Arnaud, A. Bozza, P. Capello, R. Chu, S. Civale, M. Clariá, C. Couse, V. Eleuterio, L. Ferrer, M. Garcia Caba, A. Galdeano, T. Gunawardena, J. Leal, J. Lobão, S. Malvestio, G. Marino, A. Mialhe, K.T. Morris, M. Motta, O. Ongaro, L. Pastore, V. Plavjanikova, A.N. Reck, T. Pereda Rueda, N. A. Santiago, M. Spadini, M. Tenore, L. Tettamanti, R. Trevisán, J.F. Vandellós, J. Wilkens, D. Wu, K.N. Zemberis

2020



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INTRODUCTION

Football is a global marketplace where talented players move frequently from one club to another.

Since footballers’ contracts are now more lavish than ever, the interests at stake are also huge. As a consequence, footballers, clubs, and intermediaries, are often involved in extended, exhausting negotiations to close employment and transfer agreements, which have multifaceted contents, encompassing sport activity and image marketing.

In such a context, it becomes obvious that the stakeholders’ lawyers bear the responsibility to carefully and diligently conceive, negotiate, and draft the relevant contracts’ clauses.

They do so within the legal framework designed by FIFA over the years and shaped mostly by the evolution of the CAS and FIFA jurisprudence. So, it is unsurprising that the transfer regulatory framework has been amended several times.

The last reform has recently been endorsed by the FIFA Football Stakeholders Committee which debated and agreed some measures in the spirit of positive dialogue between parties with mutual interests in the effective functioning of the transfer rules.

Taking into account the legal and economic context of the transfer system, the ongoing reform process, and the consolidated digest of FIFA and CAS jurisprudence, this book has the realistic ambition to provide football stakeholders and lawyers with an updated and comprehensive overview of all the sensitive questions, which seriously matter for the transfer of players, such as:

What are the indispensable facts and legal acts that clubs and players should consider in order to complete a mutually profitable and successful transfer agreement?

What are the main provisions that clubs, players, and intermediaries should focus on while concluding a contract?

Furthermore, what are the federations’ responsibilities, duties and operative measures?

How do the regulatory provisions governing football transfer and employment agreements work in practice?

The Authors of this publication are practitioners and scholars who answer those and other questions, exploiting their proven, professional experience as in-house lawyers or legal counsels to clubs, Football Associations, and players.

They provide a comprehensive overview of all matters related to the transfer of players.

This book is updated with the latest amendments to the *FIFA Regulations on the Status and Transfer of Players* published in March 2020.

It is divided into two parts: the first one has an international scope and puts emphasis on the main contractual clauses drafted in the context of a transfer in light of the relevant FIFA regulations and international case law.

Highlighted topics include training compensation, third party ownership, transfer of minors, intermediaries and international tax issues.

The second part concentrates on national transfers. Following the same outline, the Authors analyse the relevant domestic regulatory frameworks by underlining and explaining in detail the peculiarities of each system from a practical viewpoint.

On the basis of such analysis the editors draw the main conclusions in order to identify and validate the best practices and to hopefully contribute to upgrading the legal framework of the football transfer system.

The editors wish to sincerely thank James Mungavin for his linguistic revision and valuable comments, Durante Rapacciuolo for his precious suggestions, and Antonella Frattini for her patience and her meticulous work in editing the book.

Last but not least, a word of thanks to all the Authors who – despite their busy agendas – found the time and the necessary concentration to write the chapters which have made this book unique.

Ornella Desirée Bellia and Michele Colucci

Zurich – Brussels, 13 April 2020

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PART I

INTERNATIONAL TRANSFERS OF PLAYERS

FIFA REGULATIONS ON THE STATUS AND TRANSFER OF PLAYERS – THE LATEST DEVELOPMENTS

by Omar Ongaro*

I. Introduction

In order to give a comprehensive overview of the issues affecting the transfer of players, this chapter complements the analysis made in the other parts of this book by focusing on the latest amendments to the FIFA Regulations on the Status and Transfer of Players (“FIFA RSTP”). The rationale behind those amendments as well as the reasoning of the FIFA deciding bodies when applying the main FIFA provisions is explained. Moreover, in line with the practical approach of this publication, concrete examples of cases and circumstances that clubs and players (and their legal representatives) should take into account on the occasion of a transfer are given.

At the time of writing this essay, the work of the Task Force Transfer System (‘Task Force’), which was institutionalised by FIFA’s Football Stakeholders Committee (“FSC”)¹ and mandated to carry out a detailed review of the transfer system at working level, is still ongoing. It has presented a first series of findings to the FSC on the occasion of its meeting held in London on 24 September 2018. A second “Reform Package” was proposed to the same Committee for endorsement on 25 September 2019.

The last paragraph of this chapter will address the relevant resolutions and provide some background information concerning the various principles that were endorsed for the future reform of the transfer system.

* Vice Chairman of the FIFA Dispute Resolution Chamber. The opinion of the author expressed in this article does not necessarily correspond to the official position of the Fédération Internationale de Football Association (FIFA) and its competent decision-making bodies. All indications contain in the following text are of a general nature and serve a purely informative purpose only. Consequently, they are without prejudice whatsoever. A previous, original and shorter version of this article appears in M. Bernasconi/A. Rigozzi (eds.), *International Sports Arbitration*, 7th CAS & SAV/FSA Lausanne Conference 2018, Weblaw, Berne 2019. E-mail: omar.ongaro@fifa.org.

¹ Cf. art. 44 of the FIFA Statutes.

Like the aforementioned Committee, the Task Force comprises representatives of all the stakeholders, i.e. the Confederations, member associations, leagues, clubs and players. The purpose of the Task Force is to investigate and explore the various issues of the current transfer system (‘broad issues’) and to provide advice, proposals and recommendations to the FSC based on its findings.

While it may not have been expressly stated as being the case, broadly speaking and based on the manner in which the current system has been set up, the main and original objectives of the transfer system framework, as set out, in particular, in the FIFA RSTP, may be summarised as follows:²

- Protection of contractual stability between clubs and professional players;
- Encouragement of training of young players;
- Solidarity between the elite and grass-roots;
- Protection of minors; and
- Ensuring the regularity and integrity of sporting competitions, in particular, by preventing teams from altering their competitive strength during an ongoing competition.

These objectives and principles of the transfer rules remain sound. Consequently, any possible future new, revised or amended system will have to duly consider them, while asking the question if they are being achieved. If necessary, appropriate measures to realign the rules to meet the stated aims will need to be taken.

Moreover, other challenges and “threats” are currently pressuring football:

- A, at least perceived, lack of transparency on the transfer market, which has a direct impact on the enforcement of the training compensation and solidarity mechanisms;³
- The persisting malpractice of overdue payables towards players but also clubs;
- The increasing financial gap between ‘rich’ clubs/leagues and others, resulting in the concentration of power and influence in the transfer market within those with the greatest resources; and
- A, at least perceived, decrease in competitive balance.

A possible reform of the transfer system will have to address these issues too. However, it remains to be seen if potential new, revised or amended rules regulating the transfer market will, alone, be able to provoke the desired results. At least with respect to the increasing financial gap and the decrease in competitive balance, additional, broader matters, such as distribution, sponsorship and competition formats will probably also have to be taken into account. Indeed, studies show that top clubs are now earning more than 50% of their revenues

² For a comprehensive overview of the main provisions of the FIFA RSTP, cf. O. ONGARO, “Maintenance of contractual stability between professional football players and clubs The FIFA Regulations on the Status and Transfer of Players and the relevant case law of the Dispute Resolution Chamber”, in *Contractual Stability in Football*, M. Colucci ed., SLPC, 2011, 27-67.

³ Cf. Report to the European Commission, “An update on change drivers and economic and legal implications of transfers of players”, March 2018, 8, available at <https://ec.europa.eu/sport/sites/sport/files/report-transfer-of-players-2018-en.pdf>.

from sponsorship,⁴ meaning that even if distribution and the transfer system are regulated properly and effectively, the issues might not be solved.

Last but not least, the pertinent and required rules need to fairly balance the interests of players, clubs, leagues, federations and, also, of those who follow the game with a passion.

Parties' rights, such as freedom of movement, must be respected. Legitimate interests, such as incentives for clubs to train young players, must be protected. And certain rights/interests will inevitably be divergent. In any case, the pertinent rules will have to ensure that any restriction to freedom of action or competition arising from them is justified. Each proposed reform will have to be designed to be inherent and proportionate to achieving the stated legitimate objectives. This will ensure that the proposed reforms are, by design, aligned with fundamental legal principles.

No doubt, not an easy exercise. However, it makes sense that in the given circumstances FIFA has a duty to reform the transfer rules to address the current challenges facing football. The next months will show what measures will be adopted, how existing rules will possibly be changed or amended or potential new rules introduced. It is most likely that it will represent the most significant reform to the transfer system since its inception in the current form back in 2001.

In the meantime, however, and before venturing a gaze at the future, let us cast a backward glance at the latest developments that affected the transfer rules, and in particular the RSTP, in the past four years. Certainly not a revolution, more an evolution. Yet, still important steps aiming at ameliorating the existing system, and rendering it more efficient.

II. *The FIFA RSTP amendments over the past few years*

Before analysing in detail the most recent changes to the FIFA RSTP it appears worth recalling that, albeit not shaking them to the very foundations, various and regular revisions were made to the RSTP since September 2001, when the current framework of the transfer system came into force. Indeed, new editions of the RSTP were regularly released over the years⁵ and the current version is in place since 1 June 2019.⁶ The main impulse for changes and amendments was given by experience “on the grounds” (i.e. development in and observation of the market), jurisprudence of the different decision-making bodies, initiatives/proposals of the various stakeholders and/or consultation/engagement with the stakeholders concerned.

⁴ Cf. for example, UEFA Club Licensing Benchmarking Report: Financial Year 2016, 77; UEFA Club Licensing Benchmarking Report: Financial Year 2017, published in 2019, 66 and 67; Deloitte Football Money League 2018, 2, available at www2.deloitte.com/us/en/pages/consumer-business/articles/deloitte-football-money-league.html.

⁵ First on 1 July 2005, and then in 2008, 2009, 2010, 2012, 2014, 2015, 2016, and 2018.

⁶ Cf. FIFA Circular no. 1679 dated 1 July 2019.

Some of the milestones that deserve particular mention comprise:

- *Overdue payables*;⁷
- *Protection of minors*: implementation of the subcommittee of the Players' Status Committee;⁸
- *Transfer Matching System (TMS)*;⁹
- *Ban on third-party ownership of players' economic rights (TPO)*;¹⁰
- *Female players*: international transfers of professional female players processed in TMS since 1 January 2018;¹¹
- *Contractual relationship between players and clubs and execution of monetary decisions*.

1. *Overdue payables*

Players, due to unpaid remuneration, clubs, due to unpaid transfer and training compensation as well as solidarity contributions, and other stakeholders such as coaches are more and more frustrated of clubs not respecting their financial obligations. The discontent of players having to wait for their salaries and clubs having to run after outstanding compensation is more than understandable. Moreover, the voice of clubs complaining about other clubs obtaining an unjustified competitive advantage by promising and committing to pay money they actually do not have becomes constantly louder. Finally, not least the deciding authorities are also pointing at the persisting malpractice of overdue payables. Indeed, the vast majority of (contractual) disputes brought before the various decision-making bodies continues to concern outstanding or late payments.¹²

In view of the above, it will not come as a surprise that many of the most recent amendments to the RSTP relate to overdue payables. A first important step was taken with the coming into force of art. 12bis of the RSTP on 1 March 2015.¹³ Subsequently, further measures were adopted and implemented. The guiding

⁷ Cf. art. 12bis of the RSTP and FIFA Circular no. 1468 dated 23 January 2015.

⁸ Cf. FIFA Circulars no. 1190 dated 20 May 2009 and 1206 dated 13 October 2009.

⁹ Cf. FIFA Circular no. 1233 dated 12 July 2010. The TMS started its operations based on Annexe 3 of the RSTP on 1 October 2010, after a one-year transition period, and having served the procedure regarding the protection of minors already as of October 2009.

¹⁰ Cf. FIFA Circular no. 1464 dated 22 December 2014 and FIFA Circular no. 1679 dated 1 July 2019 concerning the latest version (2019) of FIFA RSTP.

¹¹ Cf. FIFA Circular no. 1601 dated 31 October 2017.

¹² Cf. for example, DRC decision of 25 October 2018, ref. no. 10180947-E; DRC decision of 14 September 2018, ref. no. 09181685-E; DRC decision of 17 May 2018, ref. no. 05181023-FR; DRC decision of 1 February 2019, ref. no. 02191515-E; DRC decision of 4 October 2018, ref. no. 10180174-E; DRC decision of 4 October 2018, ref. no. 10182112-E; DRC decision of 14 September 2018, ref. no. 09180063-E; DRC decision of 10 August 2018, ref. no. 08181749-E; DRC decision of 7 June 2018, ref. no. 06180751-E; available at www.fifa.com/about-fifa/official-documents/governance/dispute-resolution-chamber.html; and Single Judge decision of 19 September 2018, ref. no. 09180583-E; Single Judge decision of 5 June 2018, ref. no. 06181392-E; available at www.fifa.com/about-fifa/official-documents/governance/player-status-committee.html respectively.

¹³ Cf. FIFA Circular no. 1468 dated 23 January 2015.

theme clearly is – clubs pay, please. It remains to be seen how the different amendments and procedures will impact parties behaviour, and how effectively dilatory tactics will be addressed and tackled. Much will probably depend (also) on the stance of the deciding bodies. The efficiency of the different provisions requires a firm and convinced application by all of them, at FIFA level, but also by the Court of Arbitration for Sport (“CAS”).

2. *The Protection of minors and the five-year rule*

By means of its circular number 1542,¹⁴ FIFA informed its member associations of certain amendments to the provisions of the RSTP governing the protection of minors,¹⁵ which were to come into force on 1 June 2016.

As to the substance, the amended provisions – paras. 3 and 4 of art. 19 of the RSTP – did nothing more than codifying already existing practice and jurisprudence of the Subcommittee of the Players’ Status Committee. The latter is the competent body to decide on applications for approval of any international transfer of a minor player or first registration of a foreign minor player.¹⁶ In fact, the so-called “*five-year rule*” had already been consistently applied by the aforementioned deciding authority for several years, and it had also found its way into the TMS. Any association that wished already then to submit an application to the Subcommittee via TMS,¹⁷ would find a respective application (tab) of its own in the “*minors section*” of the system, referring to the existing additional possibility to potentially be authorised to register a foreign minor player.

The “*five-year rule*” establishes that a foreign minor player who has lived continuously for at least the last five years in the country in which he wishes to be registered for the first time, should be treated as a “national” from a sporting point of view and as regards the provisions on the protection of minors. Consequently, he/she shall not be considered a foreign minor player anymore, and he/she shall not be subject to the conditions of art. 19 paras. 1 and 2 of the RSTP. Nevertheless, it is up to the Subcommittee to assess the specific situation of a minor player and to authorise or not the minor player’s registration, if an association is calling for the application of the pertinent rule.¹⁸

The “*five-year rule*” only concerns the first registration of a foreign minor player, i.e. players who have never previously been registered at an association with a club, and it came to add to the three exceptions contained in art. 19 para. 2 of the RSTP.

¹⁴ In addition, the same circular letter referred to several changes to Annexe 1 of the RSTP, which governs the release of players to association teams. They aimed at having a more uniform approach with respect to possible breaches of FIFA regulations, assigning the respective competence, in principle, to the FIFA judicial bodies also in that area. Furthermore, a purely linguistic simplification was adopted in Annexe 1, art. 5 of the RSTP.

¹⁵ Cf. art. 19 of the RSTP.

¹⁶ Cf. art. 19 para. 4 and Annexe 2, art. 3 of the RSTP.

¹⁷ Cf. art. 19 para. 5 in conjunction with Annexe 2, art. 5 of the RSTP.

¹⁸ Cf. art. 19 para. 4 of the RSTP.

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EMPLOYMENT AGREEMENTS OF FOOTBALL PLAYERS

by *Salvatore Civale** and *Luca Pastore***

1. *Introduction*

The negotiation of the commercial, financial and legal terms of employment agreements between football clubs and players represents the more complex and relevant part of a transfer. A clear and well-drafted employment contract is not only essential in order to set out the obligations of the parties but it also plays a fundamental role in minimising possible future disputes between them.

Employment contracts between professional football players and clubs have become more and more complex in recent decades. Professional football is nowadays a specific industry, a “special sector” with features that deviate from the standard practices of the labour market. The relationships between clubs and players are defined within domestic and international legal frameworks: as a result, employment contracts are not only dependent on the agreement of the parties and on the principles of the domestic labour legislation, but they must also comply with the rules of the relevant League, national Association, regional Confederation and, of course, with the principles provided by the FIFA regulations.

In this chapter, the Authors take stock of the applicable rules and relevant issues that arise at international level when parties negotiate and draft an employment agreement, with a focus on the key clauses which are most relevant and often lead to disputes between the parties. In such a perspective, the mutual rights and obligations binding footballers and clubs are analysed in the light of the relevant FIFA and CAS jurisprudence.

The aim of this chapter is to offer a practical guide to the professionals involved in football law, with the due premise that constant updating is essential for continuous development.

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1.1 The maintenance of contractual stability

Since the introduction of the FIFA Regulations on the Status and Transfer of Players (hereinafter: the *FIFA RSTP*),¹ implemented within FIFA's regulatory framework in September 2001, FIFA has focused its attention and main efforts on safeguarding the maintenance of contractual stability between professional players and clubs in the world of international football.²

In this sense, the FIFA RSTP contain a set of rules regarding the maintenance of contractual stability, from article 13 to 17, specifying when one of the contractual parties is allowed to unilaterally early terminate the employment contract, and what the consequences are for the parties in cases of termination without a so-called "just cause".³

The goal is clearly indicated in the FIFA Commentary under article 13: "*The Regulations aim to ensure that in the event of a club and a player choosing to enter into a contractual relationship, this contract will be honoured by both parties. A contract between a player and a club may therefore only be terminated on expiry of the contract or by mutual agreement. Unilateral termination of a contract without just cause, especially during the so-called protected period, is to be vehemently discouraged*".

The attention of FIFA on this principle goes beyond the direct application of the FIFA RSTP, since FIFA expressly provided that each national association "*shall include in its regulations appropriate means to protect contractual stability, paying due respect to mandatory national law and collective bargaining agreements*".⁴

The principle of contractual stability is of paramount importance in the world of football, as a key pillar of the entire system of international sports law, which is especially recognised in the jurisprudence of the sports justice bodies. In fact, of all disputes that fall within the competence of the FIFA Dispute Resolution

¹ Article 1, para. 1 of the FIFA RSTP indicates its scope: "*1. These regulations lay down global and binding rules concerning the status of players, their eligibility to participate in organised football, and their transfer between clubs belonging to different associations*".

² O. ONGARO, 'Maintenance of contractual stability between professional football players and clubs – The Fifa Regulations on the Status and Transfer of Players and the relevant case law of the Dispute Resolution Chamber', *European Sports Law and Policy Bulletin* 1/2011, 27-67.

³ As will be analysed more into details at para. 7, FIFA Regulations do not provide a definition of "just cause".

⁴ Article 3, para. 3, lett. b) of the FIFA RSTP sets the following list of principles to be considered by the national association, namely, – article 13: the principle that contracts must be respected; – article 14: the principle that contracts may be terminated by either party without consequences where there is just cause; – article 15: the principle that contracts may be terminated by professionals with sporting just cause; – article 16: the principle that contracts cannot be terminated during the course of the season; – article 17 paras. 1 and 2: the principle that in the event of termination of contract without just cause, compensation shall be payable and that such compensation may be stipulated in the contract; – article 17 paras. 3-5: the principle that in the event of termination of contract without just cause, sporting sanctions shall be imposed on the party in breach.

Chamber⁵ in the first instance, and the Court of Arbitration for Sport of Lausanne in appeal,⁶ the most intensive debates arise in relation to aspects pertaining to the maintenance of contractual stability between professional players and clubs.

Besides, and as a more apprehensive aspect for the parties, the calculation of the compensation payable for the premature unilateral termination of a contract without just cause, in breach of the principle of *pacta sunt servanda*, also represents a controversial point when it comes to the application of article 17 of the FIFA RSTP and its relationship with the national law chosen by the parties and with Swiss law, which is applicable subsidiarily.⁷

1.2 Professional vs. Amateur Players

Article 2 of the FIFA RSTP classifies players who participate in organised football on the basis of their status as Amateur or Professional.⁸

According to the definition provided by the FIFA RSTP, the main difference between the two categories is that a Professional is a player who has at least a written employment contract⁹ with a club and is paid with economic entitlements in a higher amount than the expenses he effectively incurs in return for his footballing activity.

Players who have another regular working activity or employment besides their remunerated football activity (so-called semi-professionals) shall also be considered as professionals if they comply with the above requirements.

All other players are considered as Amateurs, namely players who pursue sport just for fun or as a hobby, without any material gain, and who do not receive any remuneration or, if they do, this is limited to their actual expenses incurred.¹⁰

⁵ Cf. art. 24 para. 1 in combination with art. 22 lit. a) and b) (stability of contracts between professional players and clubs), lit. d) (training compensation) as well as lit. d) and e) (solidarity mechanism) of the FIFA RSTP.

⁶ Cf. art. 24 para. 2, last sentence, of the FIFA RSTP, which specifies: "*Decisions reached by the DRC or the DRC judge may be appealed before the Court of Arbitration for Sport (CAS)*". Cf. art. 58 para. 1 of the FIFA Statutes, 2018 edition, which specifies: "*Decisions reached by the DRC or the DRC judge may be appealed before the Court of Arbitration for Sport (CAS)*".

⁷ For a complete view on this matter, U. HAAS, 'Applicable law in football-related disputes - The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law', *CAS Bulletin*, 2015/2, 7-17.

⁸ The term "*professional*" replaced the former expression, "*non-amateur*", to more reflect the evolution of professionalism in football over the years.

⁹ The written contract is also mentioned as "*contract as a Professional*" (cf. art. 20 of the FIFA RSTP) or as "*professional contract*" (cf. art. 7 in annex 6 of the FIFA RSTP).

¹⁰ The Commentary on the FIFA RSTP (page 12) specifies that the Amateur basically has no written contract with the club with which he is registered. In this sense, CAS 2004/A/691 FC Barcelona SAD v. Manchester United FC, award of 9 February 2005, goes into details on the hypothesis that an Amateur has a written contract: the mere existence of a written agreement between an amateur and the club for which he is registered does not suffice to trigger the application of the FIFA RSTP regarding contractual stability. These provisions are only applicable to professional contracts. In other words, amateur status is not defined by reference to an "amateur

The fact that the new club may play with one of its teams in a professional league has no impact on the status of the player if the player is only registered with the new club as an amateur and not bound by an employment contract.

The social aspects of participating in the group of a club, as well as his own health and fitness, play a predominant role for an amateur player. Expenses incurred through involvement in a match or in training (e.g. travel and hotel, insurance etc.), and the costs of a player's equipment, can be reimbursed to the player without jeopardising his amateur status.

Players of both status, Professional and Amateur, must be registered with an association to be eligible to participate in organised football.¹¹ A player may only be registered for one club at a time and for a maximum of three clubs during one football season (defined by the FIFA RSTP as “the period starting with the first official match of the relevant national league championship and ending with the last official match of the relevant national league championship”). However during this period, the player is only eligible to play in official matches for two clubs.

Whenever a player wishes to change from professional to amateur status, he has to wait for a period of 30 days after his last match as a professional before becoming eligible to play as an amateur. It does not make any difference if the player is reassuming amateur status at the same club or if he is transferring to a new club and reacquiring amateur status.

The timeframe in which the player is not (yet) eligible is applied for purely sporting reasons, since it preserves the regularity of competitions and guarantees that the provisions on the restriction of player transfers provided for in national and international regulations are not circumvented.¹²

The FIFA RSTP do not control the relationship between amateur players and clubs, and contain no provisions about the establishment or substance of such relationship. Consequently, the regulations concerning the maintenance of contractual stability are not applicable to the relationship between an amateur player and a club.

contract” but by the fact that a player has never received any remuneration other than the reimbursement of the actual expenses incurred. The interests of a club that has engaged an amateur player are protected by the provisions on training compensation when an amateur player becomes professional (para. 76 & 77).

¹¹ Cf. art. 5, para. 1, of the FIFA RSTP.

¹² The Commentary on the FIFA RSTP (page 13) specifies that at national level, the rules regarding the registration of amateurs are generally less restrictive than at international level (cf. art. 6 para. 4 & annex 3 art. 3). Moreover, the deadline of 30 days in which the player is not yet eligible to play as an amateur starts as from the last match effectively played by the player as a professional. It may therefore occur that at the moment the player requests to reacquire amateur status, the 30 days have already elapsed and he is therefore entitled to be fielded for the amateur club with immediate effect. On the other hand, a player that changes from amateur to professional status is not requested to comply with a deadline for the acquisition of the new status. However, he can only be registered and thus become eligible to play as a professional player during one of the registration periods established by the relevant association.

In the light of the definition of an amateur player, whenever a player changes from professional to amateur status, the club for which he was previously registered is not entitled to training compensation.

If the player reacquires professional status within 30 months of being reinstated as an amateur, the new club shall pay training compensation to the former club(s) in accordance with art. 20 of the FIFA RSTP. In this way, the regulations safeguard the work done by the training clubs at an earlier stage, in the event that the player reverts to professionalism. Training compensation would be payable in such an event until the end of the season of the player's 23rd birthday.

Professionals who end their careers upon the expiry of their contracts and Amateurs who terminate their activity, shall remain registered at the Association of their last club for a period of 30 months.¹³ This period begins on the day when the player makes his last appearance for the club in an Official Match. This “extended” registration period is applied for two main reasons. First of all, it allows the player to know which club and association has his registration in case he wishes to resume playing again, as this association will need to reactivate the registration of the player for a club affiliated to the same association or issue an international transfer certificate (ITC) to a club affiliated to another association. Moreover, it safeguards the interests of the player's last club in the event that, cumulatively, (1) the player signs an employment contract with a new club within 30 months, and (2) at that moment, he is still younger than 23, as in this case training compensation would be payable in application of art. 3 para. 2 of the FIFA RSTP.

1.3 *Negotiations and culpa in contrahendo*

Negotiations involve discussions and potential compromises on the terms and conditions of a contract in order to reach a final agreement. During the negotiations, each party will try to obtain the best possible deal for themselves and, therefore, the negotiation phase often leads to differences between the parties, who may need to focus on which provisions are more important to them in order to safeguard their respective rights.

First and foremost, the financial aspects of the employment relationship are key: there are essential financial terms that must be indicated in the employment contract for its validity – i.e. the salary – and other terms that might be negotiated and inserted into an employment contract but do not represent essential elements for the validity of the contract – i.e. collective or individual bonuses, flight tickets, accommodation, medical insurance, car and driver, school fees for children, bank guarantees, and other fringe benefits.

Furthermore, there are a number of additional terms that, albeit not mandatory, have a huge impact on the relationship between the parties and therefore

¹³ The mutual termination of an employment contract also falls under the description of art. 4 para. 1.

TRANSFER AGREEMENTS PURSUANT TO THE FIFA PSC DECISIONS AND THE CAS JURISPRUDENCE

by Josep F. Vandellós Alamilla*

1. General aspects of transfer agreements

1.1 Introduction

Every single football fan in the world understands what a transfer of a football player is. On the surface, a transfer appears to be a fairly uncomplicated process, which simply involves the movement of a player from club A to club B. However, behind the scenes the process can be complicated and presupposes the alignment of multiple interests of different parties (clubs, players, intermediaries) and all the work is done with the imminent pressure of deadlines marked by the transfer window in each national football association. Consequently, the underlying process of an international transfer from a legal perspective becomes considerably complex.

To begin with, it would be pertinent to mention that in spite of the explicit reference in the title of the FIFA Regulations on the Status and Transfer of Players (ed. 2020)¹ (the “RSTP”), there is no concrete definition of a transfer agreement.² What we know, is that the material scope of the RSTP is limited to laying down the rules governing the transfer of players between clubs belonging to different associations, and therefore, to transfers having an international dimension. Moreover,

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¹ The 2020 Edition of the FIFA Regulations on the Status and Transfer of Players is available at: www.fifa.com/about-fifa/who-we-are/legal/rules-and-regulations/documents/.

² In CAS 2008/A/1519-1520 (Matuzalem – unpublished award) the Panel made the following interesting remark: “In doing so, the Panel only acknowledges the economic reality in the world of football, i.e. that services provided by a player are traded and sought after on the market, are attributed economic value and are – according to art. 17 FIFA Regulations – worth legal protection. The Panel is eager to point out that the sole object of this approach are the services provided by a player and not the human being as such”.

through Circular 1679 of 1 July 2019,³ FIFA has included for the first time in the regulations, a definition of “*International transfer*” and “*national transfer*”. According to these new definitions, an international transfer is “*the movement of the registration of a player from one association to another association*”, while a national transfer is “*the change of a player from playing for one club at an association to playing for a new and different club within the same association*”.

Arguably, the norm is mainly focused on regulating the “*transfer of the registration*” of the player, or what I call *the administrative or external dimension* of the transfer, rather than the underlying transaction between the parties involved, or – likewise in my own terms – *the private dimension or internal dimension* of the transfer.

In other words, aspects such as transfer fees, sell-on clauses, buy-back clauses and many others are nowhere to be found in the RSTP and the lack of a specific regulation of the transaction itself, can generate some degree of uncertainty with regards to the correct identification of the substantial applicable law, particularly when it comes to role of Swiss law⁴ to those matters not included in the RSTP. Recent decisions show that it might be relevant.⁵ The same problematic exists in the case of football coaches⁶ and has been the subject of intense debates.

In practice, the FIFA PSC avoids as a general rule, relying upon dispositions of national laws, deciding by default on the basis of *general legal principles of law*,⁷ such as *pacta sunt servanda*, and where existing, the *well-established jurisprudence of the PSC*, while always remarking that the FIFA regulations prevail over any national law chosen by the parties.⁸

Keeping these introductory considerations in mind, before diving deeper into the realm of transfers having an international dimension, it is necessary to identify the essential elements of a transfer.

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³ Circular 1679 is available at: <https://resources.fifa.com/image/upload/1679-amendments-june-and-october-2019.pdf?cloudid=yhpcqh0syjuzaccv1yrz>.

⁴ Swiss law constitutes the *additional law* complementing the RSTP before the CAS according to article with article 57 para. 2 of the FIFA Statutes, which are available at: <https://resources.fifa.com/image/upload/the-fifa-statutes-2018.pdf?cloudid=whhncbdzio03cuhmwfxa>.

⁵ See the Decision of the Single Judge of the PSC of 5 June 2018 (ref. 06180108-e) para. 2, 6 where in lack of dispositions in the RSTP regarding the interpretation of contracts, the Single Judge explicitly refers to Swiss law for such purpose. Available at: <https://resources.fifa.com/mm/document/affederation/administration/03/01/17/38/06180108-e.pdf>.

⁶ For a detailed study on the issues around the applicable law see J. F. VANDELLOS, “*Football Coach-related disputes. A critical analysis of the Players’ Status Committee Decisions and CAS Awards*”, Chapter 2, Ed. Michele Colucci (2019).

⁷ See the Decision of the Single Judge of the PSC of 8 August 2018 (ref. 08181951-e). Available at: <https://resources.fifa.com/mm/document/affederation/administration/03/01/97/84/08181951-e.pdf>.

⁸ Decision of the Single Judge of the PSC of 26 April 2016 (ref. 08181951-e) para. 8, 9. Available at: <https://resources.fifa.com/mm/document/affederation/administration/02/84/84/92/04161527-e.pdf>.

1.2 Essential elements of transfer agreements

In lack of a specific definition of transfer agreement, in order to delineate its nature, one must necessarily look at:

- (i) *the parties involved in transfers* and their role,
- (ii) *the structure of transfers* and finally,
- (iii) *the procedure followed to transfer football players from one club to another.*

While looking at a transfer from *the parties' perspective*, we confront with the previously anticipated *private or internal dimension* of the transfer. The private dimension strictly concerns the contractual relationships between the parties to the transfer. First, *the releasing club*, with whom the football player has an ongoing employment relationship. Second, *the engaging club*, with whom the player will sign a new employment contract and continue his sporting career. And third, *the football player* who is being transferred between clubs belonging to different associations and whose consent will be crucial.

The private dimension of the transfer will necessarily involve the interplay of three different and (to the extent the parties decide) independent transactions⁹ (“*negotii*”) which will form *the structure of the transfer agreement*:

- a) *The agreement between the former club and the new club*:¹⁰ the two clubs will essentially have to agree upon the transfer of the player and establish the terms and conditions (i.e. whether there is a transfer fee or not; whether the transfer has a permanent or temporary character; whether there are certain conditions to which the transfer might be subject to, e.g. passing of medical examinations, the consent of the player etc.).
- b) *The agreement between the former club and the player*: the releasing club and the player will have to *terminate or suspend* (depending on the character of the transfer) their employment relationship by mutual agreement and also establish the possible terms of the termination or suspension.
- c) *The agreement between the player and the new club*: the engaging club and the player will have to enter into a new employment relationship.

The principle of contractual freedom necessitates that the parties have complete freedom to establish the terms of the three transactions mentioned above (*let. a, b and c*) and also to determine the interdependence of the relationship between them.

By way of example, they are free to decide that the parties to the transfer agreement are solely the clubs. Alternatively, they can include the player as a party to the transfer agreement. The structure chosen for the contract will

⁹ See CAS 2011/A/2356 *SS Lazio SpA v. CA Vélez Sarsfield & FIFA*, award of 28 September 2011 on the notion of transfer agreement for the purposes of the solidarity contribution mechanism. Available at: <https://jurisprudence.tas-cas.org/Shared%20Documents/2356.pdf>.

¹⁰ *Former club* and *new club* are the terminology used by the FIFA Regulations on the Status and Transfer of Players. See definitions 2 and 4.

eventually determine the *essential elements* for its validity such as, for instance, the concurrence of consent of all parties including the player's or, only of the clubs.

Thus, when only the two clubs are parties to the transfer agreement, it would be prudent to subject the validity of the transfer (*let. a* above) to the subsequent agreement between the player and the new club i.e. to the employment contract (*let. c* above). Likewise, it would be advisable to condition the termination of the employment contract between the former club and the player (*let. b* above) to the receipt of the transfer fee or the successful passing of the medical examination (*let. a* above) amongst many other possibilities to be explored in this chapter.

The transfer of a football player from one club to another at the international level is accordingly, a complex *sui generis* institution of football law that differs from the classical *assignment of employees* existing in employment law usually conducted through authorized job placement agencies.

The existing FIFA decisions and CAS jurisprudence offer valuable insight in understanding the diverse mechanics indicated before and identifying the *essential elements* of transfer agreements in football.

For example, in the *Decision of the Single Judge of the PSC of 14 January 2015 (ref. 01150088-e)*¹¹ the Single Judge concluded that the transfer agreement between two clubs was valid and binding because it contained *the essential elements*; which for the Single Judge consisted of (*a*) the agreement between the clubs to transfer the player against the payment of a transfer fee; and (*b*) the signature of the transfer agreement by the parties, which is nothing but the external manifestation of the agreement.

“9. *The Single Judge thus analysed the wording of the agreement 1 and concluded that the Claimant and the Respondent agreed upon the essential aspects, namely the transfer of the player to the Respondent in return for the amount stipulated, as well as the fact that the latter agreement was duly signed by the parties*”.

According to the Single Judge, in the above-mentioned case, the *essential elements* are the agreement between the clubs to transfer the player (i.e. the *object of contract*) in return of a fee (i.e. *the consideration*) and ultimately, the ability of the parties to prove its existence (i.e. *the consent*).

The *Decision of the Single Judge of the PSC of 6 March 2018 (ref. 03180237-e)*¹² refines the criteria highlighting that *in order for a transfer agreement to be considered valid and binding, apart from the signature of all parties involved, it should contain the essentialia negotii of a legal agreement, such as the parties to the contract and their role in the transfer*

¹¹ Available at: <https://resources.fifa.com/mm/document/affederation/administration/02/87/76/17/01150088-e.pdf>.

¹² Available at: <https://resources.fifa.com/mm/document/affederation/administration/02/98/90/47/03180237-e.pdf>.

IMAGE RIGHTS

by Konstantinos N. Zemberis*

1. Introduction

The present chapter is aiming to analyse the so called “Image Rights” and the related agreements for their exploitation.

Following the definition of the term, the reasons of the ever-increasing popularity and importance of image rights, in particular in the sports world, will be explained.

In the sports world, image rights can be dealt with from different perspectives: in fact, we have image rights of individuals (e.g., football players, basketball players, tennis players, F1 drivers and other athletes, etc.), image rights of clubs (e.g., football and basketball clubs, baseball teams, etc.) and image rights of associations/confederations (e.g., FIFA, FIBA, NBA, etc.).

In this chapter, we focus mainly on football players as image rights holders and we address topics related to the exploitation of image rights, the protection of such rights against infringements, the possible restrictions that might exist that affect the exploitation of such rights, the exploitation possibilities in the frame of a transfer of player, and the important issue of dispute resolution where we examine the jurisdiction of the CAS and of FIFA with respect to image rights disputes.

Moreover, as the intention is to have a more practical approach to the matter, at the end of the chapter there is a “practical guide” for drafting image rights agreements.

It is self-understood that image rights is a very broad subject with complex aspects and it is thus impossible for the present chapter to fully cover all pertinent issues.

However, this chapter shall be useful for practitioners who are involved in transfers of players and who are generally working with football players.

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2. Image rights definition and importance

During the last twenty years the term “image rights” has become very common in the sporting world and is used to determine the right of an athlete to exploit his image and the pertinent rights that emerge from such image.

It is thus crucial that the term is defined before one can enter into more details concerning the different aspects of image rights and the problems and opportunities that are related to such rights.

By referring to image rights of a famous football player, we refer to a group of characteristics of the said person that define him and by which he can be easily recognised.

The term includes, apart from the actual image of the person, his voice, his name, his signature, his initials, but even the combination of his name and shirt number, his likeness, his caricature, graphic representations of him and logos, etc.

Indeed, “image rights” is to be understood as an umbrella term that includes any characteristics of a person which are part of his identity and personality, or elements by which a person can be easily identified by the public or be distinguished from others.

What is, though, that makes image rights so important in today’s reality and why they are more and more football players that are entering into image rights agreements with big brands and are being remunerated with considerable amounts in the frame of such agreements?

In a world of media and internet, where information can travel in amazing speeds and is easily shared and exchanged globally at the touch of a button and where the brands and the image are playing a key role in the lifestyle decisions of people, image rights of popular players have a significant value, influence and importance as they allow big brands to more easily and efficiently reach their target groups, as well as to penetrate new markets faster and have a greater impact on people.

On the other hand, it is exactly the aforementioned importance of such rights and the described above properties that explain why there are so many and frequent infringements and violations of such rights by third parties.

Image rights need therefore to be protected according to the principle that anything that is worth exploiting, is worth protecting.

As it will be explained in paragraph 4 below, image rights are mainly protected either on the basis of the personality right (continental countries) or on the basis of the “right of publicity” and/or “right of privacy” (Common law jurisdictions) and such protection has strongly contributed to the development of the notion of exploitation of Image Rights by the image rights holders.

3. *Exploitation of image rights*

While it is an undisputed fact that there were sponsorship and other image rights agreements in the past, whereby famous football players, football clubs, associations, etc., agreed to be associated with certain brands and/or advertise different products of known brands against a considerable remuneration, the truth is that the actual booming in the exploitation of image rights has been a recent phenomenon, that is, of the last couple of decades.

The main reasons for such booming were a) the increased level of protection in common law jurisdictions like the United Kingdom and the United States of America, which used to be in the past much lower than the one in continental countries, since at that time no right of privacy and publicity was recognized to famous athletes, b) the development of the internet and other media that enables an easier and more penetrating, efficient and influential access to markets and people, than any time before and c) the understanding and acceptance that image rights agreements have a genuine and independent value and are real commercial agreements and not emoluments of the employment.

The independent value of image rights agreements was recognized in the UK following the landmark “Sports Club” case¹ involving two famous footballers of Arsenal FC, David Platt and Dennis Bergkamp, who apart from their employment contracts, had entered, through their image rights companies, into separate agreements with Arsenal FC, whereby they were being remunerated by the club for some agreed promotional activities.

The Her Majesty’s Revenue and Customs (“HMRC”) initially held that the said promotional agreements were actually “sham agreements” that were permitting the players to escape from tax obligations (since companies’ tax rate was much lower than individuals’ income tax rate) and national insurance payments, and ruled that the remunerations under these agreements were actually emoluments of the players’ employment.

Following though an appeal lodged by the players, the Special Commissioners finally decided that there was a real and independent value in the aforementioned promotional agreements signed between the players’ companies and Arsenal FC. Thus, they accepted that the remuneration of the players under these agreements was not an emolument of their employment, but in fact a genuine payment under a real commercial agreement.

The outcome of this case was the moving force for more image rights agreements between players and clubs and had a great impact on the evolution of the exploitation of image rights by the players.

However, it should be pointed out that the HMRC in the UK always address image rights agreements with some skepticism and try to tackle schemes that are in reality just an effort to evade tax and social security obligations.

¹ Sports Club plc and others v. CIR (SpC253, [2000] STC (SCD) 443.

In that respect, the HMRC always rely on the idea that there is no property right in the name and image of a player recognized in the UK, but only a genuine value in some promotional activities and obligations that emerge from promotional agreements (which according to the HMRC are wrongly referred to as image rights agreements).

The approach of the HMRC is based on some remarks and considerations of judges in the delivery of some relevant judgments.²

Today, all famous players are taking advantage of their increased popularity, their fame and public recognition and exploit their image rights by entering into big sponsorship agreements and/or other image rights agreements that bring them enormous revenues.

Likewise, big clubs, leagues and associations are of course also exploiting their respective intellectual property rights and generate huge turnovers.

Some current sponsorship deals of players and clubs are indicative of the value and importance of such rights, like for example (reported amounts): Cristiano Ronaldo & Nike 16,2 million euros per year (lifetime deal),³ Lionel Messi & Adidas 11 million euros per year (lifetime deal), Manchester United & Nike 32,5 million euros per year, Manchester United & Chevrolet (GM) 72 million euros per year, Liverpool FC & Warrior Sports 34,2 million euros per year.⁴

It is interesting to note that while many players keep their image rights and enter into image rights agreements directly with their club, most of the football stars have assigned their image rights to image rights companies that belong to them, or are being controlled by them, and then such companies negotiate and enter into image rights agreements with the clubs, whereby they grant all or some of the image rights of the players.

The reason why many players exploit their rights through image rights companies is twofold. First, there is obviously a tax benefit since highly paid individuals are taxed in all countries higher than legal entities (it should be reminded that while tax evasion is illegal, tax planning is not), and second, big football stars can focus on their game while somebody else (in many case experienced executives) is taking care of their businesses.

As aforementioned, the ever-increasing value and importance of image rights, in combination with the emergence of new media and the rapid development of the internet, has rendered the protection of image rights more relevant and necessary than ever, since nowadays, not only infringements are more frequent but they are actually easier and much more difficult to deal with.

² HMRC Internal Manual, Capital Gains Manual 12 March 2016 as updated, CG68455, CG68460, CG68465, where reference is made to *Fenty v Arcadia Group Brands Ltd* [2015] EWCA civ 3 (para. 29 & 33), *Douglas and Anor v Hello! Ltd and others* [2007] UKHL 21 (para. 124) and *Sports Club plc and others v CIR* (SpC253, [2000] STC (SCD) 443) (para. 8).

³ www.bloomberg.com/news/articles/2019-09-07/cristiano-ronaldo-gets-162-million-euros-from-nike-deal-spiegel.

⁴ <https://sportsshow.net/richest-sponsorship-deals-of-soccer/>.

It is, thus, of utter importance to know what the weapons are in the arsenal of an image rights holder to protect his image rights and safeguard his image rights agreements.

4. Legal instruments for the protection of image rights holders

The legal means that are available for an image rights holder to protect his/her image rights and their exploitation, heavily depend on the jurisdiction where the infringement took place or where the litigation is taking place and on the type of the infringement in question.

4.1 Common Law jurisdictions

In common law jurisdictions like the UK and the USA, the main instruments for the protection of image rights holders are:

a) Misappropriation actions / Passing Off

These actions are considered to be one of the best legal measures for the efficient protection and enforcement of image rights.

In order for such an action to be successful, the famous player/image rights holder needs to prove that a) the image rights holder has fame and goodwill, b) that there was an unauthorized use of his image, name, voice, etc. for commercial purposes and with commercial profit or advantage, c) that due to the infringer's actions, it appears to be an association with a brand or a specific product/service and/or an implicit or explicit representation/endorsement of such a brand or product/service or that at least a significant percentage of the people had been led to believe that such an association or representation/endorsement exists and d) that the image rights holder has suffered certain damages as a result of such infringement.

Thus, for example, if a company uses the image of a football player without his consent, in an advertisement campaign in a magazine for the launch of a new product in a way that the public would normally believe that the football player has indeed endorsed and approves the said product, the football player would be able to stop such infringement and/or be compensated for the unauthorized use on the basis of a passing off/misappropriation action.

In such case, the football player would be able to stop the infringement and/or be compensated for the unauthorized use with, at least, an amount equivalent to the amount that he would have received if he had authorised the use of his/her image.

The landmark case of passing off is considered to be the case of the famous racing driver Edmund Irvine who successfully brought an action against Talksport Radio, a company that used without his consent a doctored picture of him showing him to hold a portable radio with the logo of Talksport (instead

TEASER

TRAINING COMPENSATION AND SOLIDARITY MECHANISM

by Vanessa Plavjanikova* and Ariel N. Reck**

I. Introduction

Training compensation and solidarity contribution are two mechanisms designed by FIFA to reward training clubs. The concepts have been part of the Regulations for the Status and Transfer of Players (hereafter: *the Regulations*) since 2001, following the Bosman ruling of the European Court of Justice¹ and the Gentlemen's agreement between the European Commission, FIFA and UEFA.

There have been several modifications since their implementation, the key reform introducing the Transfer Matching System for the procedure of training compensation and solidarity claims. Nonetheless, the core aspects of the system remained the same. Currently, new reforms are being implemented as part of "FIFA 2.0: The vision for the future",² bringing positive changes with regard to the enforcement and distribution of training rewards.

Despite being rather "minor issues" in the context of transfers, training compensation and solidarity contribution shall not be overlooked. In line with the practical approach of the book, this chapter contains reasoned "check list" of the concepts, addresses therewith related challenges and introduces the latest as well as the upcoming changes of the Regulations.

II. Training Compensation

1. Concept

1.1 General principles

The system of training compensation is designed to support the training and education of young football players, by rewarding the clubs when one of their

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¹ Case C-415/93, *Union Royale Belge des Sociétés de Football Association and others v. Bosman and others*, ECLI:EU:C:1995:463.

² Available at https://resources.fifa.com/mm/document/affederation/generic/02/84/35/01/FIFA_2.0_Vision_LOW_neu.17102016_Neutral.pdf, last access on 30 November 2019.

players becomes a professional. At the same time, the clubs that do not bear such financial burden, shall reimburse the training club for the latter's efforts. The system is built on the objective to encourage the clubs to invest in their grass-roots. The regulatory basis is to be found in art. 20 and Annexe 4 of the Regulations.

The principles are laid down in art. 20 of the Regulations, which establishes the following:

- (1) Player's training and education takes place between the ages of 12 and 23.
- (2) Training compensation is payable for training incurred up to the age of 21 and is triggered by a transfer up to the age of 23, unless it is *evident* that the player has already terminated his training period before the age of 21.³

1.2 Player's birthday

With regard to the aforementioned, it is important to clarify the rule of player's birthday. Within the system of training compensation, it is the *season of the respective birthday* that is relevant for the legal entitlement.

Example:

In case that the player was born on 3 March 1996 and the season runs from 1 July to 30 June, the season of the player's 12th birthday ran from 1 July 2007 until 30 June 2008.

1.3 Event giving rise to the dispute and the particularity of the training compensation

The training compensation is due based on two different legal grounds:

- (1) When a player is registered for the first time as a professional;⁴
- (2) When a professional is transferred between clubs of two different associations.⁵

In both scenarios, the respective registration or the transfer must occur before the end of the season of the player's 23rd birthday.⁶ For the Regulations to apply, the relevant first registration as a professional needs to occur with a club affiliated to a different association than the one of the training club.⁷ Under these circumstances, training compensation is due whether the transfer takes place during or at the end of the player's contract.⁸

Since the concept is meant to be a financial compensation, the training club shall benefit of training compensation for a specific player *only once*.

³ Art. 1 para. 1 Annexe 4 of the Regulations.

⁴ Art. 2 para. 1 i) Annexe 4 of the Regulations.

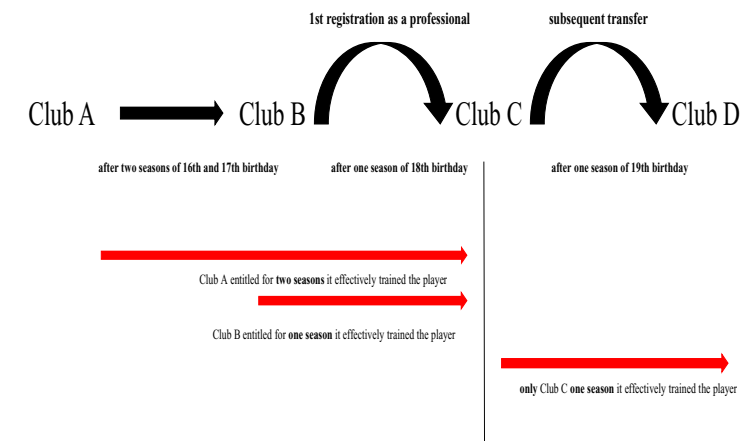
⁵ Art. 2 para. 1 ii) Annexe 4 of the Regulations.

⁶ Art. 2 para. 1 Annexe 4 of the Regulations.

⁷ Art. 22 lit. d) of the Regulations.

⁸ Art. 20 of the Regulations.

Consequently, on registering as a professional for the first time, the new club will have to pay training compensation to every club with which the player has previously been registered. In case of subsequent transfers of the professional, training compensation will only be owed to his former club.



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1.4 The liable party and the beneficiary

The obligation to pay the training compensation always lies with the new club, which reimburses all former clubs that registered the player and that contributed to his training starting from the season of his 12th birthday.⁹

Furthermore, in case that the training club has in the meantime ceased to participate in organised football or no longer exists, its national association becomes entitled to receive the compensation. Aligned with the objective of the training compensation, the reimbursement shall be reserved for youth development programmes within the respective association.¹⁰

⁹ Art. 3 para. 1 Annexe 4 of the Regulations.

¹⁰ Art. 3 para. 3 Annexe 4 of the Regulations.

2. Calculation

2.1 Categories and calculation formula

The calculation formula also follows the rationale of the Regulations as the compensation amounts to the costs that would have been incurred by the new club if it had trained the player itself.¹¹

While solidarity contribution rules apply globally without differences, the training compensation rules are established on a confederation basis *per* specific category of clubs.¹² The costs in each category correspond to the amount needed to train one player for one year multiplied by the so called *player factor*, which is the ratio between the number of players who need to be trained to produce one professional player.¹³ The pertinent amounts are published by FIFA once per year around the end of May by means of a circular letter,¹⁴ and have remained unchanged since 2002.

The current version of the yearly training costs:¹⁵

Confederation	Category I	Category II	Category III	Category IV
AFC		USD 40,000	USD 10,000	USD 2,000
CAF		USD 30,000	USD 10,000	USD 2,000
CONCACAF		USD 40,000	USD 10,000	USD 2,000
CONMEBOL	USD 50,000	USD 30,000	USD 10,000	USD 2,000
OFC		USD 30,000	USD 10,000	USD 2,000
UEFA	EUR 90,000	EUR 60,000	EUR 30,000	EUR 10,000

The calculation formula takes into consideration the yearly training costs of the new club's category multiplied by the number of years of training with the former club(s).¹⁶ In the event that the player does not stay with the club for the complete season(s), the calculation is made on a *pro rata* basis.¹⁷

2.2 Role of national associations

The FIFA members are asked to allocate their clubs into the *four categories*,¹⁸ depending on their expenditures linked to the training of youth players, whereby

¹¹ Art. 5 para. 1 Annexe 4 of the Regulations, see also CAS 2015/A/3981 *CD Nacional SAD v CA Cerro*; CAS 2011/A/2681 *KSV Cercle Brugge v FC Radnicki*.

¹² Art. 4 para. 2 Annexe 4 of the Regulations.

¹³ Art. 4 para. 1 Annexe 4 of the Regulations.

¹⁴ Art. 4 para. 2 Annexe 4 of the Regulations; see latest version: FIFA Circular no. 1673 of 28 May 2019.

¹⁵ FIFA Circular no. 1673, 4.

¹⁶ Art. 5 para. 2 Annexe 4 of the Regulations.

¹⁷ Art. 3 para. 1 Annexe 4 of the Regulations.

¹⁸ Art. 4 para. 2 Annexe 4 of the Regulations, Art. 5.1 para. 2 Annexe 3 of the Regulations.

not all national associations have all categories at disposal.¹⁹ When doing so, the following guidelines established by FIFA are to be taken into consideration:

- i. "Category 1 (top level, e.g. club possesses high quality training centre):
 - all first-division clubs of national associations investing on average a similar amount in training players.
- ii. Category 2 (still professional, but at a lower level):
 - all second-division clubs of national associations with clubs in category 1
 - all first-division clubs in all other countries with professional football.
- iii. Category 3:
 - all third-division clubs of national associations with clubs in category 1
 - all second-division clubs in all other countries with professional football.
- iv. Category 4:
 - all fourth- and lower division clubs of the national associations with clubs in category 1
 - all third- and lower division clubs in all other countries with professional football
 - all clubs in countries with only amateur football".²⁰

These guidelines are not applied rigidly; if a club in a lower division makes big investments into the youth training, it will be respectively placed into a higher club category (the financial investment prevails). FIFA members are free to propose another system for categorizing their clubs,²¹ however, to this day, none of them has made use of this possibility.

2.3 Overlapping seasons

Further challenge concerns the relevant season for the calculation: shall the one of the former club or the one of the new club be considered? This can potentially affect not only the amount of training compensation, but more importantly, with regard to the season of player's 23rd birthday, it can influence the existence of the entitlement *per se*.

Both FIFA and CAS have sustained that the relevant season is the one of the former club.²²

¹⁹ Cf. FIFA Circular no. 1673 of 28 May 2019 for further details about which member association disposes of what categories.

²⁰ FIFA Circular No. 779, 2 et seq.

²¹ *Ibid.*, 3.

²² CAS 2015/A/4183 *Club Atletico Independiente v. Cdp Curicó Unido*. FIFA DRC 478 10 December 2009: "13. In that regard, the Chamber stressed that the player had been registered for Respondent on 31 August 2007, i.e. during the season of the player's 23rd birthday in x. In that context, the Chamber highlighted that the season of the player's 23rd birthday in the sense of art. 2 par. 1 lit. b) of Annex 4 to be taken into consideration is the season of the Association of the last club for which the player is registered prior to the event giving rise to training compensation, i.e. in casu the

THIRD PARTY OWNERSHIP

by *Stefano Malvestio** and *Marcos Motta***

1. Third party ownership: what is it?

1.1 Introduction

Third-party ownership (“TPO”) refers to the circumstances in which a third party invests in the economic rights of a professional football player, potentially in order to receive a share of the value of any future transfer of that player.

While some claim that the practice is a danger to the game and that it causes players to lose control of their own sporting careers,¹ proponents argue that third-party ownership provides clubs with funds that they may otherwise never have access to and allows them to be more competitive.² Investment allows these

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The authors are also thankful to Prof. Colucci and Mrs. Bellia for the prestigious task they have been entrusted with.

¹ Representatives of FIFPro and UEFA have, in several occasions, expressed their opinion in favour of the outright ban on the practice of TPO in football. In this respect, see sub-section 1.6 of this Chapter on “The football stakeholders points of view”.

² Notably practitioners such as Marcos Motta, founding partner of *Bichara e Motta*, Juan De Dios Crespo, partner heading the sports department at Ruiz – Huerta & Crespo, Ariel Reck, sports lawyer in Argentina, are among the most representative exponents of the current in favour of regulating the practice of TPOs rather than a complete ban of the same.

teams to keep their young talent for longer, participate in the transfer market and potentially recoup larger transfer fees than they might otherwise be able to do.

This contribution analyses TPO from a practical perspective, starting from a general overview of TPO and of the main related concepts such as federative and economic rights. After having looked into the main applicable regulations and jurisprudence³ at an international level, we will address the basics of TPO contractual practices, as well as the main alternatives relied upon by practitioners following FIFA’s decision to ban TPO. Finally, the last part of this chapter will be dedicated to the (so far unsuccessful) legal challenges brought to the validity of the TPO ban.

We also believe that this contribution comes at an interesting time for TPO, in light of FIFA’s announced reform of its transfer system and of the amendments recently introduced to the definition of third-party in the FIFA Regulations on the Status and Transfer of Players (“FIFA RSTP” or “the FIFA Regulations”), which, in the authors’ opinion, might bring the practice back into the spotlight of the international sports law forums.

In fact, after FIFA decided to outlaw it, the debate on TPO – previously focused on the *pros* and *cons* of the practice⁴ and, consequently, on whether it was preferable as a matter of policy to regulate it or to ban it – had somehow “stagnated” (on the assumption that FIFA already had taken the decision to ban it), being essentially focused, at an academic level, on the challenges brought in different courts against the prohibition⁵ and, at a practical level, on finding alternative contractual structures capable of reaching the same objectives pursued through the use of TPO without incurring in any regulatory breach.⁶

However, on 8 May 2019, FIFA published its 2019 Edition of the FIFA Regulations which, having entered into force on 1 June 2019,⁷ amended the definition of “third party” pursuant to art. 18-ter FIFA RSTP excluding “players” from such a definition.

Although this represents to a certain extent, as we will see, a codification of existing jurisprudence of the FIFA Disciplinary Committee, the authors anticipate that the formalization into the FIFA Regulations of the players entitlement to hold their own economic rights is likely to have significant consequences at a practical level that might, as said, restore the importance of TPO in the field of sports law.

³ To the extent that it is available. See considerations in footnote 68 *infra*.

⁴ See sub-section 1.5 of this Chapter on “TPO: Pros and Cons”.

⁵ See section 4 of this Chapter on “Challenges before national and international courts”.

⁶ For instance through representation contracts with “graduated” commission fees or via structures involving ownership or partnership with clubs. See Section 3.2 of this Chapter on “TPO and agents/intermediary’ commissions”.

⁷ Art. 29, FIFA Regulations on the Status and Transfer of Players (2019 edition).

1.2 Definition of third-party ownership

“Third-Party Ownership” is the definition given to a business practice created by the football market to answer to financial needs of football clubs and players, combining them with the interest of investors, other clubs or agents to profit from potentially undiscovered or unexploited talent.

Although – as we will see in continuation – there’s no single “TPO” model, TPO has been defined as:

*“The entitlement to future transfer compensation of any party other than the two clubs transferring the registration of players from one to the other, with the exclusion of the players’ training clubs as per the solidarity mechanism in accordance with the FIFA Regulations on the Status and Transfer of Players”.*⁸

TPO is therefore essentially an investment (whether financial or not) made by a party other than the club holding the player’s registration into the transfer value of a player, which is eventually monetized in the moment of the player’s transfer to a future club.

Defining this as “ownership” is, however, inaccurate. As a matter of fact, nobody, not even the club itself, “owns” a player. The club holds an employment relationship with the player which is subject to the FIFA (and national) rules on the protection of contractual stability.⁹ Within this context, the “transfer fee” or “transfer value” of a player represents the amount which the club would be ready to accept in order to terminate such employment relationship by mutual consent.

The player is thus registered by its employer club with an association¹⁰ and becomes eligible to play. Nothing of this constitutes a title of “property” or “ownership” rights over such player; for this reason, the practice has also been defined as “Third-party entitlement” (“TPE”) or “Third-party investment” (“TPI”).¹¹

Such inaccurate association between the entitlement to a percentage of a future transfer fee and “ownership” rights over a player has, however, contributed to the creation of a negative public perception around the practice. For instance, in the context of the debates that led to FIFA’s decision to ban TPO, the then UEFA General Secretary Mr. Gianni Infantino, used such association to negatively characterize TPO as follows:

“Why is third-party player ownership an issue for football? Firstly, it raises ethical and moral questions. Is it appropriate for a third party to own the economic rights to another human being and then to trade this ‘asset’? This

⁸ Centre de Droit et d’Economie du Sport (CDES), “Research on third-party ownership of players’ economic rights (part II)”, June 2014, 20.

⁹ Chapter IV, articles 13-18, FIFA Regulations on the Status and Transfer of Players.

¹⁰ See sub-section 1.3 of this Chapter on “Federative Rights”.

¹¹ For ease of reference, we will maintain “TPO” in the course of this contribution.

*would be unacceptable in society and has no place in football. Footballers (like everyone else) should have the right to determine their own future”.*¹²

The argument, in the authors’ opinion, is scarcely grounded under a legal perspective since the consent of the player is always a required element of any football transfer.¹³ However, similar statements exercised a comprehensible impact over stakeholders and decision-making bodies.¹⁴

Another common misconception is that the entitlement of the third-party to a share of the player’s future transfer fee derives from a financial investment done by such third-party, which provides funding to a club interested in signing a player. This is actually only one of the variety of TPO models (“investment TPO”) and the reason of said misconception is that this form of TPO is the most common in Europe, where clubs – mainly pertaining to the Spanish and Portuguese leagues – used TPO funds to acquire players they could otherwise not afford.

In South America, however, which is where the practice started and was most relied upon, other forms of third-party participation in the economic rights of players are recurrent. In certain instances, a percentage of the economic rights over a player is granted to agents, the player himself or his previous club, as a reward for indicating, registering or transferring a youth player with a new club (“recruiting TPO”). In other cases, TPO can be a financial mechanism used to retain a player rather than to transfer him. This happens when a club either receives an offer for a transfer of one of his players and cannot (by itself) sustain his financial expectations and thus either assigns him a portion of economic rights as an alternative way of (future) compensation, or sells such rights to a third-party, using the funds thus immediately obtained (without losing the player) to guarantee the player the salary increase he expected (“retaining TPO”). This may represent an important alternative bargaining tool for clubs with limited resources, allowing them to increase their capacity to compete at an international level against wealthier entities.¹⁵

Finally, TPO can also be a way for a club to obtain funding when it requires financial support, not in order to sign or maintain a specific player, but rather to comply with its ordinary financial obligations, and thus receives financial support from a third party in exchange for assigning a percentage of the economic rights of one or more players of its squad (“financing TPO”); this TPO model

¹² UEFA, “No place for third-party ownership”, 19 March 2013, available at www.uefa.com/insideuefa/about-uefa/news/newsid=1931937.html?redirectFromOrg=true.

¹³ As simply but brilliantly put by A. RECK, “*Otherwise, for clubs, owning 100% of a human being would be equally immoral*”. A. RECK, “*The impact of the TPO ban on South American football*”, in “*Debating FIFA’s TPO ban: ASSER International Sports Law Blog symposium*”, International Sports Law Journal (2016) 15:233–252.

¹⁴ See sub-section 1.6 of this Chapter on “The football stakeholders points of view”.

¹⁵ Within this context, it is worth noting that critics of TPO allege that the mechanism is against contractual stability; this view, however, is based on the conception of TPO as an “investment” modality, and not necessarily backed by other forms of partnerships such as the “retaining TPO”.

tends to be more financially risky for the club involved, likely to be in a poor bargaining position *vis-à-vis* the investor and thus possibly inclined to accept conditions which in the long-term might prove counterproductive.¹⁶

1.3 Federative Rights

The concept of “economic rights arising out of the federative rights”¹⁷ has been, for years, the terminology used to define a party’s entitlement to a percentage over the future transfer of an athlete in the countries where recourse to TPO was more recurrent.¹⁸

FIFA, who previously affirmed that concepts such as “federative rights” and “economic rights” did not or no longer exist,¹⁹ now also makes use of such notions,²⁰ which have also been adopted in a number of CAS.²¹

The “federative rights” are the right of a club to hold the registration of a player with the relevant association; they arise out of the registration of a player at an association, which is necessary for the same to be eligible to play for a club²²

¹⁶ On the other side, it appears that if a club is ready to enter into any such financial deal, this would be for a lack of sustainable alternatives and that thus simply abolishing TPO, without at the same time offering viable alternatives, does not “*per se*” necessarily protect the clubs’ financial stability.

¹⁷ In Spanish, “*derechos federativos derivados de los económicos*”; in Portuguese, “*direitos federativos derivados dos económicos*”.

¹⁸ Spain, Portugal, Mexico and all South-America.

¹⁹ “FIFA stated that since September 1, 2001 the concept of ‘federative rights’ to players did no longer exist. It had been replaced by the principle of maintenance of contractual stability between the contracting parties, which entailed, in particular, that compensation for unilateral breach of contract without just cause was to be paid by the party in breach of contract in favour of the counterparty” in CAS 2008/A/1482 *Genoa Cricket and Football Club S.p.A v/ Club Deportivo Maldonado*.

²⁰ Art. 18-ter of the FIFA Regulations on the Status and Transfer of Players refers to “Third-party ownership of players’ economic rights”.

²¹ For instance, the Panel in the awards CAS 2004/A/635 *RCD Espanyol de Barcelona v. Atlético Vélez Sarsfield* and CAS 2004/A/662 *RCD Mallorca v. Club Atlético Lanús* affirmed that:

“A Club holding an employment contract with a player may assign with the player’s consent, the contract rights to another clubs in exchange for given sum of money or other consideration, and those contract rights are the so-called economic rights to the performances of a player.

This commercial transaction is legally possible only with regard to players who are under contract, since player who are free from contractual engagements – the so-called free agents – may be hired by any club freely, with no economic rights involved (...)”

“(...) in accordance of the above distinction, while a player registration may not be shared simultaneously among different clubs, a player can only play for one club at a time, the economic rights being ordinary contract rights, may be partially assigned and thus apportioned among different right holders. The finds implicitly confirmation of the lawfulness of contracts trading portions of economic rights in both the 1997 and 2001 FIFA Regulations”.

²² Art. 5, FIFA Regulations on the Status and Transfer of Players:

“1. A player must be registered at an association to play for a club as either a professional or an amateur in accordance with the provisions of article

2. Only registered players are eligible to participate in organised football”.

UNDERSTANDING THE FIFA RULES ON INTERNATIONAL TRANSFER AND FIRST REGISTRATIONS OF MINORS

by *Lucas Ferrer**

When considering what have been the most meaningful developments in football in recent history, one that may or may not come to mind is the restrictions placed upon young football players seeking playing opportunities outside of their place of birth. Hardly any other sport in the world has such restrictive approach when it comes to the mobility of minors in comparison to Football and, as it will be explained below, there have been very few developments in the FIFA Regulations that can be said to have had such a transcendental effect on the sport as the enactment and enforcement of the regulatory framework on the protection of minors has had. In recent years, for example, a number of clubs have been handed weighty sanctions for failing to comply with said regulations, which are by no means simple. However, what can currently appear to be inflexible rules should not be judged as such without understanding where they came from, how they have evolved and the details of where things currently stand. Such is the purpose of this article.

1. *The protection of minors in football: the origin of the FIFA regulations*

The emergence of the provisions aimed at regulating the transfer of minor players was based on the need to tackle a worrying phenomenon that had been taking place in the football market at the end of the last century. Many times, certain football clubs, mostly European, recruited a large number of underage players from more disadvantaged countries with the idea that such minor players could have the chance to prove their worth and conditions in a football club. Once these

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minors had travelled thousands of kilometers and therefore, were displaced from their place of origin (and in many cases, from their family environment), it often happened that clubs, upon noticing that they did not have interest in a minor player, simply proceeded to cancel his registration without providing him any solution or alternative proposal. This repeated scenario caused situations of abandonment of young players who were living in foreign countries, separated from their families and without financial resources. Indeed, the number of minors moving away from their home countries to another to pursue a footballing career has only increased along the years. By way of comparison, in 2011 a total of 1.460 registration of minors were submitted to FIFA, and in 2018 this number increased to 3.754 applications for the registration of underage players.¹

Logically, FIFA could not overlook this outrageous reality that transcended the sport and became a social problem that even affected the migratory movement of people, traffic of minors, parental authority... In this sense, FIFA, with the intention of remedying such shameful and global problem published Circular no. 769, where it *inter alia* informed that FIFA and the European Commission had entered into an agreement in March 2001 to include in its regulatory framework provisions on the protection of minors. Indeed, these amendments to the Regulations on the Status and Transfer of Players (“RSTP”) entered into force in September 2001² and were aimed at imposing strict conditions to safeguard young players. These amendments were of an eminently protectionist nature, given the very serious situation that the highest football governing body was facing at that time, as described above. In this edition of the RSTP (and with greater clarity in the following version in 2005) FIFA starts from the principle of prohibition of international transfer of minors (*i.e.* under-18 players), unless certain and limited exceptions concur. With this provision, the aim was to protect the adequate and healthy development of minors, a group particularly vulnerable to exploitation and to the adverse consequences for their personal development in foreign countries. FIFA understood (and understands) that, although an international transfer may, in certain cases, favor a minor football player, there are higher general interests related to the minors that deserve further protection and justify the prohibition regime provided in the RSTP.

As far as the technical registration of minors is concerned, the FIFA RSTP, succinctly, requires that the International Transfer Matching System (“ITMS”) must also be used in the context of so-called minor applications. The term ‘minor’ indicates a player (female or male) who has not yet reached the age of 18, while ‘application’ refers to the submission of a request through ITMS by the engaging member association for: 1. *International transfer* – a minor of any

¹ Global Transfer Market Report 2018 - A Review of All International Football Transfers In 2018 Men’s Football, www.fifatms.com/wp-content/uploads/dlm_uploads/2019/01/GTM-2018_Men_online_v1.2.pdf.

² These specific objectives were outlined by FIFA in its Circular no. 769 that introduced the provisions in the RSTP 2001, https://resources.fifa.com/mm/document/affederation/administration/ps_769_en_68.pdf.

nationality who has previously been registered with a club at one association seeking to be registered with a club at a new association; and 2. *First registration* – a minor who has never previously been registered with a club and is not a national of the country in which he/she wishes to be registered for the first time. As a general rule, international transfers and first registrations of foreign players are only permitted if the player is over the age of 18. However, there are exceptions to this rule, which will be extensively addressed in the present article.

2. *Evolution of the provisions governing the registration of underage players*

Although the provisions of the RSTP regarding the international transfer of minors have undergone certain changes over the years, the pillar of the regulations since their implementation has always been the general prohibition of transferring minors (article 19(1) of the RSTP). Nevertheless, this general prohibition may be overturned in case an exception foreseen in article 19(2) of the RSTP is fulfilled considering the particularities of each case. These exceptions – initially – were the following: a) The parents of the player moved for reasons not linked to football; b) The player is over 16 and is moving within the territory of the EU/EEA; c) Both player and club are within 50km of their common borders and the distance between the two is less than 100km; d) The player flees his country of origin for humanitarian reasons; and e) The player is a student and moves without his parents to another country temporarily for academic reasons.³

The starting point of the regulatory framework concerning the transfer of minors was the amendments introduced by FIFA related to aspects such as the reference to football academies (article 19bis – included in 2009), the establishment of a specific procedure to request the application of exceptions to the general prohibition of international transfers of minors (article 19(4) and Annex 2 – included also in 2009, when the so-called “Subcommittee” appointed by the Players’ Status Committee was created as the body entrusted with the task of approving international transfers of minors and first registrations).

In addition to the above-mentioned modifications and improvements of the system, FIFA formally introduced in 2016 another exception to the general prohibition in those cases in which a first registration of a foreign player who has been living continuously for 5 years in the country where he intends to register is requested by the relevant association. This exception was incorporated in article 19(3) of the RSTP.⁴

³ The third exception was actually included in March 2002 through the FIFA Circular no. 801. Available at: https://resources.fifa.com/mm/document/affederation/administration/ps_801_en_78.pdf. Also, the fourth and fifth exemptions have been recently codified in the RSTP by means of the FIFA Circular no. 1709 dated 13 February 2020. Available at: <https://resources.fifa.com/image/upload/circular-no-1709-amendments-to-the-regulations-on-the-status-and-transfer-of-pla.pdf?cloudid=ywr4rcrallyhoqtrqyai>.

⁴ Even if FIFA bodies were already applying such exception in its practice for a long time.

Also, it is worth mentioning that, the exceptions foreseen in the recently included articles 19(2)(d) and (e) of the RSTP to the prohibition of the international transfer of minors, which have been codified after being accepted by the FIFA Subcommittee's jurisprudence.⁵ Specifically, the Subcommittee exceptionally admitted applications regarding unaccompanied refugee players and exchange student players under certain criteria, which will be developed below. However, in summary, as described by Yilmaz,⁶ the unaccompanied refugee players are those who move to another country without their parents due to humanitarian reasons and cannot be expected to return to their country of origin because of a danger to their life or freedom.

Finally, it shall be pointed out that in the revisions to the RSTP that have happened since 2001 (versions 2005, 2008, 2009, 2010, 2012, 2015, 2016, 2016, 2019 and 2020), the prohibition on the transfer of underage players and its exceptions has not suffered substantial changes, with the exception of the amendments included by FIFA Circular no. 1709 regarding articles 19(2)(d) and (e) of the RSTP, despite the fact that many things have changed in the world of football in the last 15 years, which at least put us in a position to reflect on whether or not the system's immobility is adequate to the current times and whether this system has proved its correct functioning.

3. FIFA regulatory framework on protection of minors

a. The general rule and its exceptions

As introduced *ut supra*, FIFA created a mechanism to combat the problems emerging from the minor players leaving their homes with the intention of pursuing a professional football career, which did not always, if ever, end how these kids had dreamt. This mechanism was the well-known prohibition on internationally transferring underage players foreseen in article 19 of the RSTP. This provision is the pillar of the FIFA regulatory framework for minors that set the essential values and principles of the FIFA framework in this regard.

In order to establish a proper system aimed at securing the protection of minors, FIFA developed a central, substantive provision (article 19 of the RSTP) to regulate the requirements and the process for a player to be granted an exception to being internationally transferred from one association to another. Additionally, FIFA gave its regulations additional tools with the objective of strengthening the procedure for registering minors; these regulatory tools were Annexe 2 RSTP: the procedure governing applications for first registration and international transfer, and Annexe 3 RSTP: the use of the Transfer Matching System (TMS) for the

⁵ These two exceptions were explained by FIFA in "FIFA, Minor Player Application Guide", 23rd February 2017, http://resources.fifa.com/mm/document/affederation/footballgovernance/02/86/35/28/protectionofminors--minorplayerapplicationguide_neutral.pdf.

⁶ Yilmaz, S. *Int Sports Law J* (2018) 18:15. <https://doi.org/10.1007/s40318-018-0126-y>.

purposes of the protection of minors). The goal of this system was to observe and control FIFA's main objective of safeguarding underage players from any abuse and uncertain future away from their home.

Say it, one shall draw one basic premise, the international transfer of underage players is prohibited⁷ and only if the prerequisites for an exception to this general rule are fulfilled and approved by the competent body (the Subcommittee), the minor player can be registered with a club belonging to an association different from his club of origin's association. These exceptions are prescribed in article 19(2) of the RSTP (ed. March 2020) and are the following:

"2. The following three exceptions to this rule apply:

- a) *The player's parents move to the country in which the new club is located for reasons not linked to football.*
- b) *The transfer takes place within the territory of the European Union (EU) or European Economic Area (EEA) and the player is aged between 16 and 18. In this case, the new club must fulfil the following minimum obligations:*
 - i. *It shall provide the player with an adequate football education and/or training in line with the highest national standards.*
 - ii. *It shall guarantee the player an academic and/or school and/or vocational education and/or training, in addition to his football education and/or training, which will allow the player to pursue a career other than football should he cease playing professional football.*
 - iii. *It shall make all necessary arrangements to ensure that the player is looked after in the best possible way (optimum living standards with a host family or in club accommodation, appointment of a mentor at the club, etc.).*
 - iv. *It shall, on registration of such a player, provide the relevant association with proof that it is complying with the aforementioned obligations.*
- c) *The player lives no further than 50km from a national border and the club with which the player wishes to be registered in the neighboring association is also within 50km of that border. The maximum distance between the player's domicile and the club's headquarters shall be 100km. In such cases, the player must continue to live at home and the two associations concerned must give their explicit consent.*
- d) *The player flees his country of origin for humanitarian reasons, specifically related to his life or freedom being threatened on account of race, religion, nationality, belonging to a particular social group, or political opinion, without his parents and is therefore at least temporarily permitted to reside in the country of arrival.*

⁷ Article 19(1) RSTP: "International transfers of players are only permitted if the player is over the age of 18".

**FIFA'S TRANSFER MATCHING SYSTEM
USING TECHNOLOGY, TRAINING AND COMPLIANCE
TO CREATE A LEVEL PLAYING FIELD**

by *Kimberly T. Morris**

Introduction

International transfers of professional footballers (both male and female) are processed through FIFA's International Transfer Matching System ("ITMS" or "The System") – a ground-breaking technological and regulatory development that has revolutionised the football transfer market. The System, which has been in place for almost 9 years, has recorded 119,025 professional football transfers. In ITMS clubs have declared USD 37.56 billion in total transfer fees, USD 421 million in solidarity contribution payments and USD 2.54 billion in commissions to intermediaries. 22,336 minor applications have been submitted in ITMS by FIFA's member associations.

The decision to create an electronic online transfer system was made in 2007, when the FIFA Council, at the 57th FIFA Congress, accepted a recommendation of the FIFA task force "For the Good of the Game". The recommendation was to develop an online player transfer system to increase integrity and transparency in the market and to enforce the rules on the protection of minors. Two years later, in 2009, FIFA's Transfer Matching System was rolled out to all FIFA's member associations (then numbering 207). The online technology platform was first made available to process minor applications that previously had been submitted in paper form to FIFA's Players Status department. In October 2010, the regulations relating to use of ITMS were included in annexe 3 of the FIFA Regulations on the Status and Transfer of Players (the "RSTP") making ITMS a mandatory step for all international transfers of professional male footballers through a secure, online and real-time system.

Today all 211 FIFA member associations and over 7,000 clubs in 6 confederations (UEFA, AFC, Concacaf, Conmebol, OFC and CAF) use ITMS to

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the international movement of professional players. In January 2018, the use of ITMS was extended to international transfers of professional female players.

1. Transfer Process

The transfer process is governed by FIFA's Regulations on the Status and Transfer of Players (the "RSTP"). Annexe 3 of the RSTP was drafted to reflect the technical functioning of the transfer matching system (ITMS or the System). Annexe 3 describes the scope and purpose of the System – to increase transparency of individual player transfers, to ensure that football authorities (i.e. FIFA as the global football regulator) has more details available to them on international players transfers, and to improve the credibility and standing of the global transfer system.

As prescribed by article 1 para 5 of Annexe 3, and at the time of writing, the use of ITMS is mandatory for all international transfers of professional male and female players within the scope of eleven-a-side football. Any registration of a player without the use of ITMS will be deemed invalid.

2. Role of the Clubs

For an international transfer to be processed through ITMS, clubs must enter certain detailed confidential information into the system. This confidential information is in two forms – (i) certain data that must be entered in designated fields in the System for a particular transfer and (ii) uploading the required documents in the System to support the information entered. For example, the full legal name, the date of birth and nationality (or nationalities if there are two nationalities) of the player must be typed in a free text field and a corresponding proof of identification issued by the relevant government must also be uploaded in ITMS in a particular transfer instruction. Similarly, details about the player's salary, how much will be paid, the type of currency of said payments and when the payments will be made (either a fixed amount or an amount based on the completion of a certain condition) all must be disclosed in designated fields in ITMS in the relevant transfer instruction. The complete employment contract, including all annexes and amendments must also be uploaded in the System. It is the club engaging the player (the new club) that must provide this information in a particular transfer.

Article 3.1 para. 1 of Annexe 3 of the RSTP identifies the obligations of clubs stating that clubs are responsible for entering and confirming transfer instructions in ITMS and, where applicable, for ensuring that the required information matches. Article 4 of Annexe 3 entitled 'Obligations of Clubs' outlines in detail the compulsory data a club must disclose when creating transfer instructions dependent on the transfer type. For example, when a player is transferred out of contract and there is no transfer or loan agreement, there is no need to declare or provide this information. The information required is as follows:

TEASER

- Instruction type (Engage player or Release player),
- Indication of whether the transfer is on a permanent basis or on loan,
- Indication of whether there is a transfer agreement with the former club,
- Indication of whether the transfer relates to an exchange of players,
- If related to an earlier loan instruction, indication of whether:
 - it is a return from loan; or
 - it is a loan extension; or
 - the loan is being converted into a permanent transfer,
- Player's name, nationality(ies) and date of birth,
- Player's former club,
- Player's former association,
- Date of the transfer agreement,
- Start and end dates of the loan agreement,
- Club intermediary's name and commission,
- Start and end dates of player's contract with former club,
- Reason for termination of player's contract with former club,
- Start and end dates of player's contract with new club,
- Player's fixed remuneration as provided for in player's contract with new club,
- Player intermediary's name,
- Indication of whether the transfer is being made against any of the following payments:
 - Fixed transfer fee, including details of instalments, if any,
 - Any fee paid in execution of a clause in the player's contract with his/her
 - former club providing for compensation for termination of the relevant contract,
 - Conditional transfer fee, including details of conditions,
 - Sell-on fees,
 - Solidarity contribution,
 - Training compensation,
- Payment currency,
- Amount(s), payment date(s) and recipient(s) for each of the above listed types of payments,
- Club's own banking details (name of bank or bank code; account number or IBAN; bank address; account holder),
- Declaration on third-party payments and influence,
- Declaration on third-party ownership of players' economic rights.

The table below explains which club (either the new club or the former club) must enter what information in a particular transfer.

TEASER

New club	Former club ¹
Instruction type (Engage player)	Instruction type (Release player)
Indication of whether the transfer is on a permanent basis or on loan	Indication of whether the transfer is on a permanent basis or on loan
Indication of whether there is a transfer agreement with the former club	
Indication of whether the transfer relates to an exchange of players	Indication of whether the transfer relates to an exchange of players
If related to an earlier loan instruction, indication of whether: <ul style="list-style-type: none"> o it is a loan extension; or o the loan is being converted into a permanent transfer 	If related to an earlier loan instruction, indication of whether: <ul style="list-style-type: none"> o it is a return from loan; or o it is a loan extension; or o the loan is being converted into a permanent transfer
Player's name, nationality(ies) and date of birth	Player's name, nationality(ies) and date of birth
Player's former club	
Player's former association	
Date of the transfer agreement	Date of the transfer agreement
Start and end dates of the loan agreement	Start and end dates of the loan agreement
Club intermediary's name and commission	Club intermediary's name and commission
Start and end dates of player's contract with former club	
Reason for termination of player's contract with former club	
Start and end dates of player's contract with new club	
Player's fixed remuneration as provided for in player's contract with new club	
Player intermediary's name	
Player intermediary's name	
Indication of whether the transfer is being made against any of the following payments: <ul style="list-style-type: none"> o Fixed transfer fee, including details of instalments, if any o Any fee paid in execution of a clause in the player's contract with his/her former club providing for compensation for termination of the relevant contract o Conditional transfer fee, including details of conditions o Sell-on fees o Solidarity contribution o Training compensation 	Indication of whether the transfer is being made against any of the following payments: <ul style="list-style-type: none"> o Fixed transfer fee, including details of instalments, if any o Any fee paid in execution of a clause in the player's contract with his/her former club providing for compensation for termination of the relevant contract o Conditional transfer fee, including details of conditions o Sell-on fees o Solidarity contribution o Training compensation
Payment currency	Payment currency
Amount(s), payment date(s) and recipient(s) for each of the above listed types of payments.	Amount(s), payment date(s) and recipient(s) for each of the above listed types of payments.
Club's own banking details (name of bank or bank code; account number or IBAN; bank address; account holder)	Club's own banking details (name of bank or bank code; account number or IBAN; bank address; account holder)
Declaration on third-party payments and influence	Declaration on third-party payments and influence
Declaration on third-party ownership of players' economic rights	Declaration on third-party ownership of players' economic rights

¹ The former club only intervenes in the transfer process if there is an agreement with the player's former club to transfer her/him. For all players that are "out of contract", the former club does not enter any information in TMS.

Clubs are further obliged under Art. 4.4, annexe 3 to upload certain mandatory documents to support this information. As identified in Art. 8.2.1, annexe 3, it is the club engaging the player (i.e. the “new club”) who must upload :

- a copy of the entire employment contract between the new club and the professional player;
- a copy of the entire transfer or loan agreement concluded between the new club and the former club, if applicable;
- a copy of proof of the player’s identity, nationality(ies) and birth date, such as passport or identity card;
- proof signed by the player and his/her former club that there is no third-party ownership of the player’s economic rights; and
- proof of player’s last contract end date and reason for termination – this document is called *Proof of Last Contract End Date* and should be provided by the former club to the new club. The letter or document should be signed by an official of the former club, should be dated and should identify when the player’s contract with the former club, expired, came to an end or was terminated and the reason for the termination – was it mutual or unilateral. It is this important document which identifies that the player is in fact a ‘free agent’ and can move from the former club to his or her new club.

Where there has been a declaration of third party ownership of the player by the former club then the former club is required to upload a copy of the relevant agreement with the third party. Other than this document, the former club has no obligation to upload any document in the transfer instruction.

Documents must be uploaded in a “format required by the relevant TMS department” – this means “*TMS Compliance*”. Guidance as to the relevant format of a particular document can be found in the TMS HelpCentre which is available online to all registered TMS users. Only pdf documents can be uploaded into the System and there is a maximum size of 5MB per document. Description as to the relevant document is as follows:

Player Passport: A mandatory document that indicates the clubs with which the player has been registered since the season of his/her 12th birthday (cf. art. 7 of the RSTP). The player passport must be uploaded into TMS by the former association upon delivering the ITC. A sample template of a player passport in the form required by FIFA Players’ Status department is located in the TMS “Document Library” to help member associations comply with their obligation.

Proof of Last Contract End Date: A mandatory document applicable to the instruction type “Engage permanently without transfer agreement”. The Proof of Last Contract End Date or “POLCED” must state the date and reason for the termination of the player’s employment with his/her former club. The letter should be on the letterhead of the former club and signed by a corporate officer of that entity. There is a sample template of this document in the “Document library” to help users comply with the requirement. The document must be uploaded into TMS by the new club before confirming the transfer instruction.

THE TRANSFER MATCHING SYSTEM FROM A CLUB'S PERSPECTIVE

by João Lobão*

When created, the Transfer Matching System (“TMS”) was “*designed to ensure that football authorities have more details available to them on international transfers. This will increase the transparency of individual transactions, which will in turn improve the credibility and standing of the entire transfer system*” – Art.1 para. 1 of Annexe 3 of the Regulations on the Status and Transfer of Players (hereinafter “FIFA Regulations” or “FIFA RSTP”). However, nowadays TMS is more than an international transfer system.

On FIFA’s digital platform, National Associations, FIFA and Clubs can not only deal with transfers, but also intermediary registrations and complaints relating to solidarity contribution or training compensation. This broader range of utility of the platform since its creation can certainly be viewed as a success.

FIFA now recognizes TMS as an important tool in the relations between Clubs and Associations and has been working towards its improvement and the broadening of its range of use in order to not only better control the information within the football world, but also to simplify the exchange of such knowledge.

The FIFA Regulations now state that “*any professional player who is registered with club that is affiliated to one association may only be registered with a club affiliated to a different association after the Internacional Transfer Certificate (ITC) has been delivered by the former association and the new association has confirmed receipt of the ITC. The ITC procedure must be conducted exclusively via TMS (...) [a]ny form of ITC other than the one created by TMS shall be not recognized*” – Art. 8.2 Annexe 3 of the FIFA Regulations.

In order to perform the transfer of the ITC, the new Club needs to enter significant documents before confirming the instruction, namely, – but always depending on the transfer type – *i)* a copy of the contract between the new club and the professional player; *ii)* a copy of the transfer or loan agreement concluded between the new club and the former club, if applicable; *iii)* proof of the

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Player's identity, nationality(ies) and birth date, such as passport or identity card; iv) proof of player's last contract end date and reason for termination; and v) proof signed by the player and his/her former club that there is no third-party ownership of the player's economic rights (Art. 8.2 para. 1 of the Annexe 3 of the FIFA Regulations).

When concluding an international transfer, both parties must enter the relevant instructions, which can in some cases turn out to be not as easy as one might think.

For instance, for a simple permanent or temporary transfer, the information to enter in the instructions is basically the same as the information provided in the agreement between the clubs. However, when dealing with a temporary transfer where an option to buy is included, doubts may occur if in the temporary transfer instruction the clubs do not clearly stipulate the terms of such option to buy the Player's rights on a permanent basis. In particular, the transfer fee, and the details of when and how the option may be exercised, must all be clearly provided.

We tend to assume that such information regarding the option to transfer the Player permanently shall be taken in consideration when entering the temporary transfer instructions on TMS and, therefore, the clubs shall introduce all relevant details even when the main objective of the transfer is a non-permanent.

On the edge of turning 10 (ten) years old, TMS has however been at the centre of some unpleasant outcomes in international transfers in cases where timelines are not met or when not all of the proper documentation is inserted in the system.

Adrien Perruchet Silva's move from Sporting Clube Portugal – Futebol, SAD to Leicester City is a good example of the outcome that we can expect when the deadlines are not met. The Player was involved in a last minute transfer between the Portuguese Club and the English Club, where the ITC was requested 14 (fourteen) seconds after the deadline. Both FIFA and CAS¹ rejected a “validation exemption” and the Player spent 6 (six) months without playing as a “professional player is not eligible to play in official matches for his/her new club until the new association has confirmed the receipt of the ITC and has entered and confirmed the player's registration date in TMS” (cfr. Annexe 3, Art. 5.2 para. 4).

¹ CAS Press Release published on 17 November 2017 stated: “The Court of Arbitration for Sport (CAS) has rejected an application for urgent provisional measures filed by the Portuguese footballer Adrien Silva. The Player had sought an order from CAS requiring FIFA to issue an International Transfer Certificate (ITC) which would allow the Football Association (the FA) to provisionally register him for its affiliated club Leicester City FC (Leicester) until CAS renders its final award in these proceedings. On 31 August 2017, the last day of the registration period for the 2017/2018 sporting season in England, Sporting Clube de Portugal (Sporting) concluded a transfer agreement with Leicester for the transfer of Adrien Silva to Leicester. However, the ITC request was blocked by the FIFA Transfer Matching System (FIFA TMS) as it was outside of the registration period and the FA was unable to register Adrien Silva's transfer to Leicester. The FA requested a “validation exemption” from FIFA which was refused in a decision issued by the Single Judge of the FIFA Players' Status dated 27 September 2017”.

The same happened with Yannick Djalo's transfer to OGC Nice Côte D'Azur from Sporting Clube de Portugal – Futebol, SAD. The French Club only uploaded the mandatory documents to TMS after the deadline had elapsed. The Court Arbitration of Sport was called to resolve this case² and not only rejected the provisional measures that were requested by the Club, but also rejected all the arguments that the club presented.

However, FIFA had a different interpretation of the Regulations in a special case in Portugal. The English club Sunderland's signing of the goalkeeper Mika from Boavista – Futebol, SAD was first blocked by the TMS System but later confirmed by FIFA. In Mika's case, both clubs uploaded the necessary documentation and completed all the mandatory information, however the clubs – due to a TMS software problem – were not able to match each other's information, as both clubs were constantly asked to provide the counter instruction. The FA and the Portuguese FA did not intervene in this transfer as they were never requested to complete the transfer. FIFA later confirmed the transfer due to the fact that all the paperwork and information were completed before the closing of the window. FIFA held that in spite of the fact that the ITC had not been requested within the required timeframe, both clubs had complied with their duties before the deadline and therefore the transfer of the Player should be successfully completed.

As a general rule, transfers can only be successfully validated when the TMS procedure is completed within the deadline. However exemptions only occur in special circumstances. Let us imagine for example that a player from a Brazilian club is on loan to a Portuguese Club and during the loan period a further temporary transfer is agreed by the Brazilian Club to a Chinese Club.

Both the Portuguese and Brazilian Associations have their registration window closed, however, the Chinese Club has its registration window open. In this scenario, the Brazilian Club shall enter a return from loan instruction in order to allow the temporary transfer to the Chinese Club, however, as said, the registration window is closed in Brazil.

The ITC would have to return to Brazil, and then, immediately, be subject to a temporary transfer and registration with the Chinese FA. Bearing in mind that the registration window is closed in Brazil, a request would be made to FIFA to allow a special exemption for the return from loan of the ITC.

When dealing with this case, FIFA will ascertain i) why the transfer is being made outside the registration period, and ii) if there is concrete and irrefutable proof that the registration is being made with the sole purpose of allowing a subsequent transfer to the Chinese Club where the registration period is open.

² CAS 2011/A/2578, *OGC Nice Côte d'Azur & Yannick Dos Santos Djalo v. FIFA*, Order on Provisional Measures of 11 October 2011, CAS 2014/A/3647 *Sporting Clube de Portugal SAD v. SASP OGC Nice Côte d'Azur* and CAS 2014/A/3648 *SASP OGC Nice Côte d'Azur v. Sporting Clube de Portugal SAD*.

In this case, the registration outside the registration period is needed, in order to successfully complete the transfer of the player. FIFA has been sensitive to this matter by allowing such cases to proceed.

In all the examples presented above, the FIFA deciding body would be the Player Status Committee, while, the only one that has standing to sue and to pursue the ITC registration out of such period is the Association where the Player wishes to be registered. The Clubs and Players provide the information needed to complete the ITC release and registration (Art. 4 of the Annexe 3 of the Regulations) but it is the Association's that have the special role when verifying such information and requesting/releasing the ITC from/to the other Association.

FIFA's intervention only occurs when an ITC request is made by an Association, and not from the Club or the Player, even though ultimately they will be the parties who will be directly affected by FIFA's decision. Therefore the standing to appeal occurs when an ITC request is rejected, and lies with the new Association (Art. 5 namely para. 5 of Art. 5.2 of the Annexe 3 of the Regulations) where the player is to be registered.

The responsibility for asking, issuing or rejecting the ITC is solely in the Association's hands.³ In Honorato da Silva's case, CAS established that *"The Club was in complete control of the ITC process. Although the QFA was – formally speaking – in charge of issuing the Player's ITC, in practice a national association only grants the ITC upon approval of the Player's former club. The Club, therefore was in control whether the Player's ITC would be issued timely enough for him to be registered with International by 3 October 2014"*. However, *"it was clear for the Panel (...) that the Club made the issuance of the Player's ITC conditional upon the execution of the Settlement, and, thus, conditional upon the Player's waiver of his entitlement to claim compensation"*.⁴

The Panel considered that neither the Club nor the Association *"had any right over the Player and, therefore, were not entitled to decide whether to release the Player's ITC or not. In addition, the deadline referred to in the above provision [Art. 8 (2)(4)(b) Annexe 3 of the Regulations] is a maximum period, within which the national federation (and the respective former club) shall assess the contractual situation and take the decision either to grant or to reject the issuance of the ITC. However, in case the legal situation is clear before the expiry of said deadline – as is the case here given that the Employment Contract had been unilaterally terminated by the Club – the*

³ CAS 2016/A/4826 *Nilmar Honorato da Silva v. El Jaish FC & FIFA*, award of 23 August 2017. The mentioned case decides over a dispute concerning the compensation that should be awarded to a Player after the unlawful sport employment contract termination by the Club. Following the Association reluctance to release the ITC, the Player was forced to settle on a amicable termination with the Club that made him relinquish the compensation that he should be entitled to.

⁴ CAS 2016/A/4826 *Nilmar Honorato da Silva v. El Jaish FC & FIFA*, award of 23 August 2017, para. 80.

relevant club is under the obligation not to obstruct the player's search for a new employment. The deadline provided for in article 8 (2)(4)(b) Annexe 3 FIFA Regulations is evidently not intended to give the former club the opportunity to block at will the post contract free movement of a player. In the case at hand it was the Club that terminated the contract. Therefore, the Player was obviously entitled to the ITC. To arrive at this obvious conclusion was neither complicated nor time-consuming, but only fair. There remained, therefore, abundant time for the Club to properly process the ITC request forwarded to it by the QFA. Instead of enabling the Player to timely register with this new club, as was the Club's duty pursuant to the FIFA RSTP and its obligations post contract, the Club exploited the Player's straitened circumstances by conditioning the issuance of the ITC on the Player's waiver of his financial claims against the Club".⁵

Finally the Arbitrators concluded that *"(...) Article 3(1) of Annexe 3 of FIFA RSTP requires that all parties involved in the FIFA TMS act in good faith. Furthermore, article 9 (1) FIFA RSTP provides that "[t]he ITC shall be issued free of charge without any conditions or time limit" and that "[a]ny provision to the contrary shall be null and void"*.⁶

The presented CAS Award shows the reasons why matters concerning ITCs fall within the Associations' competence. Furthermore, the regulations refer to certain circumstances under which an ITC shall not be issued by the Association. In particular, Art. 8(2)(7) Annex 3 FIFA RSTP states that *"The former association shall not deliver an ITC if a contractual dispute on grounds of circumstances stipulated in Annex 3, article 8.2 paragraph 4 b) has arisen between the former club and the professional player. In such case, upon request of the new association, FIFA may take professional measures in exceptional circumstances. If the competent body authorizes the provisional registration (cf. article 23 paragraph 3), the new association shall complete the relevant player registration information in TMS (...) The delivery of the ITC shall be without prejudice to compensation for breach of contract"*.

An Association shall analyse each case independently of the Parties and must have no position on the matter at stake. Its duty is only to check the terms and conditions of the transfer and ensure that it complies with National and FIFA Regulations.

An Association cannot block or delay the issue of the ITC for reasons relating to an obligation of the former club to pay taxes or amounts due in relation to the transfer agreement, as these are dealt with by National Laws and Regulations.

On the Club to Club relationship, TMS Global Transfers & Compliance (FIFA) have conducted several investigations with the clear objective to detect and fine clubs for the misuse of TMS as a negotiation tool. TMS Compliance

⁵ Idem, para. 82.

⁶ Idem, para. 84.

INTERMEDIARIES

by *Andrea Bozza* and *Pierfilippo Capello**

1. *Intermediaries within the Football System*

1.1 *Introduction*

The role of professional football players has completely changed in the last twenty years along with the developing trend of the football industry. The incredible growth of revenues and investments in football bears correlation with the amount of capital that clubs generally spend to ensure the performances of young and talented players.

In view of the amount of money involved and the complexity of many of the negotiations, players and/or clubs often hire a professional to represent them and close the deal in their best interest.

These professionals, who work in the football industry, are referred to as player's agents or intermediaries. For this reason, in this chapter, the use of the terms "agent" and "intermediary" shall be used interchangeably.

The purpose of this chapter is to illustrate the technical and practical aspects of the intermediary profession, especially within the context of a transfer.

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The authors wish to thank their colleagues Marco Cusumano and Vincenzo Colasante for their invaluable contribution for the preparation of this chapter.

Firstly, the chapter will analyse the genesis of the regulations from the *Players' Agent Regulations* (PAR) to the current *FIFA Regulations on Working with the Intermediaries* (RWI).

Secondly, it will focus on how RWI has been implemented by national associations (NAs), together with the issues related to its implementation and application at national level.

Then, the chapter will analyse the representation agreements between intermediaries and clients in order to provide a meaningful understanding of how this type of agreement works in practice and the issues that arise from such agreements.

Finally, the Authors will analyse the main principles and guidelines FIFA is currently following in the context of the envisaged reform of the regulations concerning Intermediaries which should be enter into force in 2020.

1.2 *Definition of intermediary in the RWI*

In the business world, the definition of intermediary refers to companies or persons (e.g. brokers or consultants) who act as mediators between the parties to a transaction, investment decision or negotiation.

Intermediaries usually specialise in specific areas, act as an interface for market and other types of information, and are usually paid a percentage of the total value of the consideration/transaction.

In the football industry an intermediary is a person authorized by athletes or clubs to act on his or her behalf and in their best interest. That said, the definition of a sport's agent may vary from sport to sport and from association to association.

As regards football, FIFA in the RWI defines the intermediary as "a natural or legal person who, for a fee or free of charge, represents players and/or clubs in negotiations with a view to concluding an employment contract, or represents clubs in negotiations with a view to concluding a transfer agreement".¹

As a result, footballers engage intermediaries to obtain the best employment contract, while clubs hire them to conclude a satisfactory transfer agreement or the renewal of an existing employment relationship. However, as noted in Paragraph 1.4 below, the work of intermediaries goes far beyond this narrow definition and touches upon many other legal and factual aspects.

In practice, in all sports, players' agents have a broader role than "intermediaries" within the meaning of FIFA's new regulations. Indeed, in addition to negotiating contracts, agents are meant to support and advise players, defending and managing their interests during their career or any part thereof.

An important part of an agent's job is to look for potential new clubs and introduce "their" players to some of them, and generally to be responsible for

¹ FIFA Regulations on Working with Intermediaries, Definitions.

managing the players' communication, negotiating sponsorship contracts, designing and implementing a strategy for marketing and image rights, and in some cases even advising on investments.

An intermediary can be used by clubs to identify players, or to find clubs for players they are looking to sell. Their network of connections is often a valuable tool for sport directors and managers, from the highest level down.

Their activity also ensures that players are able to focus on "football", thus being relieved of contract negotiations and other business discussions.

Therefore it is clear that, with the new regulations, FIFA sought to draw attention only to the conditions for concluding a transfer agreement and the associated activities, rather than the relevant aspects and formalities to be a players' agent.

1.3 *The intermediary's role and activities: an empirical assessment*

Intermediaries are active on the global transfer market either for international and domestic transfers or for the renewal of a player contract.

Their involvement in international transfers has increased significantly, as reported in the "*Intermediaries in International Transfers 2018 edition*",² a report published by the FIFA/TMS Data & Report department, which can be considered as a tool to gain an insight into the number of operations where intermediaries are involved.

As further explained in the relevant chapter of this book, the RSTP define the International Transfer Matching System (TMS) as a "*web-based data information system with the primary objective of simplifying the process of international player transfers as well as improving transparency and the flow of information*".

The aim of TMS is to simplify the process of international transfers by increasing transparency within the transfer market.

In this regard, the clubs must input into TMS all the relevant information on the transfers of a player, including the name of the intermediaries who served (whether they worked in the interest of the player, of the club or both), the nature of the services provided and the total amount of the relevant commissions.

Since 1 April 2015, when FIFA's RWI entered into force, each member association had to set up a registration system, recording and providing data for every single transaction where an intermediary is involved.

Currently, the FIFA/TMS Data & Report hold data from January 2013 to December 2018. In that period, 19.5% of the total international transfers (86,212) involved at least one intermediary and more than 2.14 billion US dollars have been paid in commissions to intermediaries. The report shows that out of the 7,457 clubs involved in international transfers (over a six-year period), 1,060 used an

² FIFA TMS, *Intermediaries in International Transfers* (2018), see www.fifatms.com.

intermediary; out of the 44,913 players involved in international transfers over the last five years, 9,652 were represented at least once by an agent.³

In international transfers (as per the Report data), intermediaries have been mostly working for players (in 12,604 transfers since 2013), followed by intermediaries representing an engaging club (6,066) and finally by those representing a selling club (1,489). In 2018, Italian clubs were the most involved in transfers with intermediaries (45.1% of the transfers), followed by the English clubs (38.6% of the transfers).

It is also very interesting to look at the steady growth of commissions paid by clubs to intermediaries, which reached a "*chiffre monstre*" of 548 million US dollars in 2018.

The clubs belonging to one of the UEFA member associations were responsible for 96% of the record spending in 2018, with most clubs (83.9%) coming from only six member associations (Germany, Portugal, Spain, England, Italy and France).

Two preliminary conclusions can be drawn from the analysis of the above data: first, engaging clubs tend to pay higher commissions than releasing clubs; second, the higher the transaction fees are, the lower the percentage of commissions paid for the services of intermediaries.

For example, for a US\$ 1 million transfer fee, the average commission paid by clubs ranges between 28.2% and 16.1%, while for a US\$ 1 million transfer fee, the average commission paid by clubs is around 7.3%, with the majority below 10%.

As is well known, although the charging of transfer fees for international transfers is rather customary in international football, there are still many free transfers (i.e. transfers where no fees are paid by the engaging club to the realising one, or transfers involving a free agent player). However, the interesting feature of free transfers is that intermediaries still receive a commission.

The report indeed demonstrates that there have been 3,256 free transfers involving intermediaries since 2013, with an amount of 375 million US dollars spent on commissions.

Many clubs are searching for cost-effectiveness in the market, and hiring a player out of contract could be a very profitable opportunity.

Therefore, in this kind of circumstances in which different clubs are willing to get a "free player", the activity of the intermediaries and their influence in the transaction is crucial since they have the "negotiation power" on their side.

For this reason, in these transfers, the activity of the intermediaries and their influence on the accomplishment of the transaction is crucial, and clubs tend to reward agents for having completed a transaction that would otherwise have been more expensive.

³ For further information and data, see www.fifatms.com/wp-content/uploads/dlm_uploads/2018/12/Intermediaries-2018.

Among the factors that may play a role in determining how often intermediaries are involved in transfers on behalf of players, players' age is one of the most significant ones.

The report shows that eighteen-year-old players used intermediaries in 18.3% of their international transfers, while eighteen to twenty-five-year-old players used intermediaries in 14.6% of their international transfers, and the percentage goes further down when players between twenty-six and thirty-two years of age are considered (13.4%).

This data displays that younger players, eager to enter the football system, are more inclined to rely on the service of intermediaries, which is certainly due to their expertise and connections, that can help them to be scouted and assessed by more clubs and in general improve their career path.

Another interesting finding from the report is the involvement of intermediaries depending on the type of transfer. In 2018, players' intermediaries provided their services three times more frequently for a permanent transfer (31.4%) than for a transfer of a player out of contract (10%).

Lastly, it is interesting to point out the significant increase in the number of players' agencies that are active in the football industry, also due to the new regulation which has formally opened the market to this type of structure in the interests of clubs and players.

In fact, as will be highlighted in paragraph 2.3.3 below, FIFA Regulations also provide for a "Declaration" for legal persons. For the first time, a regulation has officially created a provision for legal persons acting as a football agent, although many agencies had already appeared on the market.

From this empirical assessment, one can certainly infer that intermediaries play a very important role in the football industry.

On this basis, it will be interesting to carry out, as in paragraph 3 below, a comparative analysis on the different national rules, in particular those foreseen in Europe's most influential federations, i.e. the so called Big Five (The FA, FFF, DFB, RFEF and FIGC).⁴

Thus the importance of agents in football is linked to the economic growth of this sport. Taking into account the industrial dimension of the underlying business, the need for competence and qualification in the representation activity has increased significantly.

As a matter of fact, FIFA requires that a representation contract shall be concluded prior to the negotiation of an employment contract between a player and a club or a transfer agreement.

In particular, Article 5 of the RWI states that "*for the sake of clarity, clubs and players shall specify in the relevant representation contract the nature of the legal relationship they have with their intermediaries, for*

⁴ The Football Association, Fédération Française de Football, Deutscher Fußball-Bund, Real Federación Española de Fútbol, Federazione Italiana Giuoco Calcio.

INTERNATIONAL TAX ISSUES RELATED TO TRANSFERS OF FOOTBALL PLAYERS

by *Mario Tenore**

1. *Outline of the Chapter*

This chapter focuses on international tax issues arising from transfers of football players between different national federations. The purpose of the chapter is to provide sports lawyers and non-tax lawyers with a general overview regarding the main international tax issues arising in transfers of players between different jurisdictions.

The chapter includes five sections. In section 2 the Author deals with issues related to the tax residence of football players and provides a brief overview of selected European domestic tax laws as well as of the international tax rules which apply if a football player is regarded as tax resident in two different jurisdictions with regard to the same tax period (i.e. so called "dual residence conflicts"). In addition to some European jurisdictions, the analysis includes China which is currently trying to challenge Europe's hegemony by, *inter alia*, bringing in several footballers that have forged their career in the "Old Continent".

In section 3 the Author focuses on international tax issues related to certain special categories of income, namely image rights payments, termination payments, buy-out payments and sign-on fees or bonuses.

Furthermore, the Author discusses in section 4 the taxation of fringe benefits related to the payments of agents' fees, focusing the analysis on the tax treatment of such fees from the perspective of some selected jurisdictions. In addition, in section 5 the Author addresses a number of special tax regimes currently

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The author wishes to thank Panagiotis Roumeliotis for his invaluable help in the drafting of this chapter and for co-authoring the sections related to Chinese taxation and sec. 3.3 ("Sign-on fees"). Panagiotis is senior tax advisor at KPMG Luxembourg. He is, concurrently, pursuing a Master in International Sports Law.

The Chapter is updated to 1st October 2019.

in force in some jurisdictions, which may provide for tax benefits to football players and, therefore, foster their transfer on an international level.

Finally, the last section includes an analysis of the most relevant contractual issues arising in the framework of gross-up agreements, which are often stipulated in connection with international transfers of players and are aimed at ensuring that football players receive an agreed “net amount” of income which is not affected by the tax burden applicable in the State of destination.

2. Tax residence of football players

2.1 Residence tax issues to be considered in relation to international transfers of players

During their professional career, football players may move among different clubs in various jurisdictions. They are mobile taxpayers for whom the identification of the state of residence for tax purposes (where most likely the player shall be due to report his / her worldwide income) can turn into a rather complex exercise.¹

In most jurisdictions, the concept of tax residence relies on factual elements, which may take into account the personal and business ties of the player with a given jurisdiction. There may be situations (not so infrequent) in which, for example, the player lives in a jurisdiction (because he plays for a local team), whereas his family continues to live in a different jurisdiction.

Each tax jurisdiction has its own rules governing the residence of individuals. In the aforementioned scenario, the football player may be considered tax resident in two different jurisdictions, provided that one State (in which he performs his activity as a football player) regards the economic interest of the person as relevant for establishing his tax residence, whereas the other State (in which the family lives) takes into account the existence of personal ties with the territory for the purpose of establishing tax residence of individuals. In the international tax language, such situation is referred to as “dual residence conflict”; the main consequence of the conflict is double taxation, which materialises insofar as the same income is taxed in two different jurisdictions. As indicated below, double taxation is avoided or mitigated through the application of international tax treaties (if applicable).

That said, generally speaking, for an international (permanent or temporary) transfer, the tax rules of two different States must be taken into account, namely those of the State of origin and those of the State of destination. In particular, it should be considered:

¹ It has been noticed that football players are less mobile than other categories of sportsmen, see S. RYCHEN, “Football Players – Employees rather than Sportspersons: An exception to Article 17 OECD Model”, in *Taxation of Entertainers and Sportspersons Performing Abroad*, (ed. Guglielmo Maisto), EC and International Tax Law Series, Vol. 2013, IBFD, 2015, 213.

- what are the residence criteria in force in both the States involved;
- which is the relevant fiscal year (e.g. the calendar year or a different period) for individuals in both the States involved;² and
- if either State applies the so-called split-year rule, under which individuals can be considered tax residents therein only for a portion of the relevant tax period.

2.2 Brief overview of domestic tax laws

The present section contains an overview of the tax residence criteria applicable in some selected jurisdictions hosting the major football leagues on a global scale. The analysis is certainly not exhaustive but is meant to make the reader aware of the fact that the criteria for tax residence may be substantially different depending on the jurisdiction under consideration. The overview demonstrates that the tax residence is a factual concept. Depending on the jurisdiction, regard should be made, for example, to the business ties or the personal ties of the person (such as the place where the family lives or other personal acts).

Italy

Under Italian legislation (art. 2 of Presidential Decree n. 917 of 22 December 1986), an individual is deemed to be resident in Italy for individual income tax purposes (IRPEF) if either of the criteria illustrated below is satisfied for more than 183 days in the calendar year: a) the individual is registered in the official register of the Italian resident population; b) the individual has a domicile in Italy according to art. 43(1) of the Civil Code, which is identified as the place in which a person has the centre of his personal and economic interest; and c) the individual has his residence in Italy for civil law purposes, namely the place in which the person has his habitual abode according to art. 43(2) of the Civil Code.³

The tax period coincides with the calendar year. Italian domestic law does not envisage the “split-year” period rule. Therefore, in case either of the conditions outlined above under a) to c) is fulfilled in the calendar year (for more than 183 days), the individual shall be considered tax resident in Italy for the full tax period.⁴ In addition to IRPEF, for which the marginal tax rate is 43% for

² In general terms, a “tax period” or “tax year” is an annual accounting period for keeping records and reporting income and expenses and can be either the calendar year (i.e., 12 consecutive months beginning 1 January and ending 31 December) or a fiscal year (i.e., 12 consecutive months ending on the last day of any month save December).

³ For a broad analysis, see S. DORIGO – P. MASTELLONE, “Italy: Tax residence of professional football players”, in *Global Sport Law and Taxation Reports*, September 2017, Nolot, 30 and ff.

⁴ Special rules apply in the case of transfer of residence to jurisdictions that are listed in the Ministerial Decree of 4 May 1999 (so-called “blacklist”). These rules provide for the shifting of the burden of proof on the Italian individual, who has removed himself from the Civil Register of the Resident Population upon transfer of his residence to a blacklisted jurisdiction. The individual is deemed resident of Italy unless proof to the contrary, i.e. the rules introduce a rebuttable

income exceeding EUR 75.000,00, the individual is also subject to local (regional and municipal) surcharges.⁵

In light of the above, in the event a football player transfers his domicile to Italy in August, he shall take up Italian tax resident as from the subsequent year. Conversely, if, following the conclusion of a transfer agreement, the football player moves out of Italy, for example, at the end of August, he will be regarded as Italian tax resident for the year in which the transfer takes place.

France

Under French legislation (article 4A in conjunction with article 4B of the Code Général des Impôts) an individual (whether a French national or not) is treated as a French tax resident if he fulfils alternatively one of the following conditions:

- i. the individual has a home located in France or has his main place of abode in France;
- ii. the individual maintains on the French territory his professional activity, salaried or not, unless he can prove that it is a secondary activity;
- iii. the individual has his centre of economic interest on the French territory.⁶

The tax period for individual income tax purposes is the calendar year. The marginal tax rate is 45% for income exceeding EUR 156.244,00. French domestic law does envisage the “split-year” period rule.

That being said, any football player transferring his domicile to France shall, therefore, be taxed on the income generated therein as from the date of the transfer therein. Conversely, if, following the conclusion of a transfer agreement, the football player moves out of France, for example, at the end of August, he will be liable for tax only until the end of August (article 166 in conjunction with article 167 of the Code Général des Impôts).

Germany

Under German legislation, an individual is considered resident in Germany if his domicile is located on the German territory.

In particular, an individual’s domicile is the place where he occupies a home/dwelling in circumstances which indicate that he will retain and use it (section 8 of the Abgabenordnung, the German General Tax Code, hereinafter “AO”, adopted with the Adoptiongesetz of 02 July 1976, and published on the same date with the Federal Law Gazette n. 1749-I). German tax rules rely on the facts and disregard the intention of the taxpayer. Moreover, the stay should not be just temporary.

A habitual place of abode is deemed to exist in Germany if an individual has been continuously present there for a period longer than 6 months (section 9

presumption as they allow the taxpayer to demonstrate the actual transfer abroad and that he does not meet any of the criteria highlighted above.

⁵ Surcharges may apply in the range of 3% to 4%.

⁶ See S. IVANA ZIVNOVIC, “France”, in Taxation of Entertainers and Sportspersons Performing Abroad, (ed. Guglielmo Maisto), EC and International Tax Law Series, Vol. 2013, IBFD, 2015, 394.

of the AO). Short interruptions during the stay are not taken into account for the calculation of the 6-month period. A presence of less than 6 months may also create a habitual place of abode if the presence is not temporary.

Special rules applies (section 2 of the Aussensteuergesetz, hereinafter “AStG”, the German Foreign Tax Law, entered into force on 13 September 1972) for German nationals who move to a foreign country. Under such rules, the German national remains subject to an “extended tax liability as a non-resident” for 10 years from his departure under certain conditions (such as if he has been subject to unlimited German taxation for at least 5 of the 10 years preceding his departure).

The tax period for individual income tax purposes is the calendar year. The marginal tax rate is 45% for taxable income above EUR 265.327,00. In addition, the individual is subject to solidarity tax, which is capped at 5.5% of the income tax and, under certain circumstances, to church tax ranging from 8% to 9% of the tax depending on the federal state.

German domestic law does envisage the “split-year” period rule. Accordingly, if a football player moves to Germany, he shall be subject to unlimited income tax liability from the moment of the transfer until the end of the calendar year. In the opposite scenario, if a football player moves abroad he shall be taxed on a worldwide basis until the moment of the transfer, while for the rest of the calendar year he shall be subject to limited tax liability.

Spain

Spanish legislation contemplates two alternative criteria to determine the tax residence of an individual in Spain, namely (i) the individual is present on the Spanish territory for more than 183 days in one calendar year or (ii) the individual has the centre of economic interests on the Spanish territory (i.e. the main economic or professional activities). Moreover, by way of a rebuttable presumption, an individual is deemed tax resident in Spain if the spouse and/or his/her underage children are usually resident in Spain. If that is the case, the taxpayer would be considered as resident for tax purposes in Spain even if he spends less than 183 days on the Spanish territory, unless he may rebut the presumption by proving his habitual abode in another country for 183 days or more in that given calendar year (article 9 of the Ley n. 35 of 28 November 2006).⁷

The tax period for individual income tax purposes is the calendar year. Spanish domestic law does not envisage the “split-year” period rule. The marginal tax rate is 45% for income exceeding EUR 60.000,00.

Interestingly, a Spanish author⁸ has mentioned an unwritten administrative practice under which players that move to Spain are, by way of a rebuttable presumption, considered Spanish tax residents as from the year of the transfer

⁷ See E. MONTEJO RODRIGO, “Image rights: tax situation in Spain”, in Global Sport Law and Taxation Report, Nolot, June 2017, 12.

⁸ A. JUAREZ, “Spain”, in Taxation of Entertainers and Sportspersons Performing Abroad, (ed. Guglielmo Maisto), EC and International Tax Law Series, Vol. 2013, IBFD, 2015, 613.

TRANSFERS OF FOOTBALL PLAYERS

A practical approach to implementing FIFA rules

Michele Colucci and Ornella Desirée Bellia (eds.)

PART II

NATIONAL TRANSFERS OF PLAYERS

A. Antonini, B. Arnaud, A. Bozza, P. Capello, R. Chu, S. Civale, M. Clariá, C. Couse, V. Eleuterio, L. Ferrer, M. Garcia Caba, A. Galdeano, T. Gunawardena, J. Leal, J. Lobão, S. Malvestio, G. Marino, A. Mialhe, K.T. Morris, M. Motta, O. Ongaro, L. Pastore, V. Plavjanikova, A.N. Reck, T. Pereda Rueda, N. A. Santiago, M. Spadini, M. Tenore, L. Tettamanti, R. Trevisán, J.F. Vandellós, J. Wilkens, D. Wu, K.N. Zemberis

2020



TEASER

NATIONAL TRANSFERS IN ARGENTINA

by *Mariano Clariá** and *Rafael Trevisán***

1. National Framework

1.1 The Structure of the Argentine Football Pyramid

1.1.1 The Argentine Football Association

The Argentine Football Association (“AFA”) is the national governing body of football in Argentina. As a representative of a South American country, the AFA is a member of CONMEBOL.

The AFA is the governing body responsible for regulating the Argentine football and implementing the Laws of the Game, as directed by the International Football Association Board (the “IFAB”). Consequently, the AFA gives domestic effect to international rules and has jurisdiction over on-field and off-field disciplinary matters. The AFA also regulates ‘Intermediary Activity’ at a domestic level, with delegated authority from FIFA. Supplementary to its regulatory role, the AFA manages the Men’s and Women’s senior and under age Argentine national teams, various domestic cup competitions, including the Copa Argentina. The AFA also runs the Women’s football tournaments.

1.1.2 The Superliga Argentina de Fútbol

The *Superliga Argentina de Fútbol* is an association recognized by the AFA Statutes, integrated exclusively and compulsorily by the clubs participating in the First Division, and within its main functions we find the organization of the top

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division of Argentine football, as well as the commercialization and distribution of TV rights of said competition.

It is recognized in the Statutes of the AFA, in Articles 10,¹ 18 paras. 2² and 6, 79 para. 2³ and especially in Article 81.

Pursuant to Article 18, para. 2, there will only be one national league of the first division of professional football in Argentina, which will be developed and organized by the Superliga, in coordination with the AFA.

In Article 79, para. 2, AFA temporarily assigned to the Superliga, for its management, commercialization and distribution, the audiovisual exploitation rights of the tournaments organized by Superliga.

The Superliga has the power to perform the economic and financial supervision of its members and also to set the conditions to be met by the clubs in order to participate in their competitions.

The coordination with AFA was to be implemented through an agreement signed by both associations. On 27 July 2017, the AFA and the Superliga signed the coordination agreement through which the matters subject to coordination between said institutions are regulated in accordance with Article 81 of the Statute of the AFA.

Through this coordination agreement, the AFA and the Superliga agreed that the latter is also in charge of the organization of the underage competitions involving clubs from the top division, including the so-called “*reserva*” division.

2. Registration and Transfer Rules

There are several rules in Argentine football regarding the registration and transfer of players.

In this section, we will address the following issues regarding registration and transfer rules in line with art 6 of RSTP of FIFA:⁴

¹ AFA Statutes. Article 10. Admission and Members. AFA Members are: a) First Division Clubs; b) First “B” National Clubs; c) First “B” Metropolitan Clubs; d) First “C”; e) First “D”; f) Sportive Jurisdiction of Leagues and Federal “A” Clubs, organized under the Federal Counsel orbit; g) Women’s Football Association; h) Futsal Association; i) Beach Soccer Association; j) Former Players Association; k) Former Referees Association; l) Former Football Coaches Association; m) Professional Football Superliga, with voice but no votes.

² AFA Statutes. Article 18. Clubs, leagues, sportive jurisdictional leagues, regional associations (or leagues) and other clubs aggrupation’s Status. ...There only will be a national league from the actual category of first division of professional football in the national territory, that will be developed and organized by the Superliga, in accordance with provisions of Article 81 of the Statutes.

³ AFA Statutes. Article 79, para. 2. The AFA temporarily assigns to the Superliga, for its management, marketing and distribution, the rights of audiovisual exploitation in any of the present formats and those future ones that could arise according to the advance of the technology, of the tournaments which organization is delegated to the Superliga in this statute, this assignment being rendered ineffective in case the Superliga ceased in its existence or, for whatever reason, stopped organizing the competitions assigned to it in this statute.

⁴ Art 6 RSTP inc 2. “The first registration period shall begin after the completion of the season and shall normally end before the new season starts. This period may not exceed 12 weeks. The second

a) Transfer Windows

Art. 215 of the “*Reglamento General*” of the AFA establishes certain rules regarding the periods of contract registration:

Art. 215o. *The period to formulate transfer requests will be the one between the day following the end of the National Championship and the day before the start of the First Division Championship in the following season. Notwithstanding the foregoing, transfer requests to act in First Division teams of First Category clubs may be accepted by the A.F.A. in the period between the day following the end of the First Division Championship and the day before the start of the National Championship of the same season if there is a requirement formulated by more than 3/4 of the clubs of the category.*

Art. 4 of the CBA 557/09⁵ establishes that the AFA will determine the periods in which the contracts shall have to be registered, taking into account the organization of the championships, the needs of the clubs, the number of free agent players and the particular circumstances of each case.

Therefore, the period for the registration of contracts shall not be shorter than the period between the end of a championship and/or tournament and the start of the next, but a complementary term shall be provided for the exceptions established in the CBA, mentioned hereunder.

Each year, in the specific Regulations of each tournament, it is determined *inter alia* when the period for the Registration and Transfer of Players closes. Usually, the closing occurs at 8:00 pm on the Thursday prior to the start of the tournament, both in the winter and summer windows.⁶

This raises some difficulties, since the closing of both windows does not match with the closing of the transfer window in the main competitions in Europe, where many players of Argentine clubs tend to be transferred, so once the period for the Registration and Transfer of Players in Argentina is closed, players are usually transferred – or the player exercises the buyout clause – and the club cannot sign a replacement for said player.

registration period shall normally occur in the middle of the season and may not exceed four weeks. The two registration periods for the season shall be entered into TMS at least 12 months before they come into force (cf. Annexe 3, article 5.1 para. 1). FIFA shall determine the dates for any association that fails to communicate them on time”.

⁵ CBA 577/2009. Article 4. Contracts registration periods. The AFA will determine in which periods contracts must be registered, considering the championship organization, clubs needs, the number of players free of contract and the particular circumstances of each case. The period for the registration of contracts shall not be less than the period between the end of a championship and/or tournament and the start of the next, with the exception of granting a complementary period at the close of the registration, provided for in this agreement.

⁶ Superliga’s Tournament Regulation 2018/2019. Article 15. Players Registration and Transfers. 15.1. It is established that the Players Registration and Transfers will be open since July 1° 2018 until 8 PM of the last Thursday before the beginning of the tournament, that is to said Thursday August 9 2018. The closure will be Thursday August 16 2018, 8 PM only for clubs with the intention to incorporate players from “foreigner” clubs.

NATIONAL TRANSFERS IN BRAZIL

by Victor Eleuterio* and André Galdeano**

1. Introduction: the national framework

In Brazil, almost every major football club was founded at the turn of the 19th and 20th centuries as associations under private law. At the outset, tournaments would only be played locally, in different States or regions of the country. The national championship, in this context, was held for the first time in 1959, taking more than a decade to actually become the most relevant competition.

Both the Brazilian National Olympic Committee and the Brazilian Football Association – first known as *Confederação Brasileira de Desportos* and nowadays *Confederação Brasileira de Futebol* (CBF) – were founded in 1914, gaining affiliation to the Olympic Movement and to FIFA in 1935 and 1923, respectively.

CBF is today probably the largest football association in the world, overseeing the activities of more than 1,000 (one thousand) active clubs (742 professionals and 385 amateurs) and over 54,000 (fifty-four thousand) registered players (7,048 professionals and 47,177 amateurs).¹ No wonder Brazil is one of the most active countries in the transfer market.

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¹ Numbers from 2018, available at: www.cbf.com.br/a-cbf/informes/index/raio-x-do-mercado-2019-numeros-gerais-de-registro.

Due to the continental dimensions of the country, the entity is – unlike most FIFA members – organised as an actual confederation, formed of 27 (twenty-seven) local federations, each one comprising a State in the country, plus the so-called federal district (which corresponds to the capital city). Clubs are, in this regard, mere indirect members of CBF.

Besides political power, this gives each State federation autonomy to organise its own competitions, to handle the registration of players and to govern its own affairs independently. However, when it comes to international affairs, this structure can be somewhat tricky, since it is not recognised by FIFA and CONMEBOL (see CAS 2014/A/3793).²

Historically, a significant part of Brazil's sports legislation was issued during periods of political authoritarianism, when sport was controlled by the State (under the umbrella of the Ministry of Education) and used as a tool to maintain power. The starting point for that was a federal law edited in 1941 by the dictator Getúlio Vargas, which created several bodies for the regulation and organisation of sports.³

This scenario has only changed as of 1988, with the enactment of a new Federal Constitution, which definitely reinstated democracy in the country and recognised the autonomy of sports entities and governing bodies (art. 217, I, of the Federal Constitution).⁴

Under the so-called “Zico Law”,⁵ which was afterwards replaced by the “Pelé Law”,⁶ in force until the present days, efforts then started being made to raise professional standards in Brazilian sports. To that effect, two changes were deemed pivotal in the Pelé Law: first, football clubs should be encouraged to convert from non-profit associations into companies and, second, the consequences of the European Court of Justice historical *Bosman* ruling,⁷ which set the basis for free agency in Europe, ought to be implemented at a national level.

Regarding the first issue, the new rules introduced by the Pelé Law were quite ineffective, particularly because no specific corporate structure (such

² Due to their position in the structure of Brazilian football, State federations serve, for instance, as middlemen for the issuance of player's passports and for the remittance of subpoenas from FIFA's and CONMEBOL's judicial bodies. However, without recognition from FIFA and CONMEBOL, only CBF and clubs can be held liable if a State federation fails to comply with its duties – similarly to the situation of Spanish *comunidades autónomas*.

³ Decree law nr. 3.199, dated 14 April 1941, available at www.planalto.gov.br/ccivil_03/decreto-lei/1937-1946/del3199.htm.

⁴ Available at www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm.

⁵ Federal law nr. 8.672, dated 6 July 1993, available at www.planalto.gov.br/ccivil_03/leis/L8672.htm.

⁶ Federal law nr. 9.615, dated 24 March 1998, available at www.planalto.gov.br/ccivil_03/leis/19615consol.htm.

⁷ Court of Justice, Case C-415/93 Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman, Royal Club Liégeois SA v. Jean-Marc Bosman and others and Union des Associations Européennes de Football (UEFA) v. Jean-Marc Bosman [1995] ECR I-4921.

as a *Sociedade Anónima Deportiva*, which exists in Portugal and Spain) was conceived to embrace these entities' needs. In this regard, albeit a few clubs may have attempted to convert (the most relevant example being Esporte Clube Vitória), the idea was rapidly abandoned, either because of the higher tax burden that companies had in comparison to non-profit associations or due to internal hurdles faced for the approval of such changes.⁸

As to the second matter, similar to the FIFA Regulations on the Status and Transfer of Players ("FIFA RSTP"), the Pelé Law has not only revoked the pre-*Bosman* rule that used to bind players to clubs even after the expiry of their employment contracts (art. 11 of federal law nr. 6.354/76),⁹ but created a variety of mechanisms to protect and remunerate training clubs.

Throughout the time, the Pelé Law was amended in several occasions – most relevantly in 2011, through federal law nr. 12.395/11¹⁰ – with some new mechanisms being introduced and some other being refurbished, always with the aim of protecting or remunerating training clubs.

From a regulatory standpoint, CBF's and State federation's affairs were, for decades, governed by sparse resolutions and circulars, not rarely puzzling and contradictory. The situation has only improved from 2015 onwards, when CBF decided to compile, harmonise and update its rules, creating the so-called *Regulamento Nacional de Registro e Transferências de Atletas de Futebol – RNRTAF* ("CBF RSTP"),¹¹ which revoked over thirty of these resolutions and circulars and finally established unified regulations on the transfer and status of football players in Brazil.¹² By the same period, CBF also launched its first Intermediaries' Regulations ("RNI")¹³ and deeply reformed its National Dispute Resolution Chamber (the so-called "*Câmara Nacional de Resolução de Disputas*" or "CNRD"),¹⁴ which together signified a major step towards more legal certainty and better governance in Brazilian football. In addition, as from 2018, CBF started a 4-year-long implementation process of its Club Licensing Regulations,¹⁵ with the aim of raising standards of governance and addressing the troublesome finances of Brazilian clubs.

⁸ As private associations, most football clubs in Brazil have many internal bodies – sometimes composed of tens or hundreds of its members – to supervise and inspect the activities of its board and directors, which makes decision-making processes quite complex.

⁹ Available at www.planalto.gov.br/ccivil_03/LEIS/L6354.htm.

¹⁰ Available at www.planalto.gov.br/ccivil_03/_Ato2011-2014/2011/Lei/L12395.htm.

¹¹ Available at www.cbf.com.br/a-cbf/regulamento/de-registro-e-transferencia/regulamentos-de-registro-e-transferencia-e-de-intermediarios-1.

¹² Even so, State federations still enjoy certain autonomy to pass their own transfer and registration rules, in so far as they are in line with CBF's ones.

¹³ Available at www.cbf.com.br/a-cbf/regulamento/de-intermediarios/regulamentos-de-intermediarios.

¹⁴ See www.cbf.com.br/a-cbf/cnrd/index.

¹⁵ Available at www.cbf.com.br/a-cbf/informes/index/cbf-divulga-regulamento-de-licenca-de-clubes.

NATIONAL TRANSFERS IN CHINA

by David Wu, Giandonato Marino, Tomas Pereda Rueda and Roy Chu*

1. The National Framework

1.1 The Structure of Chinese football

i. Background

The national governing body of football in Mainland China as we know it today – the Chinese Football Association ("CFA") – was founded in 1955.

The first official competition held under the auspices of the CFA was the National Football Conference of 1951. At that time, only regional representatives from institutions such as sports academies, schools or the army were allowed to participate.

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After several modifications and interruptions to this competition throughout the 60s and 70s, in the 80s the CFA allowed private companies to sponsor and invest in football teams.

It was then in 1994 that the Chinese C League became the country's first professional football league and the concept of "clubs" was introduced. After this reform, regional institutions were not allowed to participate in any official competitions anymore.

The professional first division in China – the Chinese Super League ("CSL") – was introduced by the CFA in 2002 and held for the first time in 2004. Nowadays, the CSL has become one of the most important football leagues in Asia, from both a sporting and commercial point of view, attracting top players and an audience from around the world.

As of today, the Chinese football system consists of three tiers of professional leagues, linked by promotions and relegations. These leagues are the CSL, China League One ("CL1") and China League Two ("CL2"), which between them have a total of 64 professional clubs. Below CL2, there are several amateur competitions, both at national and regional level.

The first tier amateur competition is the CFA Member Association Champions League ("CCL"). However, the CFA is expected to complete the development of the amateur system, consisting of 5 levels of leagues, by the end of 2030.

ii. *The Chinese Football Association*

The Chinese Football Association ("CFA") is the governing body of football in the People's Republic of China.

The CFA was established on 3 January 1955, after approval by the Central Government of the People's Republic of China ("PRC") and the State Council. Until 2004, it was one of the departments of the General Administration of Sports of the PRC (hereinafter "the General Administration"), being therefore directly administered by the Chinese government.

In 2015, after several attempts to minimize the administrative functions of the Football Administration Centre (department of the General Administration) and improve the autonomy of the CFA, the "General Plan of Reform and Development of Chinese Football" was introduced, which led to the CFA officially separating from the General Administration at the beginning of 2017.¹ As of today, it is formally regarded as a non-profit organization affiliated to the Chinese Olympic Committee and is the sole representative of Mainland China as a member association of FIFA and AFC.

¹ Among the reforms we should mention that: (i) the powers of the General Administration were drastically reduced to suggestions to the CFA on behalf of the government; (ii) the office-bearers of CFA cannot be government officials; (iii) CFA budget was allocated and audited independently from the government; (iv) CFA decisions are approved by its associated members rather than the government.

The CFA not only serves the general purpose of promoting the development of football in China, but also acts as the governing body responsible for managing the work of member associations, administrating football games at the national level, reviewing the registration of professional clubs, and promoting the establishment of a youth training system, etc.

One of the most relevant roles of the CFA is to manage the leagues and cup competitions for male and female football, including the CFA Super Cup, the CFA Cup² and Chinese Women's Football Association Cup.

The CFA has its own jurisdiction over on-field and off-field disciplinary matters in official competitions in China and is responsible for the implementation of regulations, policies and/or decisions from international entities, like FIFA and AFC.

The commercial functions of the CFA are largely limited. An independent company was created to ensure the best commercial interests of the clubs participating to the CSL (see *infra*).

The governing bodies of the CFA include the General Assembly, Special Committee, Disciplinary Committee and the Secretariat.

iii. *The Chinese Super League*

The Chinese Super League is the top tier competition of professional Chinese football. It consists of 16 teams participating in a double round-robin tournament, at the end of the season two teams are relegated to CL1.

The prototype of the CSL, previously called the "C League", was developed during the 80s and launched for the first time in 1987. The CFA then split the competition into two tiers, Tier A and Tier B.

After 1994, with the introduction of "football clubs" as participants to the competitions, "Tier A" and "Tier B" became the two leagues of Chinese professional football. Tier A was then given the official name of "C League". Both leagues were comprised of 12 clubs with 2 teams being promoted and relegated.

In 2004, the CFA renamed "Tier A" into the "Chinese Super League"³ and "Tier B" into "China League One" ("CL1"). In 2006, a separate company for the management of the league was established, namely the CSL Co., Ltd. ("CSL Company"). Until October 2019, the company's shareholders were the CFA and the football clubs competing in the CSL.⁴ Until then, the CSL Company has been responsible for some of the commercial and marketing activities of the CSL.

² Whereby the participants are clubs from CSL, CL1 and CL2.

³ In 2008 the number of participants to the CSL was expanded to 16 teams.

⁴ The CFA was holding 36% of shares, and the 16 clubs in the CSL owned the remaining 64%. Therefore, with the share over 1/3 but less than 2/3, the CFA was given veto power over significant issues such as amendments of company articles, changes to the nature of the company and its dismissal etc., while had no veto or decisive power over elections or normal company decisions.

NATIONAL TRANSFERS IN ENGLAND

by Carol Couse* and Tiran Gunawardena**

1. The National Framework

1.1 The Structure of the English Football Pyramid

1.1.1 Background

Founded in 1888, the English Football League is the oldest football competition in the world.

The league originally comprised of just 12 clubs from the Midlands and the North of England but since its inception, the English football pyramid has grown to include a total of 11 different tiers, 96 leagues and approximately 1,741 teams.

1.1.2 The Football Association

The Football Association (“The FA”) is the national governing body of football in England. As a representative of a European country, The FA is a member of UEFA and therefore by virtue, member of FIFA.

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The FA is the governing body responsible for regulating the English game and implementing the Laws of the Game, as directed by International Football Association Board (the “IFAB”). Consequently, The FA gives domestic effect to international rules and has jurisdiction over on-field and off-field disciplinary matters.

The FA also regulates ‘Intermediary Activity’ at a domestic level, with delegated authority from FIFA.

Supplementary to its regulatory role, The FA manages the Men’s and Women’s senior and under age English national teams, various domestic cup competitions, including the FA Cup and the Charity Shield, as well as developing the amateur game. The FA also run the FA Women’s Super League and the FA Women’s Championship, the top two divisions of women’s football.

1.1.3 The Premier League

The Premier League, commonly known as the English Premier League or “EPL”, is the top flight of English football.

The Premier League was formed as the FA Premier League on 20 February 1992 following the decision of clubs, in the then First Division of the EFL, to break away and take advantage of a lucrative television rights deal. The Premier League has since gone on to become the most-watched sports league in the world and is watched by 4.7 billion people.¹ It is also the richest, with Premier League clubs generating a combined revenue of more than £4.5 billion in the 2016-2017 season.²

The Premier League is a private company, in which shares are held by the 20 clubs who comprise the league at any one time and The FA, who has a preference share to vote on specific matters. The composition of the league changes each season, with the bottom three teams being relegated and replaced by the three clubs promoted from the Championship at the end of every campaign.

The Premier League is responsible for regulating the league competition and its commercial deal. For example, the Premier League exploits the league’s broadcasting rights on a collective selling basis and the value of its domestic television deal which runs for 3 years from 2019/20 season is in excess of UK£4.464 billion.³

1.1.4 The English Football League

The English Football League (the “EFL”) is comprised of the three fully-professional divisions below the Premier League which are made up of a

¹ Available at www.britishcouncil.org/organisation/policy-insight-research/insight/playing-game-soft-power-sport (last visited on 16 January 2019)

² Available at www.theguardian.com/football/2018/jun/06/premier-league-clubs-profit-record-revenues-tv-deal (last visited on 16 January 2019).

³ The value of the Amazon Prime deal is undisclosed.

total of 72 clubs with 24 in each division. They are referred to as: the Championship, League One and League Two. Prior to the formation of the Premier League it was the top-level League in England.

The EFL is the largest single body of professional clubs in European football and is responsible for administering and regulating the EFL, the EFL Cup and the EFL Trophy.

The EFL Cup is an annual knockout competition open to each club in the top four divisions. The EFL Trophy, is also an annual knockout competition open to only to League One and League Two teams.

Similar to the Premier League, the EFL regulates its own competition and is responsible for the commercial aspects such as selling its broadcast and commercial rights and is subject to the FA's rules and regulations.

1.1.5 *The National League and below*

Beneath the top four completely professional leagues sits the National League, making the National League the lowest ranking league of the five nationwide football divisions in England.

The league mainly consists of fully professional teams, however, is the juncture as to where there are occasional semi-professional sides/players.

Underneath this the football pyramid becomes more and more local, as below this sits the sixth tier of English football and the first two regional divisions, the National League North and the National League South. By tier 11 they eventually become county based leagues.

2. *Registration and transfer rules*

There are various rules in English football regarding the registration and transfer of players which may vary from FIFA rules or the standard practice internationally. In this section, the authors will address the following issues regarding registration and transfer rules:

- a) Transfer windows;
- b) Registering new players;
- c) Work permits;
- d) Third Party Ownership;
- e) Loans;
- f) Approaching players; and
- g) Inducement / 'tapping up'.

2.1 *Transfer windows*

England has two transfer periods / windows in the year – in summer and winter. Historically, the Premier League's summer transfer windows were in line with

NATIONAL TRANSFERS IN FRANCE

by *Alexandre Mialhe, Alexandre Antonini and Benjamin Arnaud**

1. *National Framework*

1.1 *French Historical Context*

The French regulatory framework governing the transfer of players is understandable if it is put in the historical and legal context of French professional football.

In France, the State law has a long-standing and in-depth influence on sport in general, and football in particular.

French ordinary law has a supremacy over sports rules, included those enacted by FIFA or UEFA in terms of the hierarchy of standards.

The French government has often shown itself to be a forerunner in the regulation of the football sector, in particular by keeping control of national sports federations as early as 1945 through the concept of "public service mission delegation". Through this legal concept, the State was able to set up a framework for organising, controlling and sanctioning the football stakeholders and defining the management of competitions.

Moreover, as early as the 1920s, and even before the birth of the professionalism of French football in 1932, the French Football Federation (FFF) regulations already required among the conditions for the transfer of footballers the agreement of the club of origin before granting a new license to a player moving to a new club.

However, after the Second World War, French professional football developed around the concept of a "lifetime contract" thereby binding players to their club until their 35th birthday.

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This de facto block on players' transfers between clubs, combined with a low wage practice, notably provoked the famous quote by Raymond Kopa,¹ "Players are slaves", published in 1963 in the French newspaper "France Dimanche".

In 1968, there was an air of freedom in France in all parts of its society and economy, which led to the establishment of the "fixed-term contract" in July 1969, and then in 1973, the Professional Football Charter, which had the value of a collective agreement for clubs and professional football players.²

Footballers in France had thus ensured for themselves a safe regime to cover their interests and impose obligations on clubs to comply with numerous legal requirements. This introduced to the transfer market in France the first set of detailed and effective regulations.

1984 was the year in which the law on the organisation and promotion of physical and sports activities was promulgated. This text was supplemented several times and amended on many occasions, especially in 1992 when specific provisions were drafted in order to regulate the activity and remuneration of sports agents.

1984 also saw the birth of the National Directorate of Club Management (hereafter "DNCG"), described as "the financial watchdog of French football" which, 25 years before the introduction of Financial Fair Play by UEFA, had already been commissioned to verify that professional clubs in France were not spending beyond their financial means to generate income, under the threat of possible sanctions if they were.

Finally, the compilation of various texts related to the French sports sector led to the entry into force in 2007 of the Sports Code, which itself has been amended and supplemented several times since.

1.2 The French legislative framework

Together with the applicable ordinary civil, commercial and labour law provisions, four national legal instruments contain the special rules on transfers and football player employment contracts, namely:

- the Sports Code;
- the Professional Football Charter;³
- the General Regulations of the French Football Federation (FFF);
- the Regulations of the LFP.

These instruments provide detailed legal governance of related matters, such as the issuance by FFF of players' licence, the LFP competitions' management,

¹ 1958 *Ballon d'or* winner and the first player to leave the French league to join a foreign club, Real Madrid CF in 1956.

² May 68 of the French footballers[article] Alfred Wahl - Twentieth Century. *Revue d'histoire Année 1990 26*, 73-82 - Part of a thematic issue: Football, sport of the century.

³ J.-M. MARMAYOU, *Employment relationship of National Level: France, in Regulating employment relationships in professional football* (M. Colucci & F. Hendrickx eds), 2014 (1), SLPC, 145-17.

the conclusion of employment and transfer contracts of players between clubs, and the intervention of intermediaries.

The FIFA Regulations on the Status and Transfer of Players are only applied in a supplementary manner and they do not bind the French legislative, executive and judicial powers.

Thus, in the event of litigation before a French court, judges will not consider themselves bound by the FIFA Regulations on the Status and Transfer of Players, as according to French law, they have no direct effect on French law. Therefore, players and clubs would not be able to challenge before a French court a decision or action taken by the FFF that was contrary to the FIFA Regulations on the Status and Transfer of Players.⁴

This kind of scenario already arose in France, for instance, in respect of a FFF rule for the recruitment of players outside the registration period as established by FIFA,⁵ and also regarding the French rules governing FFF Sports Agents, which had to prevail over the FIFA regulations on the activity of sports agents.⁶

However, like all the other national football federations, the FFF is forced to comply with FIFA statutes and regulations through its affiliation.

This situation reveals an inevitable "schizophrenia" of the French legal system in regulating football player transfers.

Indeed, when FIFA rules contradict ordinary provisions of French law, the FFF must make the choice either to implement the FIFA rule, knowing that it will not apply in the case of litigation before the French courts, or to refuse to do so, exposing itself to coercive measures by the international football body.

This legal reality is a given fact that any sport contractual law practitioner working in French professional football must always bear in mind.

However, this uncertainty does not raise major difficulties since, on the one hand, cases of discrepancies between French law and international sports regulations are very rare, and on the other hand, in case of a dispute, a French legal practitioner representing the interests of a club or a professional player in France will always have to rely on French law.⁷

1.3 The current context of the transfer market in France

According to the latest DNCG financial report on professional football for the 2017/2018 season, French professional clubs (Ligue 1 and Ligue 2) were very active in the transfer market, totalling 248 transfers registered for an overall

⁴ CE, 28 June 1989, n. 101894, *Bunoz*, Rec. CE p. 144, *AJDA* 1989, 627, concl. Faugère et 426, chron. Honorat et Baptiste, *Gaz. Pal.* 1989, 2° sem., note Houves 878.

⁵ CE, 3 avr. 2006, n. 282093, *Chamois Niortais F.C.*, *Cah. dr. sport* 2006, n. 4, 9, note J.-M. Duval.

⁶ CE, 8 nov. 2006, n. 289702, *Dalloz* 2007, n. 13, note Sophie Dion.

⁷ J.-M. MARMAYOU - F. RIZZO, *Les normes sportives privées internationales*, *Revue de la recherche juridique - Droit prospectif* 2011, special issue: *Cahiers de méthodologie juridique* n. 25 «Les normes privées internationales», 2341-2355.

NATIONAL TRANSFERS IN GERMANY

by Jonathan Wilkens*

1. The Framework for National Transfers in Germany

Although transfer fees for national transfers within Germany are far off from the hundred-million-euro range reached in several international transfers during the 2017/2018 and 2018/2019 seasons,¹ the revenue resulting from players' transfers is still an important source of funding for German football clubs: in DFL's² 2019 Economic Report, the share of transfer revenues in the overall revenues averages 12% in Bundesliga 2 and 16.9% in Bundesliga.³

To grasp the functioning of (national) transfers in Germany, the understanding of the national framework – with respect to the organization of German football itself as well as to the applicable sources of law – is of essence.

1.1 Organisational framework: Football organizations in Germany

German football is organised in a pyramidal structure comprising the German Football Association (*Deutscher Fußball-Bund*; DFB), the German Football League (*Deutsche Fußball Liga*, DFL) and 26 regional or state football associations (*Regional- und Landesverbände*).

1.1.1 *Deutscher Fußball-Bund, DFB*

The German Football Association (DFB) as Germany's football governing body is affiliated with more than 25,000 clubs with more than 6.8 million individual members.

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¹ The transfer of Julian Draxler from FC Schalke 04 to VfL Wolfsburg for an assumed amount of EUR 43,000,000 is still the most expensive national transfer within Germany: www.transfermarkt.de/1-bundesliga/transferrekorde/wettbewerb/L1.

² The German Professional Football League (*Deutsche Fußball Liga*), see below, section 1.1.2.

³ DFL, The 2019 Economic Report, available at www.dfl.de/wp-content/uploads/sites/3/2019/02/DFL_2019_Economic_Report_EN_S.pdf.

DFB is composed of 27 member associations (five regional football associations, 21 state football associations and DFL). DFB itself is a member of UEFA and therefore also a member of FIFA.

DFB organises the Men's and Women's senior and under age national teams, the men's national cup competition (*DFB-Pokal*), the men's highest football league below the leagues organised by DFL ("3rd League", *Dritte Liga*), and the national competitions in women's football.

DFB is also responsible for the disciplinary bodies in German football (with competence for the leagues organised by DFL, too).

1.1.2 *Deutsche Fußball Liga, DFL*

DFL was founded in December 2000 and has since been responsible for overseeing all aspects of professional football in Germany, including the organisation and marketing of Bundesliga and Bundesliga 2 as Germany's top two football leagues and of the German Supercup. DFL is composed of the 36 clubs playing in the top two leagues and itself is an ordinary member of DFB. There, DFL holds a blocking stake in DFB's general assembly on questions regarding the interests of Bundesliga or Bundesliga 2.⁴

As a result of historical development, DFL is solely responsible for the registration of players with clubs of Bundesliga and Bundesliga 2 and, therefore, plays an important role in the (national) transfers of players in Germany.

1.1.3 *Regional and state football associations*

The federally structured five regional and 21 state football associations⁵ take responsibility for all divisions below the 3rd League. These divisions are organised on the respective regional or state level which have their own administration and disciplinary organs.

1.2 *Legal framework: National state law and associations' statutes*

Transfer agreements involving German clubs as well as employment contracts of football players employed with German clubs are – in the first place – governed by the statutory regulations of FIFA, DFB and DFL.

DFL and DFB are associations under German private law and therefore benefit from the freedom of associations guaranteed by article 9 of the German Constitution (*Grundgesetz, GG*). Article 9 GG ensures the associations' self-determination regarding their own organisation, the process of their

⁴ Section 26 (2) of DFB's statutes of association.

⁵ An overview of all regional and state football associations is given at www.dfb.de/en/about-dfb/regional-associations/.

decision-making and the conduct of their business.⁶ Relevant statutory regulations governing employment contracts with football players are part of DFB's and DFL's statutes. In accordance with their respective association's purposes, DFL's statutes⁷ contain specific regulations applicable to Licensed Players of clubs of Bundesliga and Bundesliga 2 whereas DFB's statutes⁸ contain regulations applicable to players employed with clubs in the 3rd league and below. DFB as well as DFL implement mandatory FIFA regulations applicable at national level in their respective frameworks.

However, as in other jurisdictions, the freedom of association is not unlimited as the statutory regulations are completed or even discarded by mandatory state law.

While there are only a few general mandatory state law principles governing transfer agreements, the provisions of German labour law are largely considered as mandatory in the light of their purpose to protect employees' rights. As German labour law applies a strictly functional definition of employees and therefore does, in general, not differentiate between highly remunerated football players and other employees, the clubs are obliged to comply with major parts of German labour law. That is why employment contracts with football players in Germany may, *inter alia*, not deviate from the players' right to a six-week continued payment of salary in the event of illness,⁹ or the legal minimum of vacation days¹⁰ or the right to refer disputes arising from the employment contract to state Labour courts.¹¹ Regarding these three examples of mandatory state law, for the sake of clarification, Sections 9 and 10 of DFL's Licence Regulations on Players even refer to the relevant legal provisions.

On the other hand, unlike in lots of other European countries, in German football there are no collective agreements applicable to players' employment contracts.¹²

1.3 *Players' legal framework: the German application of article 2 of FIFA RSTP*

The distinction between professional and amateur players according to article 2 of the FIFA Regulations on the Status and Transfer of Players ("FIFA RSTP") has

⁶ BVerfG, ruling from 15 June 1989 – 2 BvL 4/87 = *NJW* 1990, 37.

⁷ DFL's statutes are available (in German language) at www.dfl.de/de/ueber-uns/statuten/.

⁸ DFB's statutes are available (in German language) at www.dfb.de/verbandsservice/verbandsrecht/satzung-und-ordnungen/.

⁹ Section 3 of the Act on the Continued Remuneration (*Entgeltfortzahlungsgesetz*, EntgFG).

¹⁰ Sections 1 and 3 of the Federal Leave Act (*Bundesurlaubsgesetz*, BUrtG).

¹¹ Section 2 of the Labour Courts Act (*Arbeitsgerichtsgesetz*, ArbGG); see the remarks under section 7.2 below.

¹² Section 4 (1) lit. i) of DFL's statutes of association foresee the League's competence to negotiate and – subject to the general assembly's approval – conclude a collective agreement but there have not been any efforts towards such agreements until today.

NATIONAL TRANSFERS IN ITALY

by Luca Tettamanti* and Michele Spadini**

1. *The national framework*

1.1 *Introduction*

In the year 2019, Italy was the third-highest spender among the Big 5 associations (England, France, Germany, Italy and Spain) according to the *FIFA Big 5 Transfer Window Analysis Summer 2019*.¹ Italian clubs combined for an outlay of USD 701 million on transfer fees and completed 247 incoming transfers and 264 outgoing transfers.

Therefore, despite all the problems and loss of competitiveness that the Italian professional leagues have faced in the past years compared to the other "Big Four" European football leagues, Italy still remains one of the most important football markets worldwide.

In the following paragraphs the authors will briefly outline the national regulatory framework of Italian football, highlighting the complex interactions among the different sources of law that regulate the sector – which is composed of an intricate interrelation of state laws, collective bargaining agreements and various regulations/official communications issued by the Italian Football Association – with an emphasis on the labour relationship between clubs and players and on players' transfers.²

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¹ FIFA Big 5 Transfer Window Analysis Summer 2019 is available at: www.fifatms.com/wp-content/uploads/dlm_uploads/2019/09/Big5_Summer2019_20190911.pdf (last visited on 30 September 2019).

² Terms referring to natural persons are applicable to both genders. Any term in the singular applies to the plural and vice-versa.

1.2 The Italian Football Association

The “*Federazione Italiana Giuoco Calcio*” (hereinafter, “*FIGC*”) is the national governing body of football in Italy. It was founded in 1898, recognised by FIFA in 1905 and was a founding member of UEFA in 1954.

The FIGC includes professional and amateur clubs and sports associations that pursue the aim of organising and playing football in Italy, and it is responsible for promoting and regulating Italian football and all its related aspects. In this context, it also regulates intermediary/football agents’ activity at domestic level.³

The FIGC, in accordance with its Statutes, retains regulatory and control functions but delegates⁴ its powers to organise professional and amateur competitions (i.e. three professional tiers, “*Serie A*”, “*Serie B*” and “*Serie C*” and a further six amateur tiers) to four Leagues, which form part of the FIGC, namely the National Professional Serie A League (“*Lega Nazionale Professionisti Serie A*”, hereinafter “*LNPA*”), the National Professional Serie B League (“*Lega Nazionale Professionisti Serie B*”, hereinafter “*LNPB*”) and the Professional Football Italian League (“*Lega Italiana Calcio Professionistico*”, hereinafter “*Lega PRO*”), which are professional Leagues, and the Amateur National League (“*Lega Nazionale Dilettanti*”, hereinafter “*LND*”), which is the only amateur League.

In addition to the Leagues, the following entities are part of the FIGC: the Italian Association of Referees (“*AIA*”), which designates the referees and their assistants for the various FIGC competitions; the Technical Components (i.e. the Italian Footballers Association “*AIC*” and the Italian Football Coaches Association “*AIAC*”); the Technical Sector, which is a FIGC service body that, in

³ On 17 April 2019, the FIGC, with its official communication n. 102/A, issued the new Intermediary Regulations (“*Regolamento Agenti Sportivi*”) in the context of an overall reformation of the system that started with the enactment of the specific legal provisions under art. 1, para. 373 of the Law 27 December 2017, n. 205, D.P.C.M. 23 March 2018 on the creation of a national register of sports intermediaries and the resolution n. 1596 of the CONI National Council dated 10 July 2018 which introduced the CONI Regulations on sports intermediaries (hereinafter, “*CONI Regulations*”). The new Intermediary Regulations are meant to replace the previous “*Regolamento per i servizi di procuratore sportivo*” in force as from 1 April 2015. Such new FIGC Intermediary Regulations were then amended on 16 May and, more extensively, on 10 June 2019 to fully comply with the CONI Regulations. Lastly, on 23 July 2019, the FIGC issued another Intermediary Regulations (“*Regolamento Agenti Temporanei*”) to regulate the activity of the intermediaries who gained the qualification to operate within the FIGC in the period between 31 March 2015 and 31 December 2017 and also created an *ad-hoc* register. Such Temporary Regulations will remain in force until 31 December 2019. The official communication by the FIGC regarding the amended FIGC Intermediary Regulations and the FIGC Temporary Regulations as well as the respective regulations are available at: www.figc.it/media/94295/137-modifica-regolamento-agenti-sportivi.pdf; www.figc.it/media/94297/137-all-a-modifica-regolamento-agenti-sportivi.pdf and www.figc.it/media/97891/33-registro-agenti-temporanei.pdf (all of them last visited on 24 September 2019).

⁴ In accordance with art. 9, para. 3 of the FIGC Statutes, which is available at: www.figc.it/media/55704/titolo_1_statuto_2014_comm_ad_acta_04-08-2014.pdf (last visited on 2 May 2019).

accordance with art. 14 of its Statutes, carries out studies for the promotion and improvement of football technique, and the Youth and Scholastic Sector (“*Settore Tecnico e Scolastico*”), which promotes, regulates and manages the football activities of youngsters between 5 (five) and 16 (sixteen) years old.

1.3 The structure of the Italian Football Pyramid

1.3.1 The professional leagues

As mentioned above, there are three professional tiers in Italian football – Serie A, the top category, Serie B, the second division, and Serie C, the third and last professional league – which are organised by three different Leagues, in accordance with the FIGC Statutes.

The LNPA and the LNPB are private associations, while the Lega PRO is a non-profit entity. The professional Leagues respectively include all the clubs participating in Serie A, Serie B and Serie C, which employ professional football players.

In particular, the LNPA organises Serie A and other various domestic competitions (the League Supercup, “*Supercoppa di Lega*”, the youth championship, “*Campionato Primavera 1*”, and the youth Supercup, “*Supercoppa Primavera*”)⁵ and also autonomously⁶ organises the Italian national cup (“*Coppa Italia*”) and the youth national cup (“*Coppa Italia Primavera*”).

There are currently 20 clubs competing in Serie A.⁷

Similarly, the LNPB organises the Serie B tournament and cooperates with other leagues, if necessary, in the organisation of competitions involving more than one league.⁸

On 30 January 2019, the FIGC Executive Committee set the number of clubs participating in the Serie B tournament to 22, although it also introduced a transitional rule stating that only 20 clubs would participate in the 2018/2019 competition.⁹

⁵ According to art. 1, para. 3, let. b) of its Statutes, available at: www.legaseriea.it/assets/legaseriea/pdf/LEGA_STATUTO_REGOLAMENTO_VIGENTE_20180319.pdf (last visited on 2 May 2019).

⁶ According to art. 1, para. 3, let. c) of its Statutes.

⁷ Pursuant to art. 49 NOIF FIGC, although the Executive Committee of the FIGC on 30 January 2019 reduced the minimum number of teams for the future down to 18 (eighteen). The press release is available at: www.figc.it/it/federazione/news/il-consiglio-federale-d%C3%A0-il-via-alla-riforma-dei-campionati-dal-2019-20-la-serie-b-a-20-squadre/ (last visited on 7 July 2019).

⁸ According to art. 1, para. 1.3, point 1.3.b) of its Statutes, available at: <https://s3-eu-west-1.amazonaws.com/legaseriebcontent/wp-content/uploads/2018/11/14121519/90-Allegato-al-CU-Statuto-LNPB.pdf> (last visited on 2 May 2019).

⁹ As decided by the Executive Committee of the FIGC on 30.01.2019 that amended art. 49 of the FIGC NOIF. The press release is available at: www.figc.it/media/77333/49-modifica-art-49-noif.pdf?sfn=mo.

NATIONAL TRANSFERS IN PORTUGAL

by João Leal*

1. The National Framework

1.1 The Structure of the Portuguese Football Pyramid

1.1.1 Background

The Portuguese Football Federation (FPF) was founded on 31st of March 1914 by the Football Associations of Lisbon, Portalegre and Oporto, for an indefinite period, under the name of the União Portuguesa de Futebol (FPF). It is a non-profit-organisation with public interest. FPF is a private-law association comprising twenty-two regional associations, a professional league, associations of sports agents, clubs or sports companies, players, coaches and referees, which are all registered or affiliated under its statutes.

FPF is a Member of FIFA and UEFA, and it manages 44 non-professional competitions and 23 national teams.

FPF holds the public sport utility status, pursuant to order no. 5331/2013 of 22 April emanated from the Portuguese State.

FPF's main objective is to promote, regulate and direct, at national level, the coaching and practice of football, in all its variants and competitions.

The Portuguese Professional Football League is a private non-profit association that manages the 1st and 2nd professional competitions, which are currently composed of 18 clubs in the 1st league and 18th clubs in the 2nd league.

The 1st league is the top football competition in Portugal.

The Portuguese Professional Football League was founded on February 3, 1978, named “Liga Portuguesa de Clubes de Futebol Profissional” (LPFP).

LPFP is responsible for regulating the professional competitions regarding disciplinary, refereeing and organisational matters. The disciplinary and referee regulations must be ratified by the general meeting of FPF.

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LPFP started the organisation of the professional competitions from the sporting season of 1995/1996.

2. The Legal Framework

The legal framework of the FPF, and indeed all the Federations with sport public utility status, i.e., the federations recognised by the state as those with the power to regulate sport and represent Portugal, are laid down in the public sports law (Law n. 5/2007, of 16th of January 2007) and in the Decree-Law n. 93/2014 of 23rd of June 2014. When registering contracts, the legal regime of the contract of employment of sports players, sports training contracts and contracts of representation or intermediation [Law n. 54/2017 of 14th of July 2017] must also be taken into consideration.

In relation to the registration of players, the Decree-Law n. 93/2014 of 23 of June 2014 states in article 41 n. 2 paragraph a) that it is within the competence of the federation's board to approve all the required regulations. In regard to defining competence, Law 54/2017 of 14th July 2017 stipulates in article 7th (Registration) that participation of players in competitions, promoted by a federation, is dependent on the previous registration of the player's employment contract with the corresponding federation, and such contract must be based on the terms that are established by the regulations of the federation.

In combination with the legal framework that imposes rules on the Federations from a legal point of view, and the obligations set out in the FIFA Regulations on the Status and Transfer of Players that oblige Associations to apply mandatory rules at domestic level, the Portuguese Football Federation approved the “Regulamento do estatuto, da categoria, da inscrição e transferência de jogadores”, which are the regulations that contain all the provisions for the registration of players.

A special remark must also be made in relation to the set of rules that are contained in the regulations of competitions of the Portuguese professional league. In fact, in accordance with Portuguese Law, the relationship between the Federation and the league is established by means of a contract (provided by the Decree-Law n. 93/2014 of 23 of June 2014). In this contract the parties must agree, among other things, on the number of clubs that participate in the professional sporting competition, the access between non-professional and professional sports competitions, the organisation of the activity of the national teams, and the support for the non-professional sporting activity. This contract also covers, in article 6th, the registration of players, stating that the Portuguese league is competent to deal with the registration of players who will take part in professional competitions. However, such registration is always subject to the final approval of the Portuguese Federation and all documentation must be exchanged electronically. The mentioned contract also states that the Portuguese Federation is competent to settle registration fees, and that the league compensates the Federation with 5% of the registration

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fees for players, while 10% of the registration fee is due for an international transfer of the player's registration.

3. Registration and transfer rules

Due to the FPF's affiliation with FIFA, the Portuguese regulations regarding the registration and transfer of players include, without any amendments, articles 2-8, 10, 11, 12bis, 18, 18bis, 18ter, 19 and 19bis of the FIFA Regulations on the Status and Transfer of Players.¹

There are however, a few rules in the Portuguese football regulations regarding the registration and transfer of players which may vary from FIFA rules or the standard international practice. In this section, we will address the following issues regarding registration and transfer rules:

- a) Transfer windows;
- b) Registering new players;
- c) Third Party Ownership;
- d) Loans;
- e) Approaching players.

3.1 Transfer windows

Portugal has two transfer periods / windows per season – in summer and winter.

The two periods are different for professional and non-professional (amateur) competitions and are also different for international and domestic transfers.

For professional competitions, comprising international and domestic registration of players:

- the 1st window opens on the 1st of July, formally the first day of the sports season, and ends on the 31st of August.
- The 2nd window opens on the 1st of January (non-working day) and ends on the 31st of January.

For non-professional competitions:

- the 1st window opens on the 1st of July, formally the first day of the sports season, and ends, usually, on the 14th of September.
- The 2nd window opens on the 1st of January (non-working day) and ends on the 31st of January.
- The domestic registration of players is from the 1st of July up to the 28th of February.
- The first registration of players U-6, U-7, U-8, U-9, U-10, U-11 and U-12 to U-19, except for international transfers and those relating to players in need of FIFA pre-approval, is until the 31st of May.

¹ Available at <https://resources.fifa.com/image/upload/regulations-on-the-status-and-transfer-of-players-2018-2925437.pdf?cloudid=c83ynehmkp62h5vgwg9g>.

NATIONAL TRANSFERS IN THE KINGDOM OF SPAIN

by Miguel María García Caba* and Josep F. Vandellós Alamilla**

1. The National Framework

1.1 The Legal Structure of Sport in Spain¹

In Spain, as in most European countries, football is the most popular sport. It stirs passion and excites supporters into following their favourite team's doings closely, in person and through the media. The TV ratings are always very high for matches in which a Spanish football team plays; such matches are inevitably amongst the most widely watched events. The vast magnitude that the sport has attained in Spain has caused budgets in the sector, the prowess of players, and revenues to soar.²

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¹ On this topic, see A. Camps I Povill, *Las federaciones deportivas. Régimen jurídico*, Madrid, 1996.

² See S. Gómez, C. Martí and C. Bofarull, *Commercialisation and Transformation in Spanish Top Football*, in *The Organisation and Governance of Top Football Across Europe*. Routledge Research in Sport, Culture and Society, Taylor and Francis, 2011, 181-187.

The Legal Structure of Sport in Spanish Football is currently regulated in Spain through the Act on Sport of 1990. When the Act was passed, it revolutionised professional football by introducing a new model of legal and economic liability for clubs that operate on a professional basis: the sport corporation.³

Article 43.3 of the Spanish Constitution states that “*the public authorities will foster health education, physical education and sport*”. It will likewise facilitate proper use of leisure time. All action the State is obliged to take in the realm of sport, belongs to and is exercised through the High Council of Sport, save where the Council delegates powers pursuant to the Act.

1.1.1 The High Council of Sport

The High Council of Sport is an autonomous administrative body which is granted a number of functions according to the 1990 Act. These include the following referring to professional sport:

- To authorise and on due grounds to revoke the creation of Spanish sport federations and to approve the articles of association and regulations of such federations;
- To approve definitively the articles of association and regulations of Spanish sport federations, professional leagues, and groupings of clubs, authorising their registration in the proper Register of Sport Associations;
- To suspend, on due grounds, and on a precautionary and provisional basis, the President and other members of the governing and supervisory bodies of Spanish sport federations and professional leagues, and to call meetings of said bodies in the events given in Article 43 (b) and (c) of the Act;
- To classify nationwide official competitions of professional nature; and
- To authorise the registration of sport corporations in the Register of Sport Associations.

In the organisation chart of Spanish sport, the tier immediately below the High Council of Sport is comprised by sport federations.

1.1.2 The Spanish Sport Federations

Sports federations in Spain have undergone a curious, wide-ranging process of transformation concerning their nature as instrumental entities for doing sports activities.⁴ This was a lengthy process linked to the historical view about them in

³ This new type of corporation was created with the objective of straightening out the huge debts of sport clubs and regulating sport more restrictively, so as to clad all the mechanisms of professional sport with legal certainty.

⁴ On this question, see the book by J.L. Salvador, *El deporte en Occidente*, Madrid, 2004. For a purely sporting perspective, see the book of G. Real Ferrer, *Derecho Público del deporte*. Ed. Civitas, Madrid, 1991.

relation to the international sports movement, which made them the holders in the Spanish state’s territory of the exclusive competence for doing the sports activities within their area of competence.⁵

A notion of private agents having a public function was derived from this initial structure, which radically changed their initial regulation.⁶ In this regard, it is possible to insist (state) that their evolution can be characterised as the transformation from being association entities conceived for the individual practice of sport to ones which have come to play a significant public role, in so far as they exercise public functions by delegation.⁷

Said sports federations cannot be strictly considered private associations subject to a general association regime. According to article 30(2) of the Act, they are entities which exercise public functions by delegation and are deemed as collaborating agencies of the administration. Having set out the above, it is not inconsistent to admit that the administration, as the ultimate guarantor of the general interest, may exercise legal control over the federation’s articles of association.

Federations are defined in the Act on Sport as “*private entities with their own legal personality, whose realm of action encompasses the territory of the State as a whole, in the implementation of the competences belonging to them, made up of regional sport federations, sport clubs, athletes, technicians, referees, professional leagues, if any, and other stakeholder collectives that promote, engage in or contribute to the development of sport. In addition to their own attributes, federations exercise delegated public functions of an administrative nature, acting in this case as partners of the government*” [free translation].

This means that sport federations promote, engage in, and contribute to the development of sport, and interestingly, in assigning the following functions to federations, the Act on Sport makes them government partners:

- To rate and organise any nationwide official sporting activities and competitions;
- To act in coordination with regional federations for the general promotion of their sport throughout the State;
- To design, make, and carry out plans for preparing high-performance athletes in their sport, in cooperation with regional federations or otherwise, as the case may be;

⁵ This evolution is recounted in the article by R. Terol Gomez, *La intervención pública sobre el asociacionismo deportivo en España 1869-1978*, Revista Jurídica del Deporte, No.11, Navarre, 2004. For a contemporary legal standpoint, see Bielsa Tejedor, J. C. *Público y Privado en el deporte*. Ed. Bosch Barcelona, 2003.

⁶ Regarding this issue, see J. Espartero Casado, *Deporte y Derecho de Asociación (Las Federaciones Deportivas)*, Ed. León University, 2000.

⁷ On this relationship, see the book by L. Cazorla Prieto, *Deporte y Estado*, Labor-Politeia, Barcelona, 1979. Specifically, regarding the exercising of public functions, see the article by L. Osorio Iturmendi, *El ejercicio de funciones públicas por las federaciones deportivas españolas. Régimen aplicable*, Revista Española de Derecho Deportivo. No. 4. Madrid. 1994.

NATIONAL TRANSFERS IN THE UNITED STATES: FOCUS ON MAJOR LEAGUE SOCCER

by Nicole A. Santiago*

1. *The National Framework*

Perhaps a sensible starting point in the discussion of the structure of this particular sport in the United States is a brief consideration on nomenclature. A few years ago, Stefan Szymanski wrote about the origin of the word and its roots in the phrase “Association football,” an English concept, as well as the rest of the world’s largely open rejection of the use of the term “soccer” to refer to the most commonly-played sport in the world.¹ This particularity in the sport’s name in the United States is reflective of numerous other particularities as to how football, or for purposes of this chapter, soccer, operates in the United States relative to other countries of the world, with particular emphasis on the subject from the point of view of Major League Soccer.

1.1 *The Structure of Football in the United States*

The basic framework of the sport is roughly the same as can be found in any other country with organized football. The United States Soccer Association (“US Soccer”) is the national governing body of soccer in the US, and is a member of CONCACAF and FIFA. US Soccer sanctions the various professional and amateur divisions of the sport within the country, in addition to being responsible for enforcing the FIFA rules and regulations, organizing national tournaments such as the Lamar Hunt US Open Cup, managing the youth, men’s and women’s national teams, and managing player registrations.

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¹ S. SZYMANSKI, “*It’s Football not Soccer*”, University of Michigan (May 2014), available at: <http://ns.umich.edu/Releases/2014/June14/Its-football-not-soccer.pdf>.

However, unlike the national association framework found in the vast majority of countries across the globe, one cannot speak of soccer in the United States without speaking about soccer in Canada as well. Despite the fact that each country has its own national association (US Soccer and the Canadian Soccer Association, or the “CSA”), both of these national associations are closely linked due to the way in which the professional side of the sport is organized.

Major League Soccer (“MLS”) is the first division of professional soccer in both the US and Canada. Though the league’s humble beginnings in 1994 only included a handful of US-based teams, it eventually expanded to incorporate three Canadian outfits as well. This creates a number of interesting scenarios when considering intra-league transfers, which shall be developed in further detail below, but it is fair to say that a discussion of national transfers in the US would be incomplete without due consideration for the top flight’s dual nationality, so to speak.

This dual nationality also extended to the second division up until very recently. The United Soccer League (“USL”) Championship, the current second division professional league and former third division professional league, also spanned both countries, though the last of its Canadian members ceased operations in 2019.

Conversely, the third professional division in the United States still includes one Canadian team, though it is interesting to note that US Soccer provisionally sanctioned two separate third division leagues in 2019, USL League One (which spans the US and Canada) and the National Independent Soccer Association (“NISA”).

There is no officially sanctioned lower division beyond the third division of US Soccer, though there are a number of semi-professional and amateur leagues in operation. On the amateur side, US Soccer recognizes the United States Adult Soccer Association (“USASA”) as one of its members, which in turn has a number of affiliated leagues such as the USL League Two, the United Premier Soccer League, and the National Premier Soccer League, as well as state and local soccer associations.

2. *Registration and transfer rules*

The focus of this chapter shall now turn to matters pertaining to the registration and transfer of players within MLS and players entering and exiting the league in order to provide a few concrete observations about the national transfer system. Reference will be made to the relevant provisions of the principal document governing the employment relationship between the league and its players, the collective bargaining agreement (“CBA”) negotiated between the league and the MLS Player’s Association (“MLSPA”),² and the MLS Roster Rules and Regulations, which are approved and published by the league every season.

² The MLSPA is the exclusive bargaining representative for MLS players since the players unionized under the National Labor Relations Act in 2003. Among other things, the National Labor Relations

2.1 Intra-league transfer of players

Within MLS, the main mechanisms by which players generally move from one team to another are, on a temporary basis, by way of an intra-league loan, and, on a permanent basis, by way of a trade. In either case, it is important to remember that the player's employment contract is with MLS and not with a particular club, which means that while the player's employment contract terms must fit into the receiving club's salary cap, there is no obligation to renegotiate the player's compensation upon executing the player's loan or trade because he remains under the same employment contract.³

Those who follow US sports or participate in any sort of fantasy sports league will no doubt be familiar with the concept of a player trade: the reassignment of a player from one team to another in exchange for another player or some other tradeable asset, such as a draft pick or a preferential right to sign a prospective player, among others. In MLS's case, the concept is the same: two teams come together to negotiate and, upon reaching agreement and receiving League Office approval, "a player may be required, without his consent, to relocate to any team in the league as directed by MLS".⁴ The list of tradeable assets that MLS teams may exchange in a trade is comprised of players, MLS SuperDraft picks,⁵ General Allocation Money,⁶ Targeted Allocation Money,⁷ Allocation Ranking order,⁸

Act, 29 U.S.C. sec. 151-169 (2019), provides the right for workers to form a single collective bargaining representative body to negotiate in good faith the terms and conditions of their employment relationship with their employer.

³ That is not to say that renegotiation of a player's does not occur once the trade has taken place.

⁴ See MLS CBA Section 15.1. Some players may be granted a no-trade clause in an addendum to their standard player agreement, at MLS's discretion.

⁵ The MLS SuperDraft order is set by taking the reverse order of the club standings at the end of each MLS season, taking postseason performance into account, with new expansion clubs at the top of the order. Clubs may trade their position in any given round.

⁶ General Allocation Money ("GAM") are funds that the league makes available to a club in addition to its salary budget. GAM may be used to "buy down" or reduce a player's salary cap charge, subject to certain conditions imposed by the league. Each MLS club receives an annual allotment of GAM and may also receive additional GAM if that club fails to qualify for the MLS Cup Playoffs, if a transfer fee is received for transferring a player out of MLS, if it qualifies for the CONCACAF Champions League, if it does not have a third Designated Player (marquee players whose compensation is mainly covered by a club's ownership and not the salary cap), if any new club enters the league (an "Expansion Year"), among other reasons.

⁷ Targeted Allocation Money ("TAM") is a separate category of funds strategically provided by the league to clubs in order to sign or retain players that are expected to make an immediate impact on the field. These funds are applied in an even more restrictive fashion than GAM in order to reduce a player's salary cap charge and the player must meet a particular set of criteria, chief among them being that the player must be earning a salary within a specific salary range (generally, between the "maximum budget charge" applicable for the season and USD 1,000,000 per season).

⁸ The Allocation Ranking order refers to one of the player acquisition mechanisms employed to determine which MLS Club has first priority to acquire a player listed on the Allocation Ranking List. The list is made up of select U.S. Men's National Team players, elite youth U.S. National Team players, and/or former MLS players returning to MLS after joining a non-MLS club for a transfer fee greater than USD 500,000, and may be periodically updated.

"I WANT THIS PLAYER AND I WANT HIM NOW... PLEASE MAKE IT HAPPEN!" A SYNOPSIS OF THE ESSENTIAL RULES AND PRACTICES ON THE TRANSFER OF FOOTBALLERS

by *Ornella Desirée Bellia** and *Michele Colucci***

Introduction

The FIFA regulations have been and will be, time and again amended in order to address new and often delicate issues arising when negotiating and concluding the international transfer of a player.

Rules frequently change and yet the attitude and goals of the parties involved (clubs, players, intermediaries) remain the same: they try to maximize their economic and sporting benefits from the transfer while their legal counsels are tasked with translating their wishes in legal, valid and binding agreements.

From this perspective, the contractual parties will typically consider to have achieved a good transfer when they agree upon the contractual terms and conditions that represent the best possible balance of their respective economic and sporting expectations, whilst preventing disputes and/or claims from any party.

Every transfer gives rise to two parallel and simultaneous negotiations. The first one settles the economic aspects of the transaction while the other one aims at defining the legal term of the agreement, in order to prevent and solve any possible legal issues. Both negotiations are equally important and closely connected since, as mentioned above, the ultimate task for lawyers is to give legal form to the will and interests of the parties, completing the transfer finally in the best possible way.

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Furthermore, a transfer can be a complicated operation because of the different interests and parties involved.

First and foremost, stands the player, who has his/her economic and professional demands while clubs have to deal with their financial assets or constraints in trying hard to meet their sporting ambitions and targets.

Then there are the intermediaries, whose main aim is to maximize their clients' economic profits and benefits from the transfer; incidentally, in doing so, they are also eager to earn a higher cut as percentage of the transfer value.

Of course, the parties involved have to give in to compromises on several elements of the negotiation. In fact, just like in any other business sector, labour relations in football are essentially defined by the parties' bargaining power.

On the player's side, this power is given by his/her past/current performances, the results achieved, his/her fame among supporters, not to mention his/her potential for commercial exploitation; for the club, leverage lies *inter alia* with its prestige, past and current sporting achievements, as well as its ambitious targets and more often than not, its financial, accounting and regulatory constraints. All these factors eventually have an ultimate impact on the contractual terms to be negotiated.

Finally, once they reach an economic agreement, all parties must prove they are able to maneuver through the legal, financial and fiscal provisions in view of building up the mutually satisfying contractual construction.

By considering those points and the in-depth analysis of the relevant international and national case-laws conducted by the Authors of this book, this essay shall focus on the essential issues that arise when parties negotiate and conclude both transfer and employment agreements, the practical considerations to make and the actions that parties have to take.

At the same time, due attention will be given to the challenges that lawyers have to face in identifying and flagging the legal issues, clarifying them to their clients, and providing them with the most effective solutions which enhance their legitimate economic interests in compliance with the relevant legal framework where relevant best practices and the main specific regulations of some of the most important federations¹ around the world will be addressed.

1. Preliminary to any negotiations

In a footballer's transfer, the interests at stake may often be huge: as a consequence, parties need to take all possible precautions and leave nothing to chance.

A successful transfer starts even before the parties begin negotiations.

¹ These include England, France, Germany, Italy, Portugal, Spain and, outside Europe, Argentina, Brazil, China and the USA.

1.1 The Status of the Player and the nature of the Transfer

The engaging club should ascertain the *status* (i.e. amateur or professional) of the relevant player.

In principle, if the player is an amateur there will be no transfer fee to pay.² On the contrary, if the player is a professional, the club should verify whether he is under contract or a free agent in view of a possible request for compensation.

The status of the player is also relevant in connection with the *nature of the transfer* (definitive or temporary): both amateurs and professionals can be transferred on a definitive basis, while only professionals can be loaned from club to club.

1.2 The footballer's age impacts on training compensation

The engaging club should also consider the *age* of the player. Given that training compensation for international transfers must be paid until the age of 23, in order to budget possible costs related to *training compensation*.

In order to ascertain whether and to whom such compensations should be paid, it is highly advisable for the club to request a copy of the player's passport (Art. 7 RSTP) to the former Football Association, however, these passports are not always reliable and are easily made available. In order to overcome such a problem, FIFA has recently approved the so-called *e-registration system* to facilitate the tracking of clubs with whom a player has been registered.³

1.3 Minors

In a *transfer agreement*, the age of a player is important since FIFA explicitly forbids the international transfers of *minors* (i.e. under 18).

However, there are three exceptions detailed in Art. 19 para. 2 RSTP, in particular to facilitate the transfer of young players above the age of 16 between the EEA/EU countries. In compliance with EU Single Market rules, players whose parents move to the country in which the new club is located for reasons not linked to football, those who live no further than 50km from a national border and the club with which the player wishes to be registered in the neighboring association is also within 50km of that border.

² Nevertheless, there are some specific cases in which FIFA has recognized that a transfer fee is legitimate if it has been for amateur players. See J.F. VANDELLOS ALAMILLA, "Transfer Agreements pursuant to the FIFA PSC decision and the CAS jurisprudence", *Transfer of Players*, O.D. Bellia and M. Colucci eds, para. 2.2, SLPC, 2020.

³ V. PĽAVJANIKOVA and A. N. RECK, "Training Compensation and Solidarity Mechanism", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

Clubs willing to benefit from such exceptions need to submit all relevant documentation and information to the FIFA Subcommittee of the Players Status Committee (Art. 19 para. 4 RSTP), which will eventually clear the transfer.

Furthermore, FIFA jurisprudence has foreseen two further exceptions, which are codified and implemented as of 1 March 2020 in the FIFA regulations with specific regard to refugees and exchange students.⁴

In any case, clubs can legally only offer a minor a contract with a maximum three-year length (Art. 18 para. 2 RSTP) and not five years as for any other professional football player.

There are, however, exceptions to those general rules: for instance, **Brazil's** legislation is in conflict with the FIFA rules given that, according to Brazilian law, the minimum duration of an employment contract is three months and the maximum is five years for every player regardless of the player's age. On the basis of this specific rule, the Brazilian confederation (CBF) has inserted a provision in its domestic regulations, which warns its affiliated clubs that only the first three years of the contracts may be considered in case of international disputes.⁵

In **China**, there are some rules establishing that 16 years old players (but under 18) can sign contracts for a maximum duration of 3 years (Article 50 CFA RSTP) while players under 18 cannot sign employment contracts unless they are registered in the first team of a club competing in a professional league (i.e. CSL, CL1 or CL2) (Article 4 of a CFA Regulation called "Implementation Opinion regarding Transfer of Youth Players and Standard Regulation of Training Compensation").⁶

1.4 Nationality and work permit

Depending on the player's *nationality*, there are a series of legal formalities to be carried out with regard to immigration compliance rules that the clubs should be aware of before offering an employment agreement.

In **Brazil**, for instance, visas are valid for only two years under the relevant immigration rules. As a consequence, clubs are obliged to split the total length of the employment contract (up to five years) in two or more subsequent registration periods (for up to two years).⁷

In **England** until now players coming from EU Member States have not needed visas/work permits; however, this will likely change if/when Brexit finally occurs in the course of 2020 or in 2021 following the relevant negotiations with the

⁴ L. FERRER, "Understanding the FIFA rules on International Transfer and First Registrations of Minors", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

⁵ V. ELEUTERIO and A. GALDEANO, "National Transfers in Brazil", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

⁶ D. WU, G. MARINO, T. PEREDA RUEDA and R. CHU, "National Transfers in China", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

⁷ V. ELEUTERIO and A. GALDEANO, "National Transfers in Brazil", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

European Union. Non-EU players presently require a governing body endorsement (GBE) from The FA in order to register with a club in England. The present GBE/work permit system broadly aims to permit only the most exceptional non-EU players to play in England, as it is based on EU players being able to freely move to England. If/when this changes due to Brexit, it is possible that the entire GBE/work permit system might also be overhauled or re-worked accordingly.

In **Portugal**, after the signature of a contract for the professional competitions, both the player and/or the club can request a work permit when he moves to Portugal. Furthermore, the national authorities and the League have established a Protocol granting special treatment to foreign professional players.

That said, in accordance with Art. 18 para. 4 of the FIFA RSTP, the validity of an employment contract between a player and a club cannot be made subject to the acquisition of a *work permit* from the local authorities. Such a condition, if included in a contract, is not admissible and shall be considered as null and void.

Furthermore, the FIFA DRC jurisprudence has established that this rule also implies that the club is responsible for the renewal of the visa/work permit during the contract period, and thus not only at the moment they engage the player.

It falls thus within the responsibility and remit of a club to ensure that the necessary visa/work permit is requested and delivered to a player.⁸ Therefore, the club is not entitled to unilaterally terminate the employment contract because of the lack of a valid work permit.⁹

On the other hand, the player has to put himself at the club's full disposal and supply the prospective club with all necessary information and documentation in order to facilitate this task.¹⁰

In **China** there is no specific restrains to players in this regard. However, no visas nor working permits will be provided in case a person has an offense in his/her criminal record.¹¹

1.5 Quotas

The buying club should consider the relevant *quotas* for foreigners established by its sports association in order to avoid that once recruited, the foreign player cannot be named on the field of play.¹²

It however comes to reason that if the club engages a new foreign player, whilst other foreign players are still under contract, the club envisages that the

⁸ See FIFA PSC 5 June 2013, no. 613864.

⁹ See CAS 2007/A/1205 *S. v. Litex Lovech*, award of 6 June 2007.

¹⁰ S. CIVALE and L. PASTORE, "Employment Agreements of Football Players", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

¹¹ D. WU, G. MARINO, T. PEREDA RUEDA and R. CHU, "National Transfers in China", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

¹² For the latest figures and statistics see *FIFA Professional Football Report 2019* available at <https://img.fifa.com/image/upload/jlr5corccbsef4n4brde.pdf>.

newly engaged player will take the ‘foreigner-spot’ of one of the foreign players already at the club.

If over quota, the club *will de-register* another player *forcing* the latter to claim the termination of the employment contract for just cause. This is generally an unfavourable situation for the player; he or she would have to find new employment in a time in which most registration periods are closed and new clubs would often be reluctant to sign a player who has terminated his/her contract due to the joint liability deriving from art. 17 RSTP. Also, there is no financial gain for the player in this situation: at most he or she will receive the residual value of the employment contract (which he would have earned anyway if the club had not forced him to terminate) and if the player were to find new employment, the compensation to be paid by the club to the player for breach of contract would be mitigated by the new earnings. It can be considered a lose-lose situation for the players. As a result, many players in this kind of situation are increasingly accepting of settlement agreements in order to avoid jeopardising their career and obtaining an amount in a more expedited manner, rather than having to go through an often-lengthy procedure at FIFA and possibly CAS.

For **all EU countries** there is no limit to the registration of foreign players coming from other EU countries in compliance with the principle of freedom of movement of workers as enshrined in the Treaty of the Functioning of the European Union. This situation could change in **England** after Brexit; however, it is too early at this stage to predict whether there would be any specific quotas for foreigners (be it EU or non-EU players).

Nevertheless, each national sports association can set limits to the registration of players coming from third countries, i.e. outside the European Union.

In particular, in **France**, clubs of League 1 are allowed to employ a maximum of only four players from outside the EU/EEA or countries with an Association or Co-operation Agreement with the European Union. Furthermore, employment contracts with foreigners coming outside the European Union need to be validated by the League (LFP) upon verification of the relevant documents such as the resident permit, work authorization and visas. In any case, the player will be qualified for LFP’s competitions only for the duration of validity of the corresponding document (plus an additional period of 30 days for its renewal).

The validity period of the French immigration documents varies between 4 months and 10 years.

In **Italy**, clubs of serie A (first category) can register a maximum of four foreign players (two already registered plus two new players) subject to specific conditions established by the Italian Football Federation every year.

In **Spain**, clubs of the First Division can register a maximum of three foreign players and in the Second division can register a maximum of two foreign players.

Furthermore, legal rules on quotas can vary greatly across continents.

In **Argentina** for instance, clubs playing in the top division category (Superliga), are allowed to enter into and register contracts with a maximum of up to six foreign football players per club.

Nevertheless, only five of them will be able to participate in official matches.¹³

In **Brazil**, there is no limit for registrations, but only five foreigners may be simultaneously lined-up. Refugees however are not computed in this limit and are free to play.

In **China**, the CFA has recently amended its regulations increasing the number of foreign footballers. Chinese Super League clubs (first category) can register a maximum of seven foreign footballers per year and list four together, China League One clubs (second category) can register a maximum of four foreign players per season and field two together, while naturalized (nationalized?) players meeting certain specific conditions can be registered as domestic players.¹⁴

1.6 Verification of any TPO agreement

By introducing Arts. 18 bis and 18-ter RSTP, FIFA put into effect a complete *ban of third-party ownership* whose legitimacy has been upheld by CAS as well as by several national tribunals.¹⁵

Most recently, on 12 December 2019 the Court of Appeal of Brussels confirmed the validity of the disciplinary decisions rendered by the FIFA disciplinary committees which sanctioned the Belgian club FC Seraing for having violated the TPO and TPI rules.

The Court therefore acknowledged the full effect of *res judicata* of the CAS award on the same matter rendered on 9 March, 2017 and of the judgement of the Swiss Federal Tribunal rendered on 20 February 2018.¹⁶

As a consequence, clubs and players are forbidden from assigning to a third-party any rights or participation in the compensation payable for the future transfer of a player.

As such and always bearing in mind the recent amendment of the FIFA RSTP, according to which players are not considered third parties, they are entitled to hold a percentage over their own future transfer but are prohibited from further assigning it to any other third party.¹⁷

¹³ M. CLARIA and R. TREVISAN, “National Transfer in Argentina”, *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

¹⁴ D. WU, G. MARINO, T. PEREDA RUEDA and R. CHU, “National Transfers in China”, *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

¹⁵ See M. MOTTA and S. MALVESTIO, “Third Party Ownership”, *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

¹⁶ Unpublished decision. See FIFA press release www.fifa.com/about-fifa/who-we-are/news/fifa-welcomes-brussels-court-of-appeal-ruling-on-fifa-s-tpo-and-tpi-rules.

¹⁷ M. MOTTA and S. MALVESTIO, “Third Party Ownership”, *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.