

# European Sports Law and Policy Bulletin

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## CONTRACTUAL STABILITY IN FOOTBALL







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## INTRODUCTION

The principle of contractual stability is of paramount importance in the world of football. It is at the basis of an efficient transfer system characterised *inter alia* by the redistribution of wealth from 'big' to 'small' clubs as well as by secured investments in youth development.

Any dispute between professional players and clubs at international level is dealt with by the FIFA Dispute Resolution Chamber (DRC) and the Court of Arbitration for Sport (CAS) pursuant to art. 17 of the *FIFA Regulations on the Status and Transfer of Players*.

Such regulations were the outcome of the 2001 Gentlemen's Agreement between the European Commission on one side and FIFA and UEFA on the other. Ten years after the signature of that agreement and the entry into force of the first version of the relevant FIFA regulations, the EU institutions as well as the international sports stakeholders may consider whether to review and modify – if necessary – the rules on transfer of players and contractual stability.

Under the current FIFA transfer rules a compensation must be paid in case of unilateral breach of an employment contract in football and such compensation is calculated by taking into due account the relevant national law and by referring to objective criteria as well as to the *specificity of sport*.

Of course, the consequences of such a termination for the contractual parties (players and clubs) could be extremely important in both economic and sports terms.

In light of the above, this issue of the European Sports Law and Policy Bulletin examines the genesis of the FIFA regulations on Status and Transfer of Players, its content, and – above all – its interpretation by the relevant sports arbitration bodies.

In particular, the Authors critically review the relevant case law of both DRC and CAS and make a legal as well as an economic analysis of the FIFA regulations.

The position of the main stakeholders like the players' representatives (FIFPRO) and the clubs' (European Clubs Association) is also underlined.

Particular attention is given to the relevant national law and jurisprudence of both civil law and common law countries in order to determine how contractual stability is guaranteed in practice and how compensation for early termination of employment contracts in football is calculated.

Finally some recommendations are offered to Clubs and Players in order to comply with the principle of contractual stability in a context of increasing international mobility.

*Brussels, 18 October 2011*

*Michele Colucci*

## THE 2001 INFORMAL AGREEMENT ON THE INTERNATIONAL TRANSFER SYSTEM

by *Borja García\**

SUMMARY: 1. Introduction – 2. The Commission challenges FIFA and UEFA – 3. Towards a compromise solution in the transfer system – 4. Positive reactions from football organisations – 5. A mediating political force: the intervention of Member States – 6. Conclusion

### *1. Introduction*

The control structures of football have traditionally positioned players at the bottom of the football pyramid.<sup>1</sup> Clubs must register their players with their respective national FA or league to participate in national championships. They have to follow similar procedures with UEFA if they participate in European competitions. These governing bodies regulate and decide which players can be registered to play in the competitions they organise, thus having a certain amount of power over the players that any given club can hire. Football governing bodies have traditionally adopted two sets of norms to regulate the employment and registration of footballers: transfer systems and nationality quotas.<sup>2</sup> From the players' point of view, the most contentious issue of a transfer system is any rule that can be used to prevent a player from moving from one club to another at the end of the contract, for instance if agreement cannot be reached between the buying and selling club about an appropriate 'transfer fee'. The football transfer system used to favour clubs rather than players, for it allowed clubs to retain a player at the end of the contract when there was no agreement over compensation for a transfer.

Whilst nationality quotas for EU players were lifted relatively quickly after the Bosman ruling, the situation of international transfers remained unclear. The

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<sup>1</sup> A. TOMLINSON, 'Tuck up Tight Lads: Structures of Control within Football Culture', in A. Tomlinson (Ed) *Explorations in Football Culture*. Eastbourne, Leisure Studies Association Publications, 1983, 173.

<sup>2</sup> P. LANFRANCHI AND M. TAYLOR, *Moving with the Ball, the Migration of Professional Footballers*, Oxford, Berg, 2001, 218.

European Commission was of the opinion that the football governing bodies had to amend their rules on international transfers if they wanted to avoid any further legal action. However, it was only in 2001 (almost six years after the CJEU handed down its judgment in the Bosman case) that a new international transfer system was adopted. The European Commission was forced to open legal proceedings against FIFA to obtain some movement from the governing bodies. The proceedings, however, were settled informally and no formal decision was adopted by the Commission. This contribution seeks to explain how the European Commission and football governing bodies bridged the gap to reach an agreement on the international transfer system, the negotiations really far apart. Moreover, it seeks to explain why the European Commission accepted an informal (i.e. non legally binding) settlement to a procedure under competition policy, where the European executive is a powerful actor. This paper, however, does not intend to analyse the content of the informal agreement. This is done to a considerable extent elsewhere in this volume. Thus, our aim is not to judge the extent to which the 2001 agreement can be considered lawful, nor to adjudicate on which side (employers or employees) benefited most from the settlement. We rather set to explain how and why the Commission decided to settle this dossier informally with FIFA and UEFA, and which actors participated in that decision. In that respect, this chapter highlights especially the intervention of the Member States and the relatively weak position of FIFPro, the footballers trade union.

This chapter proceeds in three steps. First, the Commission objections to the FIFA transfer system are explained, and the negotiations between the EU executive, FIFA, UEFA and FIFPro are described in detail. Second, the chapter considers the reaction of football organisations to the 2001 informal settlement. Finally, the chapter seeks to explain the outcome of those negotiations with especial reference to the political pressure that national governments, especially leaders such as Tony Blair and Gerhard Schroeder, put on the European Commission.

## 2. *The Commission challenges FIFA and UEFA*

Since 1979, international transfers in Europe had been regulated by a mixture of UEFA and FIFA rules.<sup>3</sup> Following the Bosman case, FIFA decided to withdraw UEFA's competences over transfers, assuming for itself the regulation and implementation of international transfers within Europe in 1995.<sup>4</sup> For that reason the Commission's investigation of the international transfer system was addressed to FIFA, which was formally responsible for their regulation.

In the aftermath of the Bosman ruling, FIFA and UEFA informed the Commission at that point that the international transfer system would no longer apply to players who changed clubs at the end of their contracts to play in a

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<sup>3</sup> UEFA, *Vision Europe, the Direction and Development of European Football over the Next Decade*. Nyon (Switzerland), UEFA, 2005, 16.

<sup>4</sup> UEFA, *Ibidem*.

different country within the EEA, although the rules were not officially revoked.<sup>5</sup> This decision was taken in February 1996. Unhappy with this informal arrangement, the Commission wrote to FIFA and UEFA on 27 June 1996 informing them that two particular issues, where the Court had not ruled in *Bosman*, posed extra problems in the light of article 101 TFEU.<sup>6</sup>

In reply, FIFA and UEFA informed the Commission that they did not plan to take into account aspects that were not covered by the *Bosman* judgment. The Commission notified the governing bodies that in that case it would have no other option but to start formal infringement proceedings.<sup>7</sup> On 14 December 1998 the Commission finally started an infringement procedure following the reception of three formal complaints against the international transfer system.<sup>8</sup>

### 3. Towards a compromise solution in the transfer system

On reception of the Commission's statement of objections, FIFA decided that it should conduct negotiations with the Commission on its own, without any assistance from UEFA.

FIFA took on its own the task of reforming the international transfer system. During 1999 and 2000 FIFA held talks with FIFPro but it did not present any formal alternative to the international transfer system challenged by the Commission.<sup>9</sup> The Commission's response to the governing bodies' perceived inaction came in the summer of 2000. The Commission gave FIFA a firm deadline of 31 October 2000 to come up with formal proposals to amend the international transfer system, threatening FIFA with a formal decision to both enforce changes

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<sup>5</sup> European Commission, European Commission (1996) *Sport and Free Movement, Bosman Case: Background Situation on the European Court's Decision in the Bosman Case*, 1996, 3, European Commission website. [http://ec.europa.eu/sport/sport-and/markt/bosman/b\\_bosman\\_en.html](http://ec.europa.eu/sport/sport-and/markt/bosman/b_bosman_en.html).

<sup>6</sup> The Commission considered problematic the payment of fees for international transfers within the EEA of players from third countries at the end of their contracts and the obligation imposed by FIFA and UEFA on national FAs to set up national transfer systems mirroring the one outlawed by the Court in *Bosman* (for more on that see European Commission (1996) *Sport and Free Movement, Bosman Case: Background Situation on the European Court's Decision in the Bosman Case*, European Commission website. [http://ec.europa.eu/sport/sport-and/markt/bosman/b\\_bosman\\_en.html](http://ec.europa.eu/sport/sport-and/markt/bosman/b_bosman_en.html). R. PARRISH, *Sports Law and Policy in the European Union*. Manchester, Manchester University Press, 2003, 140-142).

<sup>7</sup> European Commission, *Sport and Free Movement, Bosman Case: Background Situation on the European Court's Decision in the Bosman Case*, 1996, 4, European Commission website. [http://ec.europa.eu/sport/sport-and/markt/bosman/b\\_bosman\\_en.html](http://ec.europa.eu/sport/sport-and/markt/bosman/b_bosman_en.html).

<sup>8</sup> V. REDING, *Commission's Investigation into Fifa's Transfer Rules*, Statement to European Parliament, Strasbourg 7 September 2000. Speech/00/290. [http://europa.eu/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=SPEECH/00/290|0|RAPID&lg=EN](http://europa.eu/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/00/290|0|RAPID&lg=EN). European Commission (2002) *Commission Closes Investigations into Fifa Regulations on International Football Transfers*, European Commission Press Release. IP/02/824, 5 June 2002. <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/02/824&format=HTML&aged=1&language=EN&guiLanguage=en>.

<sup>9</sup> V. REDING, *Commission's Investigation into Fifa's Transfer Rules*, Statement to European Parliament, Strasbourg 7 September 2000. Speech/00/290. [http://europa.eu/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=SPEECH/00/290|0|RAPID&lg=EN](http://europa.eu/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/00/290|0|RAPID&lg=EN).

and, if necessary, impose fines.<sup>10</sup>

The new threat from the Commission provoked a reaction from UEFA, which considered that FIFA was on the brink of agreeing to an unacceptable liberalisation of the players' market in Europe. Thus, UEFA decided it should take more of a leading role in the negotiations with the Commission:

*We believe that a constructive and positive dialogue with the EC is both possible and necessary. We accept that change is inevitable but the form and pace of that change must be subject to a much wider dialogue than that conducted so far by FIFA with the world of professional football.*<sup>11</sup>

The Commission's pressure obliged the governing bodies to come up with solutions for a reform of the international transfer system. A Transfer Task Force with the participation of FIFA, UEFA, the players unions, and European professional leagues was set up under the chairmanship of Per Omdal, UEFA vice-president in charge of the relations with the EU.<sup>12</sup> FIFA, UEFA and the leagues represented in the Task Force agreed on a first set of proposals on 27 October 2000, which were then sent to the Commission.<sup>13</sup>

The Commission had a positive but cautious reaction to the proposals, which were considered 'a significant development after nearly two years of discussions'.<sup>14</sup> The Commission moderated its previously aggressive position. It conceded that it was ready to accept rules limiting transfers to a certain period during the season (the so-called transfer windows). It also recognised that 'stability of contracts is very important in this sector', starting to side with the governing bodies on this issue rather than with FIFPro. Finally, the Commission was prepared to consider the concept of 'training compensation fees'<sup>15</sup> designed to protect and encourage the training of young players.<sup>16</sup> The Commission

<sup>10</sup> R. PARRISH, *Sports Law and Policy in the European Union*. Manchester, Manchester University Press, 2003, 141.

<sup>11</sup> UEFA, *Uefa Comment on Transfer Speculation*, Media Release 176, 1 September 2000.

<sup>12</sup> UEFA, *Football Pledges New Dialogue on Transfers*, Media Release 179, 6 September 2000.

<sup>13</sup> M. BOSE, 'Players' Rift with Fifa Threatens Transfer Talks'. *The Daily Telegraph*, 28 October 2000, [www.telegraph.co.uk/sport/main.jhtml?xml=/sport/2000/10/28/sfnbos28.xml](http://www.telegraph.co.uk/sport/main.jhtml?xml=/sport/2000/10/28/sfnbos28.xml).

<sup>14</sup> European Commission, *Football Transfers: Commission Underlines the Prospect of Further Progress*, European Commission Press Release. IP/00/1417, 6 December 2000. [http://europa.eu/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=IP/00/1417/0|RAPID&lg=EN](http://europa.eu/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/00/1417/0|RAPID&lg=EN).

<sup>15</sup> Training compensation fees would replace the old transfer fees. Whereas the latter applied to the transfer of every player, the former would be restricted to the transfer of players under 23 years and would be set up following transparent criteria. Training compensation fees are supposed to be less restrictive and proportionate to the objective of protecting the training of young players. The training of youth players was recognised as a legitimate objective by the CJEU in *Bosman*: 'In view of the considerable social importance of sporting activities and in particular football in the community the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate' (*Bosman*: para. 106).

<sup>16</sup> European Commission, *Football Transfers: Commission Underlines the Prospect of Further Progress*, European Commission Press Release. IP/00/1417, 6 December 2000. [http://europa.eu/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=IP/00/1417/0|RAPID&lg=EN](http://europa.eu/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/00/1417/0|RAPID&lg=EN).

encouraged FIFA and UEFA to hold further discussions with FIFPro with a view to finding a negotiated compromise that could be subscribed to by all the parties.<sup>17</sup>

In 2001 the negotiations towards a final settlement gathered more pace. The Commission proposed a meeting at the highest level between the commissioners responsible for the negotiations and the presidents of FIFA and UEFA.<sup>18</sup> That meeting, held in Brussels on 14 February 2001, paved the way for a final agreement. The two sides realised that there was a common understanding, in principle, on important issues such as transfer windows, minimum and maximum duration of contracts and the principle of compensation for training costs.<sup>19</sup> The Commission let it be known that there were still some issues to be ironed out, but it was firmly committed to and optimistic of finding a final compromise before the end of February 2001.<sup>20</sup> Two further meetings between the Commission and FIFA and UEFA were held in February 2001 to clarify the technicalities of the remaining issues.<sup>21</sup>

The agreement was finalised on 5 March 2001 in another meeting between the Commissioners and the presidents of FIFA and UEFA.<sup>22</sup> Following the deal, the European Commission closed the investigation into the rules governing international transfers in June 2002.<sup>23</sup>

The settlement with the Commission required FIFA to amend its transfer regulations on the basis of the following points:<sup>24</sup>

- Training compensation fees to be allowed in the case of transfers of players under 23 years.
- The creation of one transfer period per season and a further limited mid-season window.
- Minimum and maximum contract duration would be 1 and 5 years respectively, except where national legislation provides otherwise.

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<sup>17</sup> European Commission, *Ibidem*.

<sup>18</sup> L'Equipe, 'Bruxelles Propose Une Rencontre Au Sommet'. *L'Equipe*, 2 February 2001.

<sup>19</sup> European Commission, *Joint Statement by Commissioners Monti, Reding and Diamantopoulou and Presidents of Fifa Blatter and of Uefa Johansson*, European Commission Press Release. IP/01/209, 1, 14 February 2001. [http://europa.eu/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=IP/01/209|0|RAPID&lg=EN](http://europa.eu/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/209|0|RAPID&lg=EN).

<sup>20</sup> European Commission, *Ibidem*.

<sup>21</sup> European Commission, *Outcome of Technical Discussion with Fifa/Uefa on Transfer Systems*, European Commission Press Release. IP/01/225, 16 February 2001. [http://europa.eu/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=IP/01/225|0|RAPID&lg=EN](http://europa.eu/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/225|0|RAPID&lg=EN). European Commission, *Discussion with Fifa/Uefa on Transfer Systems*, European Commission Press Release. IP/01/270, 27 February 2001. [http://europa.eu/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=IP/01/270|0|RAPID&lg=EN](http://europa.eu/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/270|0|RAPID&lg=EN).

<sup>22</sup> European Commission, *Outcome of Discussions between the Commission and Fifa/Uefa on Fifa Regulations on International Football Transfers*, European Commission Press Release. IP/01/314, 5 March 2001. <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/01/314&format=HTML&aged=1&language=EN&guiLanguage=en>.

<sup>23</sup> European Commission, *Commission Closes Investigations into Fifa Regulations on International Football Transfers*, European Commission Press Release. IP/02/824, 5 June 2002. <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/02/824&format=HTML&aged=1&language=EN&guiLanguage=en>.

<sup>24</sup> The FIFA Executive Committee adopted the new international transfer system in July 2001.

- Creation of solidarity mechanisms that would redistribute income to clubs involved in the training and education of football players.

The settlement falls short of a total liberalisation of the transfer market. It has been interpreted as a compromise between the initial positions of FIFA and the Commission, although it has been considered as beneficial for the governing bodies.<sup>25</sup> The agreement between the Commission and FIFA-UEFA was closed with an exchange of letters between Commissioner Mario Monti and FIFA President Joseph Blatter.<sup>26</sup> Although the Commission was happy to consider the proposals of FIFA, this does not mean that the new transfer system is legal under EU law. Neither the Commission, nor the CJEU have ruled on that matter, and it has been suggested that the new FIFA transfer system is still an obstacle to the free movement of players, hence illegal under EU law.<sup>27</sup> The Commission's informal endorsement (i.e. not legally binding) of the FIFA transfer system creates, thus, some legal uncertainty. On the one hand, it is clear that the new concept of training fees could be seen as an obstacle to a total freedom of movement. However, on the other hand it could be argued that the training fees pursue a legitimate objective and the restriction on the freedom of movement is proportionate to the objective. Logically, this debate can only be settled with a judgment of the CJEU, but for the moment this has not been possible.

Despite possible doubts about the legality of the 2001 agreement, the Commission seemed to be pleased with the outcome of this case. Its president, Romano Prodi, welcomed the result of the negotiations as a 'satisfactory solution that respected both the needs of football and also Community law'.<sup>28</sup> The Commission was especially happy to point out that they were able to engage 'in open and constructive dialogue leading to mutually satisfying solutions' with the football authorities.<sup>29</sup>

#### 4. *Positive reactions from football organisations*

The football governing bodies were equally satisfied with the agreement. FIFA

<sup>25</sup> R. Parrish, *Sports Law and Policy in the European Union*. Manchester, Manchester University Press, 2003, 147.

<sup>26</sup> European Commission, *Outcome of Discussions between the Commission and Fifa/Uefa on Fifa Regulations on International Football Transfers*, European Commission Press Release. IP/01/314, 5 March 2001. <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/01/314&format=HTML&aged=1&language=EN&guiLanguage=en>.

<sup>27</sup> J-C Drolet, 'Extra Time : Are the New Fifa Transfer Rules Doomed?'. *International Sports Law Journal*, no. 1-2, 2006, 66-74.

<sup>28</sup> European Commission, *Commission President Prodi Welcomes Outcome of Football Transfer Talks*, European Commission Press Release. IP/01/320, 6 March 2001. [http://europa.eu/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=IP/01/320|RAPID&lg=EN](http://europa.eu/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/320|RAPID&lg=EN).

<sup>29</sup> V. Reding, *The Reform of Fifa Rules Governing International Transfers*, Statement to the European Parliament, Strasbourg 13 March 2001. Speech/01/117. <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/01/117&format=HTML&aged=0&language=EN&guiLanguage=en>.

considered the settlement, 'very positive for football'.<sup>30</sup> FIFA President, Joseph Blatter expressed his satisfaction with the resolution of the negotiations:

*I am very happy about the finalisation of an agreement of principles between the European Commission and the football family (...) These amendments will provide for a very solid foundation for the future of the international game.*<sup>31</sup>

UEFA was equally satisfied with the negotiations with the Commission:

*It was a very good agreement, we are very happy with the outcome, but also with the way in which the negotiations ended, because I think we built some trust in both sides and this was important for the future.*<sup>32</sup>

In contrast with FIFA and UEFA, the footballers' union, FIFPro, was initially outraged with the agreement. FIFPro considered the outcome as a capitulation of the Commission before the governing bodies. FIFPro's strategy was initially to go to court in every EU country challenging the agreement between the Commission and FIFA.<sup>33</sup> FIFPro hired a familiar figure to orchestrate its legal response to the agreement: Luc Misson.<sup>34</sup>

However, FIFPro then entered into negotiations with FIFA and it agreed to withdraw the legal challenge in exchange for participating in the implementation of the new transfer system:

*FIFA and FIFPro are pleased to announce that they have reached agreement about FIFPro's participation in the implementation of FIFA's new regulations on international transfers of football players. As part of the overall agreement, the international union of football players will cease the legal challenges it had initiated against these new rules.*<sup>35</sup>

Some have argued that FIFPro was wrong to accept FIFA's offer because they had a very strong case to legally challenge the new transfer system, but for FIFPro's president Gordon Taylor it was more important to be on board the system:

*It is important for the game that FIFPro and FIFA work together. The world of football is changing, and we should make sure that commercial interests are given their proper place. Through closer cooperation we can achieve a better future for football. The*

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<sup>30</sup> FIFA, *Transfer Negotiations between European Commission and Football Organisations Finalised - Agreement over Principles Reached*, Media Release. 5 March 2001. [www.fifa.com/aboutfifa/federation/news/newsid=76699.html](http://www.fifa.com/aboutfifa/federation/news/newsid=76699.html).

<sup>31</sup> FIFA, *Ibidem*.

<sup>32</sup> Interview, UEFA senior official, February 2007.

<sup>33</sup> R. Parrish, *Sports Law and Policy in the European Union*. Manchester, Manchester University Press, 2003, 148.

<sup>34</sup> FIFPro, *Legal Procedure against Transfer System*. 29 May 2001. [www.fifpro.org/index.php?mod=one&id=2229](http://www.fifpro.org/index.php?mod=one&id=2229).

<sup>35</sup> FIFPro, *Joint Press Release of Fifa and Fipro*. 3 September 2001. [www.fifpro.org/index.php?mod=one&id=3316](http://www.fifpro.org/index.php?mod=one&id=3316).

*negotiations on international transfers have not been easy, but we appreciate FIFA's determination to keep the players on board.*<sup>36</sup>

Therefore, despite some problems, the actors involved in the dossier seemed to be satisfied with the outcome. There is a point that deserves further clarification, though. Which factors contributed to the speedy resolution of the dossier in just six months after years of problems between the Commission and the governing bodies?

##### 5. *A mediating political force: the intervention of Member States*

Although the reform of the transfer system was a negotiation between FIFA, UEFA and the Commission, a great deal of responsibility for the speed in which the negotiations moved after October 2000 can be attributed to the Member State governments'. In the hope of putting political pressure on the Commission, UEFA and FIFA skilfully lobbied national governments after the Bosman ruling to send a message about the risks that the Commission's liberalising efforts could have for football. The so-called sporting movement managed to introduce the issue of sport onto the agenda of the European Council but the only concrete results they achieved were two non-binding declarations attached to the Treaties of Amsterdam (1997) and Nice (2000). The *Amsterdam Declaration on Sport* was very short, just one paragraph. It seems a deference of the political leaders to the sporting organisations, but it nevertheless demonstrates that the issue of sport had arrived high in the EU political agenda:

*The Conference emphasises the social significance of sport, in particular its role in forging identity and bringing people together. The Conference therefore calls on the bodies of the European Union to listen to sports associations when important questions affecting sport are at issue. In this connection, special consideration should be given to the particular characteristics of amateur sport.*<sup>37</sup>

The *Nice Declaration on Sport* was longer than its Amsterdam precedent. It is of importance for our analysis here the timing of the declaration. In December 2000, it could not have been timed any better for FIFA and UEFA. As explained above, during the last months of 2000 and the beginning of 2001 the European Commission, FIFA and UEFA met several times to find an agreement on the reformed transfer system. The Nice Declaration is a three page document where the EU political leaders stressed the social and cultural role that sport has to play in European society; the European Council also invited the institutions to take into

<sup>36</sup> FIFPro, *Ibidem*.

<sup>37</sup> European Council of 1997 *Declaration No. 29, on Sport*, Attached to the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts.

account the specific characteristics of sport and collaborate with sports governing bodies when designing and applying their policies.<sup>38</sup> The Nice Declaration on Sport was sending a message to the Commission: the European Council expected, at the very least, the executive to be receptive to the positions of FIFA and UEFA.

But some EU political leaders did more than signing to the Nice Declaration, which at the end of the day is a relatively vague document, although interpreted in the context of the time it contained a clear message to the Commission. There were a few heads of state that showed special attention to the particular issue at hand in this paper: the future of football's transfer system. On 9 September 2000, the British Prime Minister Tony Blair and the German Chancellor Gerhard Schroeder published a joint statement that diplomatically supported UEFA and FIFA:

*The British and German Governments are concerned at the potential impact of proposed changes to the football transfer system. (...) The European Union has criticised the present system of transfer fees (...) We acknowledge the current system is not perfect. We fear however that a radical reform could have a negative impact on the structures of football in Europe. (...) We believe that any solution has to balance carefully the justified interests of both the players, the clubs and the associations. (...) We offer our help in seeking to resolve the issue. (...) We look to the Commission to be sympathetic to the special needs of professional football in seeking a solution.*<sup>39</sup>

Both leaders met again at an informal dinner in Berlin in January 2001, where they talked about 'continuing to work together to solve the problem surrounding the football transfer system'.<sup>40</sup> Blair and Schroeder issued a second joint statement in which they encouraged all the parties involved to work together towards a solution and they hoped for a quick settlement with the European Commission.<sup>41</sup> With this statement both leaders intended to send 'a strong signal of support that they regarded this an important matter which needed to be resolved'.<sup>42</sup> The British Prime Minister was quite active on the matter throughout the negotiations. He worked not only with Gerhard Schroeder, but also with the

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<sup>38</sup> European Council *Declaration on the Specific Characteristics of Sport and Its Social Function in Europe, of Which Account Should Be Taken in Implementing Common Policies*, Presidency Conclusions. Nice European Council, 7-9 December 2000. [www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/00400-r1.%20ann.en0.htm](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00400-r1.%20ann.en0.htm).

<sup>39</sup> Prime Minister's Office *Joint Statement by the Prime Minister the Right Honourable Tony Blair MP and Chancellor Gerhard Schroeder*. 9 September 2000. [www.pm.gov.uk/output/Page2855.asp](http://www.pm.gov.uk/output/Page2855.asp).

<sup>40</sup> Prime Minister's Office, *Press Briefing from the Prime Minister's Spokesman On: Election Spending, Northern Ireland, Keith Vaz/Hammond Inquiry/M16, Steel, Dome, Pm's Jacket and Schroeder/Europe*. 30 January 2001. [www.pm.gov.uk/output/page1982.asp](http://www.pm.gov.uk/output/page1982.asp).

<sup>41</sup> Prime Minister's Office, *Joint Statement by the Prime Minister and Chancellor Gerhard Schroeder*. 30 January 2001. [www.pm.gov.uk/output/Page2653.asp](http://www.pm.gov.uk/output/Page2653.asp).

<sup>42</sup> Prime Minister's Office (2001c) *Press Briefing from the Prime Minister's Spokesman On: Europe and Football Transfers*. 30 January 2001. [www.pm.gov.uk/output/page1983.asp](http://www.pm.gov.uk/output/page1983.asp).

governments of Spain, the Netherlands and Italy to demonstrate their disagreement with the Commission's initial plans of a thorough liberalisation of the football market.<sup>43</sup>

The involvement of Tony Blair and Gerhard Schroeder was the result of the lobbying efforts of UEFA and FIFA and the English and German FAs. When the negotiations with the Commission reached a critical point in 2000, UEFA intensified its lobbying strategy. UEFA requested its national associations to contact national leaders and it even sent the FAs sample letters that could be used for that purpose. Tony Blair, who was the most active of the national leaders, showed special concern for the effects that a liberalisation of the players market could have for smaller clubs in the Football League. One can only speculate about this, but it might be safe to assume that Blair could have seen in that a good political battle to fight. Certainly, football clubs in the lower leagues represent a major number of constituencies and Blair's siding with the governing bodies might pay political dividends.

The British Prime Minister also shared his concerns on the outcome of the negotiations with the Commission President, Romano Prodi, when they met on 15 February 2001.<sup>44</sup> Once the news of the settlement broke, Tony Blair was pleased with the outcome:

*This is very encouraging news. The agreement appears to meet all the concerns Chancellor Schroeder and I had to maintain stability and ensure the needs of all in the game, including smaller clubs, are met. I hope that matters can be concluded quickly.*<sup>45</sup>

The elements of the high level of activism on the part of significant EU Member States in this issue are out in the public, especially with the statements from Tony Blair and Gerhard Schroeder. It might be safe to assume that also some form of soft persuasion might have been going behind the scenes between the European Council and the relevant Commissioners, if not the Commission President of the time, Romano Prodi. It is of course debatable the extent to which the political pressure of the national governments contributed to the speedy resolution of the transfer system investigation. This is especially the case when the institutional setting of Competition policy clearly puts the Commission in control of the dossiers. On the other hand, academics have long recognised that competition law cases can be easily politicised.<sup>46</sup> One cannot empirically claim that the Member States

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<sup>43</sup> Prime Minister's Office, *Joint Statement by the Prime Minister and Chancellor Gerhard Schroeder*. 30 January 2001. [www.pm.gov.uk/output/Page2653.asp](http://www.pm.gov.uk/output/Page2653.asp).

<sup>44</sup> Prime Minister's Office, *Press Briefing from the Prime Minister's Spokesman On: Health/Pm's Speech, Dome, Prodi, 'Baby Bonds', Linford Christie/Lord Coe and Asylum*. 15 February 2001. [www.pm.gov.uk/output/page1948.asp](http://www.pm.gov.uk/output/page1948.asp) [Accessed 2-5-2007].

<sup>45</sup> Prime Minister's Office, *Press Briefing from the Prime Minister's Spokesman On: Northern Ireland, Football Transfers/Standing Terraces, Hammond, Foot-and-Mouth, PM's Environment Speech and Bruce Grocott*. 6 March 2001. [www.pm.gov.uk/output/page1901.asp](http://www.pm.gov.uk/output/page1901.asp).

<sup>46</sup> M. CINI AND L. MCGOWAN, *Competition Policy in the European Union*, Basingstoke, Macmillan, 1998.

forced the Commission to be receptive to FIFA and UEFA's arguments, but it is not possible to deny their influence either. We find here another instance of a regular occurrence in social sciences research, especially when dealing with policy-making processes. As John Kingdom correctly pointed out, it is almost impossible to identify a single source of origin in policy-making, but one can identify the dynamics that made a decision possible.<sup>47</sup>

In that respect, it is quite safe to affirm that the intervention of the Member States contributed heavily in favour of FIFA and UEFA to reach the informal settlement with the Commission in 2001. It was easier to demonstrate the effect that the Bosman ruling had on the Commission's initial behaviour in 1996, since the executive is bound to respect and protect Court's rulings. However, it is plausible to say that the political intervention of the national leaders influenced the Commission's new approach to football. The Commission, however, was adamant in the defence of its independence in the transfer system settlement:

*Despite considerable pressure from some senior government members, the Commission has held its ground in strict observance of its jurisdiction. As a result of this outcome, my colleague Mario Monti will not need to propose that the Commission adopt a negative decision concerning FIFA transfer rules.*<sup>48</sup>

Without disputing the Commission's independence, this remark by Viviane Reding in a statement to the European Parliament is indicative of the possible influence of the Member States in the Commission's strategy towards football. The transfer system dossier, however, was only the beginning of a long journey for football and the EU.

### *Conclusion*

The story of the 2001 Gentleman's agreement between the European Commission and FIFA is a very good example of the complex political dynamics at stake in the European Union. Even within the relatively stable context of competition policy, there is room for political manoeuvre, venue shifting and influence of other political actors. Richard Parrish pointed out that this is specially possible because of the scarce resources of the Commission, which will value reaching informal settlements without having to commit to further lengthy procedural stages.<sup>49</sup> The negative consequence of this, of course is a degree of legal uncertainty, as there is no formal endorsement of the international transfer system. Indeed, many legal scholars

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<sup>47</sup> J. W. KINGDON, *Agendas, Alternatives and Public Policies*. 2nd edition, New York, Harper Collins Publishers, 1995.

<sup>48</sup> V. REDING, *The Reform of Fifa Rules Governing International Transfers*, Statement to the European Parliament, Strasbourg 13 March 2001. Speech/01/117. <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/01/117&format=HTML&aged=0&language=EN&guiLanguage=en>.

<sup>49</sup> R. PARRISH, 'The Politics of Sports Regulation in the EU', *Journal of European Public Policy*, vol. 10, no. 2, 2003, 246-262.

and practitioners have long argued against the legality of the system sanctioned by the Commission in 2001, this is clearly explained elsewhere in this volume.

The 2001 agreement came six years after the Bosman ruling, and only when the European Commission opened formal proceedings against FIFA. The inaction of the governing bodies in this issue was in stark contrast with their quick reaction to lift nationality discrimination for EU/EEA players.

There were moments during the the negotiations, especially in the first months of 2000, when FIFA seemed eager to reach an agreement with FIFPro that would have liberalised to a large extent the players market. The intervention of the clubs and UEFA forced a change in FIFA's strategy. It has been argued that FIFA is naturally less inclined to consider professional clubs' preferences, for it is mostly interested in the organisation of national team competitions, whereas UEFA needs to keep the clubs onside to ensure the successful development of European club competitions.<sup>50</sup> But from September 2000 until the final agreement in March 2001 the negotiations moved progressively away from a real liberalisation of the system. Indeed, it was FIFPro probably the most dissatisfied actor with the final settlement, despite achieving some of its objectives. The footballers trade union was divided between those who wanted to push for greater liberalisation and a more pragmatic group that accepted minor concessions but some involvement in managing the new system.<sup>51</sup>

For those who seek to understand why the Commission agreed to the proposals by FIFA when it could have pushed for further reform, one of the explanations lies in the multi-level and multi-institutional nature of the European Union. The European Union is, by its own institutional nature, a multi faceted creature, whose multiple points of entry difficult coherent policy-making whilst, on the other hand, it facilitates access to a large number of actors.<sup>52</sup> Yet, access does not necessarily mean influence, as Greenwood<sup>53</sup> has correctly pointed out. In football issues, however, FIFA and UEFA are especially well suited to match the multi-level nature of the EU, because the governing bodies can draw on the resources of national FAs, whilst at the same time they can effectively build contacts in Brussels.<sup>54</sup> This combination of clever political manoeuvring and also an irresistible message set against the background of the social values of sport, was

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<sup>50</sup> GARCÍA, B., NIEMANN, A. AND GRANT, W. (2011) 'Conclusion: A Europeanised Game?', in A. Niemann, B. García and W. Grant (Eds) *The Transformation of European Football: Towards the Europeanisation of the National Game*. Manchester: Manchester University Press, 239-262.

<sup>51</sup> GARCÍA, B. AND MEIER, H. E. (2012) 'Abandoning hopes for Veto Power: Institutional Options for Sport's Governing Bodies in the EU'. *International Journal of Sport Policy and Politics*, vol. 4, no. 2.

<sup>52</sup> L. HOOGHE AND G. MARKS, 'Unravelling the Central State, but How? Types of Multi-Level Governance', *American Political Science Review*, vol. 97, no. 2, 2003, 233-243.

<sup>53</sup> J. GREENWOOD, *Interest Representation in the European Union*, Basingstoke, Palgrave-Macmillan, 2003.

<sup>54</sup> B. GARCÍA, 'Uefa and the European Union, from Confrontation to Co-Operation?', *Journal of Contemporary European Research*, vol. 3, no. 3, 2007, 202-223.

enough to convince powerful political leaders to set some pressure on the Commission for an agreement that could accommodate FIFA's demands to a large extent.

Thus, the story of the 2001 Gentleman's agreement is one where the art of politics and persuasion is as important as the hard facts of legal reasoning. This is not the first time, and probably it will not be the last, that politics and law meet in a sensitive dossier. The lessons from this case reinforce the argument that the European Commission struggles to dominate issues when they become high politics.<sup>55</sup> The political pressure of the Member States changed the direction of the negotiations and had an important effect on the final content of the agreement. Now, the European Commission has decided to review the international transfer system in view of the new reality of football and the development of EU sports law and policy. The Commission is now more at ease with the nuances of professional sport, but surely governing bodies will want to avoid another formal investigation. The future of the 2001 agreement is uncertain, mainly because it was, as explained, a political agreement rather than a legally sound solution to the problem.

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<sup>55</sup> S. PRINCEN AND M. RHINARD, 'Crashing and Creeping: Agenda-Setting Dynamics in the European Union', *Journal of European Public Policy*, vol. 13, no. 7, 2006, 1119-1132. B. GARCÍA, A. NIEMANN, AND W. GRANT, 'Conclusion: A Europeanised Game?', in A. Niemann, B. García and W. Grant (Eds) *The Transformation of European Football: Towards the Europeanisation of the National Game*. Manchester, Manchester University Press, 2011, 239-262. B. GARCÍA AND H. E. MEIER, 'Abandoning Hopes for Veto Power: Institutional Options for Sport's Governing Bodies in the Eu', *International Journal of Sport Policy and Politics*, vol. 4, no. 2, 2012.



**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**

by *Omar Ongaro\**

SUMMARY: 1. Introduction – 1.1 General remarks – 1.2 The nature and the activity of the Dispute Resolution Chamber – 2. The various provisions of the Regulations on the Status and Transfer of Players pertaining to the stability of contracts – 2.1 General principles in accordance with contractual (labour) law – 2.1.1 Respect of contract – 2.1.2 Terminating a contract with just cause – 2.1.3 Terminating a contract without just cause – payment of compensation – 2.2 Particularities of the Regulations on the Status and Transfer of Players – 2.2.1 Sporting sanctions – 2.2.2 Joint liability of the new club for the payment of compensation due by the player – 2.2.3 Inducement to breach of contract by the new club – 2.2.4 Sporting just cause – 2.2.5 Calculation of the compensation due in case of terminating a contract without just cause – 3. The relevant case law of the Dispute Resolution Chamber – 3.1 Existence of just cause / Breach of contract (no just cause) – 3.1.1 General remarks – 3.1.2 The most frequent constellations – 3.2 Financial compensation in case of terminating a contract without just cause – 3.2.1 General remarks – 3.2.2 Calculation of compensation in case of termination of contract without just cause by a player – selected criteria – 3.2.3 Calculation of compensation in case of termination of contract without just cause by a player – older affairs – 3.2.4 Joint and several liability of the new club – 3.3 Sporting sanctions – 3.3.1 General rule in case of sporting sanction imposed on the player – 3.3.2 Sporting sanction impossible on the player in case of aggravating circumstances – 3.3.3 Rule in case of sporting sanction imposed on the club for breach of contract or inducement to breach of contract – 3.4 Sporting just cause – 4. Final remarks

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\* The position expressed in this short article reflects the personal opinion of the author and does not necessarily correspond to the official position of the Fédération Internationale de Football Association (FIFA). Furthermore, the author would like to thank Mr Jan Kleiner, Legal Counsel within the Players' Status and Governance Department of FIFA's Legal Affairs Division for his valuable assistance in gathering the information and details pertaining to the existing case law of the Dispute Resolution Chamber.

## 1. Introduction

Both, the principle of maintenance of contractual stability between professional football players and clubs as well as the Dispute Resolution Chamber (DRC) were included in the Regulations for the Status and Transfer of Players of FIFA (hereinafter: *the Regulations*) and implemented within FIFA's regulatory framework in September 2001,<sup>1</sup> following the agreement reached in March 2001 between the joint FIFA/UEFA delegation and the European Commission on the principles that should form the basis of the international transfer rules in order to make them compatible with European law. This short essay aims at briefly referring to the various provisions of the Regulations pertaining to the stability of contracts currently in place<sup>2</sup> and, furthermore, on the basis of some selected litigations, at illustrating the existing case law of the DRC.

### 1.1 General remarks

Despite its formal creation and implementation in September 2001, it took a bit of time for the DRC to gain on speed and to achieve the currently undisputed high importance and recognition within FIFA's dispute resolution system. The first official working meeting of the DRC took place on 22 November 2002, i.e. more than one year after its formal implementation in the Regulations, and had the modest amount of two litigations on its agenda. In 2003 the DRC convened already on four occasions passing decisions with respect to 49 disputes. And then the evolution took its well-known course with the workload of the DRC rapidly increasing and requiring its members to convene more and more frequently. In the year 2010 the DRC (and the DRC judges) held 13 sessions, i.e. more than one session per month, and passed 350 decisions with respect to disputes falling within their competence. For the time being, these are the highest figures ever reached.

To remain within the field of statistics, and just on a side note aiming at completing the picture, it might be interesting to know that approximately 15-20% of all decisions taken by the DRC (or its single judges) are being appealed at the Court of Arbitration for Sport (CAS). However, only a few of these appeals are actually accepted and mostly just on minor points. But obviously, as it is always the case in such matters, the public attention focuses on that minority of the decisions.

It certainly is one of the outstanding values and an important strength of the DRC that all of its members, player and club representatives, are fully aware of their role when called to decide on a specific dispute. Only their generally open-

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<sup>1</sup> Cf. art. 21 et seqq. of the 2001 edition of the Regulations and art. 12 and 13 of the Regulations governing the Application of the 2001 edition of the Regulations (contractual stability) as well as art. 42 para. 1 (b) of the 2001 edition of the Regulations and art. 15 et seqq. of the Regulations governing the Application of the 2001 edition of the Regulations (DRC).

<sup>2</sup> Art. 13 to 17 of the 2010 edition of the Regulations.

minded and cooperative approach makes it possible for the chamber to operate in a fruitful and constructive atmosphere. It is certainly not by coincidence that with very few exceptions, which can probably be counted on one hand, the DRC passed all of its decisions unanimously. This does, however, in no way mean that intensive exchange, long and at times even passionate discussions or insistent defence of a certain position do not find their place on the occasion of the meetings of the DRC. But at the end of the debate, normally a common understanding is found and a decision passed which, in the eyes of all the participating members of the DRC, takes into account the entirety of the relevant considerations and is appropriate and justified.

For those following with attention the jurisprudence and evolution of the legal aspects of the game, it will certainly not come as a surprise that of all disputes that fall within the competence of the DRC,<sup>3</sup> the most intensive debates and longest discussions arise in relation to aspects pertaining to the maintenance of contractual stability between professional players and clubs, and here in particular, when it comes to the calculation of the compensation payable for the premature termination of a contract without just cause by one or the other party. Indeed, one may rightly claim that these are the most controversial aspects of the entire Regulations when it comes to their application.

### *1.2 The nature and the activity of the Dispute Resolution Chamber*

The DRC is a unique institution for an international sports organisation and ensures that employment-related disputes between professional players and clubs are dealt with and decided upon by a body which, like ordinary labour courts, respects the principle of equal representation of players and clubs.

Abiding by the abovementioned principle, the chamber consists of equal numbers of club and player representatives and an independent chairman.<sup>4</sup> Currently it comprises 24 members – 12 club and 12 player representatives – as well as its chairman. The chairman, deputy chairman (currently vacant) and members of the DRC are chosen by the FIFA Executive Committee, whereby the members are appointed on the proposal of the players' associations and the clubs or leagues.<sup>5</sup> All the members of the chamber, including its chairman, are designated for a term of office of four years and may be re-appointed. Equally, they may be relieved of their duties at any time.

With respect to the activity of the DRC, as already mentioned, currently it operates at a rhythm of at least one meeting per month. It adjudicates in the presence of at least three members (one club and one player representative as

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<sup>3</sup> 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 Regulations.

<sup>4</sup> Cf. art. 24 para. 2 and 3 of the Regulations.

<sup>5</sup> Cf. art. 4 of the Rules governing the procedures of the Players' Status Committee and the Dispute Resolution Chamber.

well as the chairman or deputy chairman), unless the case is of such a nature that it may be dealt with by a DRC judge (cf. the relevant enumeration of competences in art. 24 par. 2 i) – iii) of the Regulations).<sup>6</sup> In practice, the chamber normally sits in the presence of five of its members (two club and two player representatives as well as the chairman). The members for a specific meeting of the DRC are summoned following a rotation principle and taking into consideration their availability, the language of the files of the disputes to be submitted for consideration and a formal decision and, as far as possible, also the various nationalities of the parties involved in the disputes to be dealt with during a concrete meeting. The parties to a dispute are informed in advance of the composition of the chamber that will deal with their case so as for them to have the opportunity to possibly challenge one of the members if they deem it appropriate. In the latter case, the DRC shall reach a decision on the challenge in the absence of the member concerned.<sup>7</sup> To this day, no such decision has ever been necessary since, normally, in case of a challenge the member concerned withdraws from the panel of his own free will.

To conclude with this introductory part and prior to addressing the various provisions of the Regulations relating to the maintenance of contractual stability between professional players and clubs, it appears to be appropriate to point out certain specific aspects of the activity and the nature of the DRC, which are of importance in order to better understand the background of its decisions, in particular, if their content is compared to a possible decision of CAS following the pertinent appeal arbitration procedure. Yet, it should also once again be emphasised that, despite this particularities, only very few of the decisions passed by the DRC are being amended by CAS.

The first two aspects to be mentioned, concern procedural issues. Firstly, contrary to the procedure at CAS, as a general rule, proceedings before the DRC are conducted exclusively in writing.<sup>8</sup> Considering the very high number of disputes having to be adjudicated by the chamber on the occasion of every single one of its meetings, this procedural rule is an absolute must in order to guarantee the proper functioning of the DRC. As a result, as opposed to the arbitration procedure at CAS, where a hearing is regularly convened,<sup>9</sup> the parties to a dispute are not invited to a hearing in front of the members of the DRC. Secondly, in case of an appeal at CAS, the panel in charge of the relevant arbitration procedure typically has a wider range of documents and information at its disposal than the DRC at the time of taking its decision. This is mainly due to the fact that the party deciding to appeal a decision of the chamber in front of CAS will try to provide the panel with additional documentary evidence in support of its position, while having the

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<sup>6</sup> Cf. art. 24 para. 2 of the Regulations.

<sup>7</sup> Cf. art. 7 para. 2 of the Rules governing the procedures of the Players' Status Committee and the Dispute Resolution Chamber.

<sup>8</sup> Cf. art. 8 of the Rules governing the procedures of the Players' Status Committee and the Dispute Resolution Chamber.

<sup>9</sup> Cf. art. R57 para. 1 and 2 of the Code of Sports-related Arbitration and Mediation Rules.

possibility to specifically address the motivations and considerations of the DRC.

Such line of action is pandered by the Code of Sports-related Arbitration and Mediation Rules, according to which the panel shall have full power to review the facts and the law.<sup>10</sup> These two differences in the proceedings before the DRC and the CAS may obviously have an impact on the appreciation of a concrete matter and consequently, may lead to (partially) different conclusions. However, please be once again reminded that in the vast majority of the affairs, CAS confirms the decisions of the DRC in their entirety.

One last point that should also be mentioned is the fact that, contrary to the arbitrators at CAS, which all need to be personalities with full legal training,<sup>11</sup> not all the members of the DRC have a legal education. In fact, only the chairman and the deputy chairman of the chamber are required to be qualified lawyers.

This particularity, which at first sight might give reason to some amazement, is actually a common circumstance also for ordinary labour courts, at least in Switzerland. In the latter country, the organisation of the courts, like many other procedural aspects, is governed at cantonal level. In the canton of Zurich, the pertinent act is the “*Act on the organisation of courts and public authorities*” (loose translation).<sup>12</sup>

§ 12 of the relevant act governs the line-up of the labour court by means of the so-called “*assessors*” (loose translation – “*Beisitzer*”). The latter may be, but do not necessarily need to be, laymen, i.e. personalities without legal education, of which half must be representatives of the employers and half representatives of the employees (principle of equal representation).<sup>13</sup> The “*assessors*” are appointed by public voting.

When called to judge on a specific employment-related dispute, which falls under the competence of a panel of the labour court, in practice the court will adjudicate in the presence of a president and two “*assessors*”, i.e. one representative of the employers and one representative of the employee’s.<sup>14</sup> In this respect it has to be emphasised that, despite the pertinent act not explicitly mentioning it, the president always needs to be a personality with full legal training.

The members of the DRC all have a profound knowledge of the Regulations, can prove a wide experience with respect to the administration of football, in particular, as regards transfers and the relationship between professional players and clubs, and have a recognised competence and distinct understanding of the different mechanisms that play a key role when it comes to contractual relations between clubs and professional players. They all have been involved in the pertinent business for several years. All of these elements make of each member

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<sup>10</sup> Cf. art. R57 para. 1 of the Code of Sports-related Arbitration and Mediation Rules.

<sup>11</sup> Cf. art. S14 of the Code of Sports-related Arbitration and Mediation Rules.

<sup>12</sup> “*Gesetz über die Gerichts- und Behördenorganisation (GOG)*”: [www2.zhlex.zh.ch/appl/zhlex\\_r.nsf/0/C9C6078FD1A80A6EC12577E1004794E5/\\$file/211.1\\_10.5.10\\_71.pdf](http://www2.zhlex.zh.ch/appl/zhlex_r.nsf/0/C9C6078FD1A80A6EC12577E1004794E5/$file/211.1_10.5.10_71.pdf).

<sup>13</sup> Cf. § 12 para. 2 GOG.

<sup>14</sup> Cf. § 15 para. 1 GOG.

of the DRC a personality with high competence in the area of relevance, allowing them to cope perfectly with the requirements of their position as a member of the chamber. It is probably for this precise reason that, compared with the reasoning of the various panels of CAS, the decisions of the DRC may appear to be mainly resting upon the principles contained in the Regulations and general legal principles rather than on specific provisions of contractual and civil law. However, the fact that, as already reiterated on various occasions, the decisions passed by the chamber normally stand in front of CAS, despite the latter possibly coming from a slightly different perspective, is best proof for the quality of the work performed by the DRC and all of its members.

## 2. *The various provisions of the Regulations on the Status and Transfer of Players pertaining to the stability of contracts*

### 2.1 *General principles in accordance with contractual (labour) law*

If in September 2001 you had asked somebody familiar with the legal framework in place in the “pre-Bosman” era<sup>15</sup> about the contents of the Regulations relating to the maintenance of contractual stability between professional players and clubs, he or she would certainly have answered you that the new concept was a revolution. Yet, if you ask somebody who has not been influenced by the previously existing transfer system and has some knowledge of contractual and/or labour law to comment on the current provisions of the Regulations pertaining to the stability of contracts,<sup>16</sup> that person will immediately recognise that many of the fundamental aspects addressed in the relevant section of the Regulations simply reflect general principles of contractual and labour law.

#### 2.1.1 *Respect of contract*<sup>17</sup>

The first provision of Chapter IV. of the Regulations recalls the absolutely central principle of contractual stability and contractual law – “*pacta sunt servanda*”.

<sup>15</sup> Reference shall be made in particular to the Regulations for the Status and Transfers of Players in place between 1991 and 1 September 2001, which did not, or only to a quite limited extent (cf. in particular, art. 14 of the 1997 edition of the Regulations), take into account the conclusions of the Bosman ruling: *Union Royale Belge des Sociétés de Football Association ASBL & others v. Jean-Marc Bosman*; Case C-415/93, [1995] ECR I-4921.

<sup>16</sup> The wording of the pertinent provisions of the 2001 edition of the Regulations (cf. art. 21 et seqq. of the 2001 edition of the Regulations and art. 12 and 13 of the Regulations governing the Application of the 2001 edition of the Regulations) significantly differed from the current wording of the articles concerned (cf. art. 13 to 17 of the 2010 edition of the Regulations). However, the fundamental principles and the substance of the relevant provisions have remained unchanged. The current text was implemented in the Regulations on 1 July 2005 and has, except from very few adaptations, remained unchanged to date.

<sup>17</sup> Art. 13 of the Regulations.

Like any other contract concluded for a predetermined period of time,<sup>18</sup> a contract between a professional player<sup>19</sup> and a club may only be terminated upon ordinary expiry of the term of the contract or by mutual agreement. *A contrario*, it is inherent to the wording of the article concerned that at the end of the stipulated contractual duration, or following the termination of the contract by mutual agreement, both parties are no longer bound one to the other and are free to look for new engagements without the need of the approval or any authorisation of the other party.

### 2.1.2 Terminating a contract with just cause<sup>20</sup>

Apart from stipulating another implicitness of contractual law, art. 14 of the Regulations is the first one to neatly illustrate a further central element of the provisions of the Regulations pertaining to the maintenance of contractual stability between professional players and clubs. The relevant section of the Regulations is based on the principle of reciprocity. In other words, the same behaviour (or misbehaviour) shall, *mutatis mutandis*, lead to the same consequences, independently of the responsible party (player or club).

Abiding by the aforementioned principle, and while referring to a well-established principle of contractual law, art. 14 of the Regulations states that a contract may be terminated by either party without consequences of any kind where there is a just cause.

Whether a just cause for the early termination of a contract signed between a professional player and a club is given or not must, in case of a dispute, be assessed while considering all specific and particular circumstances of the concrete case. Consequently, it is not possible to provide a straightforward list of occurrences that constitute just cause. Yet, in abstract terms, only a breach of the contractual obligations by one party which is of a certain severity justifies termination of a contract without prior warning by the other party. Moreover, just cause is generally to be considered as given when there are objective criteria which do not reasonably permit expectation of a continuation of the employment relationship between the parties.<sup>21</sup>

Consequently, should, for example, a player intend to prematurely terminate his contract claiming that he has just cause, and should the club object to such reasoning, it will be up to the competent deciding authority that will have to deal with the specific dispute, to assess the matter, taking into account all particularities

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<sup>18</sup> It is a feature of contracts concluded between professional players and clubs that they always run for a predetermined period of time (cf. art. 18 para. 2 of the Regulations). The whole concept behind the provisions relating to the maintenance of contractual stability is based on that fundamental condition.

<sup>19</sup> A player who has a written contract with a club and is paid more for his footballing activity than the expenses he effectively incurs (cf. art. 2 para. 2 of the Regulations).

<sup>20</sup> Art. 14 of the Regulations.

<sup>21</sup> Cf. CAS 2008/A/1517, para. 56, with reference to CAS 2006/A/1180, para. 8.4.

and specificities of the concrete case at stake, including, in particular but not limited to, all given circumstances and the stance of the parties.

Bearing in mind the just mentioned considerations, one may conclude that, as a general rule, for a party to have a just cause to early terminate a contract, the other party needs to have seriously neglected its own contractual obligations. As a result, the fact that the party prematurely terminating a contract with just cause will not suffer consequences of any kind obviously does not mean that the counterparty will also remain free from any possible liability. On the contrary, normally and at the request of the party having put an end to the contractual relation with just cause, the counterparty will be required to pay compensation<sup>22</sup> and possibly, also sporting sanctions will be imposed on it.<sup>23</sup> In other words, creating or setting a valid reason for the other party to early terminate the contractual relation by seriously neglecting contractual obligations, is, *mutatis mutandis*, regarded as the equivalent to having personally terminated the relevant contract without just cause.

### 2.1.3 *Terminating a contract without just cause – payment of compensation*<sup>24</sup>

Once again, it fully corresponds to a well-established and recognised fundamental principle of contractual law that a party in breach of a contract shall pay compensation to the other party concerned. Art. 17 par. 1 of the Regulations does, in its first part, simply take up this concept, while once again abiding by the principle of reciprocity.

It is commonly known that the principle as such is recognised also amongst the various stakeholders of the world of football. However, as it is so often, the devil is in the details and so it is here specifically when it comes to calculating the compensation that should become payable. That point is the source for so many intensive discussions, not only at DRC and CAS level, but also amongst player and club representatives, officials and lawyers. Without pretending to be exhaustive and within the limits of the scope to be covered by the present article, the issue of the calculation of the compensation due in case of terminating a contract without just cause will be address in this short essay later on (cf. point 2.2.5 below).

## 2.2 *Particularities of the Regulations on the Status and Transfer of Players*

As shown in the preceding paragraphs, with respect to the maintenance of contractual stability between professional players and clubs the Regulations follow a basic structure that is fully in line with the principles of contractual (labour) law. Contracts need to be respected, if a party has a just cause it may proceed to

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<sup>22</sup> Art. 17 para. 1 of the Regulations.

<sup>23</sup> Art. 17 paras. 3 and 4 of the Regulations.

<sup>24</sup> Art. 17 para. 1 of the Regulations.

prematurely terminate the contract without suffering any consequences whatsoever and finally, if a party terminates a contract without just cause it will in all cases be liable to pay compensation to the respective counterparty.

Besides this set of elements, the pertinent chapter of the Regulations contains also a series of further essential components which take into consideration the particularities and the specificity of the relation between a professional player and a club. In this regard, it appears to be of particular importance to emphasise that all of the relevant elements were introduced in the Regulations in September 2001 following the exchange and intensive discussions that the joint FIFA/UEFA delegation had with the European Commission on the acceptance of the transfer rules established by FIFA and which ultimately led to the agreement reached between the aforementioned parties in March 2001. Within the scope of the aforementioned process, FIFA held repeated consultation meetings with the various interested stakeholders, most notably the member associations, clubs as well as player representatives (FIFPro). The particularities to be incorporated in the Regulations with respect to the maintenance of contractual stability obviously formed part of the most discussed topics. But finally, the various components that eventually found their way into the Regulations,<sup>25</sup> and which will be addressed one by one in the following paragraphs, were, to some extent as part of a wider compromise, supported by the general agreement of all the interested stakeholders, a fact that obviously contributes to enhance their legitimacy and appropriateness.

### *2.2.1 Sporting sanctions<sup>26</sup>*

As already exposed, in all cases, the party (player or club) found to be in breach of a contract shall pay compensation to the counterparty. Yet, considering the paramount importance rightly given by the Regulations to the maintenance of contractual stability, it was considered appropriate to provide for a mechanism that would further strengthen the relation between a professional player and his club and serve as a supplementary deterrent for clubs and players (reciprocity) to unilaterally terminate their contracts without just cause.

On the basis of reasonable considerations, the means chosen directly affects the sporting activity of both, players and clubs. However, within the spirit of proportionality, it was also deemed appropriate to limit the application of such additional measures to the first part of the duration of the contract of a professional

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<sup>25</sup> The relevant elements are: sporting sanctions and the introduction of the protected period (cf. art. 17 para. 3 and 4 as well as point 7 of the Definitions section of the Regulations); the joint liability of the new club for the payment of compensation for unjustified breach of contract that a professional player may be required to pay to his former club (cf. art. 17 para. 2 of the Regulations); the responsibility of a club inducing a player to breach the contract with his former club (cf. art. 17 para. 4 of the Regulations); the introduction of the sporting just cause (cf. art. 15 of the Regulations); the objective criteria for the calculation of the compensation due in case of termination of a contract without just cause (cf. art. 17 para. 1 of the Regulations).

<sup>26</sup> Art. 17 para. 3 and 4 of the Regulations.

player. In fact, a general agreement was found to defend contractual stability throughout the duration of a contract, but particularly and with all rigour for a certain period of time at the beginning of the pertinent contractual relation.

In this respect, it is worth reaffirming that the principle of the maintenance of contractual stability represents a crucial theme of the agreement between FIFA/UEFA and the European Commission reached in March 2001. This agreement and its pillars represent the core of the Regulations. By means of the relevant provisions, the DRC, as you will remember a deciding authority composed of an equal number of representatives of players and of clubs, is asked to sanction the party that it considers responsible for the unilateral breach of an employment contract without just cause, in order to reinforce the essential principles of the Regulations.<sup>27</sup> The sanction must serve as a reminder to the faulty party that its conduct will not be tolerated in the world of football as well as to ensure that other members of the football family will reconsider before damaging someone with such conduct.

The important supplementary deterrent was implemented in the Regulations in the form of sporting sanctions.

As far as players are concerned, in addition to the obligation to pay compensation, sporting sanctions shall also be imposed on any player found to be in breach of a contract. This sanction shall be a four-month restriction on playing in official matches, and in the case of aggravating circumstances the restriction shall last six months.<sup>28</sup>

As far as clubs are concerned, in addition to the obligation to pay compensation, sporting sanctions shall also be imposed on any club found to be in breach of a contract. The club shall be banned from registering any new players, either following a national or an international transfer, for two entire and consecutive registration periods.<sup>29</sup> It goes without saying that the imposition of such a registration ban is a strong sanction for the club, since it has a direct impact on the competitiveness of the club in national and international club competitions.

However, as already mentioned, the application of the sporting sanctions is limited to a specific period of the contract, i.e. to the so-called protected period.

The protected period is *“a period of three entire seasons or three years, whichever comes first, following the entry into force of a contract, where such contract is concluded prior to the 28<sup>th</sup> birthday of the professional, or two entire seasons or two years, whichever comes first, following the entry into force of a contract, where such contract is concluded after the 28<sup>th</sup>*

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<sup>27</sup> The DRC is the competent deciding body when it comes to disputes between clubs and professional players in relation to the maintenance of contractual stability in connection with a request for an international transfer certificate (ITC) as well as, as a general rule, for employment-related disputes between a club and a player of an international dimension (cf. art. 24 para. 1 in combination with art. 22 lit. a) and b) of the Regulations).

<sup>28</sup> Cf. art. 17 para. 3 of the Regulations.

<sup>29</sup> Cf. art. 17 para. 4 of the Regulations.

*birthday of the professional*".<sup>30</sup>

Consequently, and as explicitly stated in the pertinent provisions of the Regulations, in addition to being liable for the payment of compensation for breach of contract, players and clubs will possibly suffer sporting sanctions<sup>31</sup> only if the relevant unjustified termination of the contract in question occurred during the protected period. In summary: if the contract is terminated, either by the professional player or by the club, without just cause during the protected period, then the consequence for the faulty party will be to be obliged to pay compensation and in addition, the possible imposition of sporting sanctions. If, however, the breach occurs after the protected period, sporting sanctions do not need to be taken into consideration anymore.

With respect to the protected period it is finally of importance to state that the protected period starts again when, while renewing the contract, the duration of the previous contract is extended.<sup>32</sup>

To conclude with the brief exposition pertaining to the sporting sanctions, it is indispensable to stress that the premature termination of a contract without just cause is always inadmissible. Therefore, any statement or allegation that after the end of the protected period a player (or a club) has a right to terminate his (its) contract must vehemently be rejected. The early termination of a contract without just cause is always a breach of contract, independently of whether it occurs during or after the protected period. The only difference is to be found in the consequences of such illegitimate behaviour. If the breach occurred during the protected period, then besides obliging it to pay compensation, sporting sanctions might be imposed on the faulty party. Should the breach, however, occur after the protected period, solely compensation will become payable.

### 2.2.2 *Joint liability of the new club for the payment of compensation due by the player*<sup>33</sup>

Whenever a professional player has to pay compensation to a club for having prematurely terminated a contract without just cause, the new club for which the

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<sup>30</sup> Cf. point 7 of the Definitions section of the Regulations.

<sup>31</sup> Although the wording of the Regulations seems to indicate that in case of termination of a contract without just cause during the protected period the imposition of sporting sanctions on the player or the club respectively is mandatory, in its constant and well-established jurisprudence the DRC considers to have a certain margin of discretion with respect to this question, and at times renounces to the imposition of sporting sanctions, on both players and clubs, despite the breach having occurred during the protected period. Yet, the discretion is limited to deciding whether or not to impose sporting sanctions. In case the DRC concludes to impose sporting sanctions, it cannot go below the sanction provided for in the Regulations and, for example, suspend the player only for a period of 3 months or impose a registration ban on the club covering one registration period only.

<sup>32</sup> Cf. art. 17 para. 3, *in fine*, of the Regulations.

<sup>33</sup> Art. 17 para. 2 of the Regulations.

professional player registers after the contractual breach will be jointly and severally liable for the payment of the relevant compensation. According to the well-established and constant jurisprudence of the DRC based on the current structure of the chapter of the Regulations governing the maintenance of contractual stability and the wording of the provision in question,<sup>34</sup> this is an automatic consequence. The new club will be responsible, together with the player, for paying compensation to the former club, regardless of any involvement or inducement to breach the contract. The consistent approach of the DRC has been confirmed by the CAS on various occasions.<sup>35</sup>

Obviously, the pertinent provision is to the benefit of the players. It takes into account that a club that is willing and ready to sign a contract with a player, who has left his previous club prior to the ordinary expiry of his contract without valid reason and without reaching a mutual agreement with said club, although possibly not having directly influenced the player's decision, was nevertheless all set to acquire the services of the player. In other words, the new club was in any case interested in the player. Consequently, had it proceeded in accordance with the appropriate and habitual course of action, it would have contacted the player's previous club in order to negotiate the transfer of the player,<sup>36</sup> and would have had to pay the transfer compensation agreed upon with the player's former club, subject to both clubs and the player finding a common understanding on the terms of the player's move to a new club prior to the end of his contract with his previous club.

Despite the abovementioned considerations, it appears essential to emphasise that the main and primary debtor for the payment of the compensation due for the committed contractual breach is and remains the professional player. Equally, it needs to be pointed out that when establishing the amount of compensation due, the DRC never takes into account the fact that the new club of the player will in any case be jointly and severally liable for its payment. In other words, the relevant compensation is and will always be exclusively calculated on the basis of the damage caused by the professional player having terminated his contract prematurely and without just cause and his behaviour in this respect.<sup>37</sup>

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<sup>34</sup> The current structure and wording of art. 17 para. 2 of the Regulations came into force on 1 July 2005. In the 2001 edition of the Regulations the format was a different one. While under the current wording the joint liability of the new club for the payment of compensation due by the professional player to his previous club automatically arises with the decision obliging the professional player to pay compensation, the 2001 edition of the Regulations stated that the professional player would have to pay the due compensation within one month. If the player was registered for a new club and had not paid the due compensation within the mentioned one month time limit, only then the new club was deemed jointly responsible for the payment of the relevant compensation (cf. art. 14 para. 2 and 3 of the Regulations governing the Application of the 2001 edition of the Regulations).

<sup>35</sup> Cf., amongst others, CAS 2006/A/1075 Al Dhafra v/Zakaria & F.C. Istres; CAS 2006/A/1141 Moises Moura Pinheiro v/FIFA & PFC Krilja Sovetov; CAS 2007/A/1298 Wigan Athletic FC v/Heart of Midlothian, CAS 2007/A/1299 Heart of Midlothian v/Webster & Wigan Athletic FC, CAS 2007/A/1300 Webster v/Heart of Midlothian.

<sup>36</sup> In this regard, cf. art. 18 para. 3 of the Regulations.

<sup>37</sup> For more details with respect to the calculation process, cf. point 2.2.5 below.

### 2.2.3 *Inducement to breach of contract by the new club*<sup>38</sup>

Another important particularity of the provisions pertaining to the maintenance of contractual stability of the Regulations concerns the responsibility of a club that induces a player to breach his contract with his former club. It goes without saying that such stance is inadmissible and can by no means be accepted. Certainly, the premature termination of an existing contract without just cause undermines the principle of contractual stability. But, doubtlessly, the same goes for the totally unjustifiable conduct of a club, which being interested in the services of a professional player approaches the latter with the aim of persuading him to terminate his existing contractual relation without any valid reason at all.

It was therefore of paramount importance for FIFA to also address such situation with appropriate means in the Regulations, in order to be able to properly safeguard the principle of maintenance of contractual stability, which, as already repeatedly mentioned, represents a crucial theme of the agreement between FIFA/UEFA and the European Commission reached in March 2001 and is one of the pillars if not the actual core of the Regulations.

Sporting sanctions shall therefore be imposed also on any club found to have induced a breach of contract. The nature of the sanction is the same as for a club having terminated a contract without just cause, i.e. the club shall be banned from registering any new players, either following a national or an international transfer, for two entire and consecutive registration periods.

The inducement to a breach of contract is accessory to the actual breach. This fundamental principle leads to two main conclusions. Firstly, where there is no claim for breach of contract against a professional player there cannot be a claim for inducement to such a breach against any club. In other words, it is not possible to pursue an action against the new club only, without claiming the breach of contract committed by the professional player. Secondly, and as explicitly stated in the Regulations, the relevant sporting sanction may only be imposed on the new club that induced a contractual breach if the termination of contract without just cause by the professional player occurred during the protected period. In fact, it would not appear to be appropriate to sanction the instigator more severely than the party actually committing the breach. And, as already exposed at an earlier stage, sporting sanctions against a player early terminating his contract without just cause, may only be imposed if the breach occurred during the protected period.<sup>39</sup>

So as to further foster the deterrent effect on any club possibly considering inducing a professional player to breach his contract, the relevant provision of the Regulations contains a regulatory presumption which leads to the reversal of the burden of proof. In fact, it is to be presumed, unless established to the contrary, that any club signing a professional player who has terminated his contract without just cause has induced that professional player to commit a breach. In other words,

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<sup>38</sup> Art. 17 para. 4 of the Regulations.

<sup>39</sup> Cf. Art. 17 para. 3 of the Regulations.

it is not up to the former club to prove the inducement, but it is rather the responsibility of the new club to provide evidence that, despite having signed the professional player, it did not induce the latter to the breach. By means of this construction, additional burden is imposed on any potential new club, with the aim of having any possible thought about inducement to breach of contract duly reconsidered.

Finally, and for the sake of good order, it should be reminded that the possible imposition of sporting sanctions against a club found to have induced a professional player to breach his existing contract with his former club, always comes to add to the joint liability of the new club with respect to the payment of compensation due by the professional player to his former club for the unjustified early termination of the contract.<sup>40</sup>

#### 2.2.4 *Sporting just cause*<sup>41</sup>

It is one of the fundamental rules of the “Laws of the Game” that a football match is played by two teams, each consisting of not more than eleven players, one of whom is the goalkeeper.<sup>42</sup> Consequently, it may well be that a professional player is being regularly paid by his club, is orderly participating in all the training sessions with the first team of the club, is admitted to all of the club’s activities, without exception, is called to media and social events, can benefit from the entire infrastructure of the club, has the medical staff at his disposal and receives all the needed medical assistance – short: the club is fully complying with all of its contractual obligations towards the player. However, the player is (almost) never fielded in official matches.

Under such circumstances it cannot be claimed that the professional player concerned would be in a position to invoke a just cause to prematurely terminate his (long-term) contractual relation with the club. Nevertheless, it was recognised that, from a purely sporting point of view, it might appear appropriate for such a player to have the possibility to leave his club prior to the ordinary expiry of his contract under facilitated terms. Yet, in order to avoid potential abuse, the field of possible application of such a measure had to be clearly defined and, above all, limited.

The provision of the Regulations introducing the sporting just cause, first and foremost, provides for two mandatory conditions for a professional player to be entitled to invoke such reason for the early termination of his contract.

First of all, the player needs to be an “*established professional*”. The Regulations do not define the latter term. And, unfortunately, to this day, there is not one decision of the DRC that would have had to address this issue. Consequently,

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<sup>40</sup> Cf. art. 17 para. 2 in combination with art. 17 para. 4 of the Regulations.

<sup>41</sup> Art. 15 of the Regulations.

<sup>42</sup> Cf. Law 3: [www.fifa.com/mm/document/affederation/generic/81/42/36/laws\\_of\\_the\\_game\\_2011\\_12\\_en.pdf](http://www.fifa.com/mm/document/affederation/generic/81/42/36/laws_of_the_game_2011_12_en.pdf).

reference to existing jurisprudence is not possible either. From the example used at the beginning of this subsection of the present short essay it can be felt that the key element of the scope of the pertinent provision is that a player with a certain level of footballing skill does not have sufficient opportunities in his club and therefore, might wish to move to a new club in order to obtain the possibility to play competitive football on a regular basis. Furthermore, in abstract terms, the player in question will have to have completed his training period. In this respect, maybe reference might be made to the provisions of the Regulations on training compensation.<sup>43</sup> Equally, the level of footballing skills of the player should probably be taken into account. Such skills should be at least equivalent to those of his team-mates who appear regularly. And finally, also the course of his hitherto existing career should be duly considered. Was he regularly fielded with his previous clubs? Was he regularly fielded during the previous seasons with the current club? – A change of coach may have made the difference. Trying to find a negative delimitation, as a general rule, it would seem to be quite difficult, for example, for a reserve goalkeeper to invoke sporting just cause. The player's position on the pitch, injuries or suspensions sustained during the course of the season as well as other reasons that may justify, from a purely sporting point of view, the fact that the player was not regularly fielded will all need to be taken into consideration by the competent authority if asked to assess whether a specific player can be considered an established professional.

In order to provide the competent deciding body with the necessary scope of discretion needed, so as for it to be in a position to take into account all the specific and concrete circumstances of a particular professional player, the article concerned states that the existence of sporting just cause shall be established on a case-by-case basis.

The second mandatory condition is that during the course of the season the professional player needs to have appeared in fewer than ten per cent of the official matches in which his club has been involved. "*Appeared*" means that the player was fielded and actively took part in the game. Official matches are the ones played by the club in the national league championship, national cups and international championships for clubs, but not including friendly and trial matches.<sup>44</sup> A controversial point is whether it is the number of appearances in games that need to be considered when addressing the ten per cent limit, or rather the minutes effectively played therein. The DRC and the CAS do not appear to have the same understanding as regards this point. While the DRC, based on a grammatical interpretation of the relevant provision, concluded that the floor of ten per cent needs to be established on the basis of the official matches in which the player participated (number of appearances) and not the minutes,<sup>45</sup> the CAS in its so far unique award relating to that specific point preferred to judge that the minutes

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<sup>43</sup> Cf. in particular, Annexe 4, art. 1 para. 1 of the Regulations.

<sup>44</sup> Cf. point 5 of the Definitions section of the Regulations.

<sup>45</sup> DRC meeting of August 2007, decision no. 871322 on FIFA.com.

effectively played need to be the appropriate basis.<sup>46</sup>

A further important element to be emphasised is that a professional player may invoke sporting just cause only at the end of the season, more precisely in the 15 days following the last official match of the season of the club for which he is registered.<sup>47</sup> Following that limited period of time, he will not have the possibility to refer to his very restricted appearance with the team during the past season anymore in order to justify his wish to prematurely terminate the existing contract. Should the professional player nevertheless decide to leave the club, he will risk suffering the consequences of terminating a contract without just cause,<sup>48</sup> unless he will be able to satisfy the competent authorities that he had a “normal” just cause for the early termination of the contract.<sup>49</sup> Normally, the latter will not be easy to achieve, if we start from the assumptions as exposed in the example made at the beginning of the present subsection of this short essay. In this respect, it should be stressed that the notice of termination referring to sporting just cause must be received by the club personally during the time frame fixed by the pertinent provision.

In case the existence of a sporting just cause will be confirmed, the player will not suffer any sporting sanctions for having decided to prematurely terminate his contract. However, considering that, as already explained, the club did actually not neglect its contractual obligations but the reasons of the early termination of the contract are motivated by pure sporting considerations, compensation may still become payable. The respective amounts should though normally be assessed at a reasonable low level.

For the sake of good order, and taking into account that, admittedly a bit as a surprise, in practice at times the question arises, it should be mentioned that only professional players and not clubs may invoke sporting just cause to early terminate an existing contractual relation. This should actually become clear already when reading the pertinent article, but at the latest when considering the scope of the provision concerned.

Despite the possibility for a professional player to terminate a contract on sporting just cause having been introduced in the Regulations in September 2001,<sup>50</sup> to this day, hardly any case based on sporting just cause was referred to the DRC.

If one was to try to identify the reasons for such little impact of the provision in question, it might be reasonable to consider that a player, who is being fielded by its club on very few occasions only but is paid his salary punctually and receives a perfectly proper treatment from his club in accordance with the relevant contract, will only consider leaving the club if he is sure that he will be able to find a new club where he will have the possibility to play competitive football on a

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<sup>46</sup> CAS 2007/A/1369 *Omonigho Temile v/FC Krylia Sovetov Samara*.

<sup>47</sup> Cf. art. 15, *in fine*, of the Regulations.

<sup>48</sup> Cf. art. 17 of the Regulations.

<sup>49</sup> Cf. art. 14 of the Regulations.

<sup>50</sup> Cf. art. 24 of the 2001 edition of the Regulations and art. 12 of the Regulations governing the Application of the 2001 edition of the Regulations.

regular basis. In case no club shows a real interest in his services, the player will probably prefer to adhere to his existing contract, despite his situation not being (fully) satisfactory from a sporting point of view. Obviously, the fact that a player remains without actually playing official matches for a considerable period of time prevents him from showing his skills and qualities to potentially interested clubs. As a result, the whole matter risks ending up in a vicious circle, since the chance that a club will show its interest in the services of the player will diminish continuously.

On the other hand, if a new club shows a real interest in the services of the professional player, it will probably contact the current club of the player and explore the possibility of a transfer on reasonable terms. Considering that the interest of the current club in the services of the player appears to be quite limited (otherwise, they would probably field him more frequently), as a general rule, the requested transfer compensation will not be exorbitant and a transfer of the player to the new club on mutual agreement between all the parties concerned will be achievable. Compared to having to go through a procedure, where the actual existence of a sporting just cause needs to be established by the competent authority, and where, ultimately, compensation might still have to be paid, an agreed transfer appears to be the more suitable option for a professional player, which will guarantee him clearer circumstances and higher legal security.

#### *2.2.5 Calculation of the compensation due in case of terminating a contract without just cause<sup>51</sup>*

As already mentioned, in full line with contractual law principles, also the Regulations state that, in all cases, the party (club or player) found to be in breach of a contract shall pay compensation.<sup>52</sup> The reciprocal obligation to compensate the counterparty in case of breach of contract is of high significance for the protection of the essential principle of contractual stability. In fact, not only is it important to create and establish means that serve as a deterrent to breach a contract (prevention), it is also pivotal to set clear and unequivocal signs that if a contractual breach is nevertheless committed, it will not be accepted and the party concerned will have to suffer the appropriate consequences (repression).

But the Regulations are not satisfied with explicitly mentioning that principle and, in addition, include certain general guidelines related to the calculation of the relevant compensation for the competent deciding authority, which aim at providing a kind of orientation but also at avoiding taking into consideration elements not corresponding to the spirit of the agreement reached between FIFA/UEFA and the European Commission back in March 2001.

Having said that it is however crucial to emphasise that the wording chosen for the relevant provision still grants a wide margin of discretion to the

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<sup>51</sup> Art. 17 para. 1 of the Regulations.

<sup>52</sup> Cf. point 2.1.3. above.

competent deciding body when it comes to assessing the compensation payable in a specific affair.

*a) Contractual clauses relating to compensation*

When looking at the details of art. 17 par. 1 of the Regulations, as a first point, one will note that it is possible for the parties (professional players and clubs) to stipulate in their contract, and thus establish in advance, an amount due by the faulty party in case of unjustified early termination of the contractual relation. In this respect, it should be noted that the sports legislation of certain countries provides for such a clause to be included as compulsory in contracts.<sup>53</sup> On the other hand, (sports) legislation of other countries prohibits the inclusion of such a clause in their contracts as it is not compatible with mandatory labour law.

When having to examine such clauses, the DRC, as well as CAS, have constantly confirmed that they need to comply with the fundamental principle of proportionality. In case the amount stipulated in the contract appears to be disproportionate, in particular, if compared to the remuneration to which the professional player concerned is entitled to on the basis of the same contract, then the respective compensation may be reduced to a reasonable and appropriate level.<sup>54</sup>

Another aspect of relevance when speaking about contractual “*compensation clauses*” is the distinction between a so-called “*liquidated damages clause*” and the so-called “*buy-out clause*”.

If the parties to a contract agree on a “*liquidated damages clause*”, then their aim is actually to somehow evaluate in advance the damage that will be caused by a possible early termination of the contract without just cause. This might not always be very easy: can a party, for example, really know already today all aspects of relevance that it needs to consider for the case that the counterparty should commit a breach of contract in the (near or not so near) future? In any case, considering the aforementioned principle of proportionality, a properly drafted “*liquidated damages clause*” should be declining over time, since, in principle, and a general agreement should exist on that point, the damage caused by an unjustified early termination of a contract – by the player or the club – will be lower the closer it is to the ordinary expiry of the contract.

If, however, the parties agree on a “*buy-out clause*”, then a right is conferred to the counterparty to prematurely terminate the contractual relation at any time against the payment of a fixed sum stipulated in the pertinent contract.

<sup>53</sup> E.g. Spain, Real Decreto 1006.

<sup>54</sup> DRC meeting of November 2004, decision no. 114796 on FIFA.com, and CAS 2004/A/780 Christian Maicon Henning v/Prudentopolis & FIFA; DRC meeting of January 2006, decision no. 16394 on FIFA.com, and CAS 2006/A/1082 Real Valladolid CF SAD c/Diego Daniel Barreto Caceres & Club Cerro Porteno, CAS 2006/A/1104 Diego Daniel Barreto Caceres c/Real Valladolid CF SAD.

The party that chooses to early terminate the contract by paying the agreed amount is therefore making use of a contractual right and it does not need to have a valid reason for putting an end to the contract. Obviously, this requires the party concerned to be ready to pay the agreed sum without any reservation or objection at all. A further consequence of the fact that the party is simply making use of a contractual right is that no sporting sanctions can be imposed on it, even if the termination of the contract occurs during the protected period. Obviously, the considerations are different if the party that decides to put a premature end to the contract does so but contests the amount payable. Then it is not making use of the contractual right and it will have to prove that it has a valid reason to terminate the contractual relation early.

It is probably one of the most difficult tasks for any deciding authority having to look at such clauses to evaluate whether the aim was for the clause to be treated as a “*buy-out clause*” or rather as a “*liquidated damages clause*”. Consequently, particular attention should be given to this aspect when drafting the specific contractual clause.

In case the parties did not include in their agreement any specific provision regarding the compensation due in case of a premature termination of the contract, then the Regulations state that “*compensation shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria*”.<sup>55</sup>

As already emphasised, the aforementioned wording grants the deciding authority a wide scope of discretion when having to assess the amount of compensation due. Furthermore, it is once again worth noting that, in full line with the fundamental principle of reciprocity, the pertinent provision does not distinguish or make any difference if it is the club or the player that terminates the contract without just cause prior to its expiry. The same elements, criteria and principles shall, as a general rule, be applied when calculating the compensation payable, irrespective of who is the party at fault.

#### *b) The law of the country concerned*

As regards the law of the country concerned, the Regulations do not stipulate that it needs to be applied, but rather that it should be duly taken into consideration by the deciding authority. As already exposed in the introductory part of this short essay, the decisions of the DRC normally are mainly resting upon the principles contained in the Regulations and general legal principles rather than on specific provisions of contractual and civil law.<sup>56</sup> Actually, you will hardly find any decision of the DRC in which the question of the law of the country concerned was discussed in detail. Such approach is fully covered and justified by the wording of art. 17 par. 1 of the Regulations, which, as indicated, does not oblige the deciding authority to

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<sup>55</sup> Cf. art. 17 para. 1 of the Regulations.

<sup>56</sup> Cf. point 1.2 above.

apply the national law. Bearing in mind their background,<sup>57</sup> the members of the DRC tend to motivate their decisions by resorting to their wide experience with respect to the administration of football, in particular, as regards transfers and the relationship between professional players and clubs. Their distinct understanding of the different mechanisms playing a role when it comes to contractual relations between clubs and professional players, combined with constant and strict reference to the various provisions, guidelines and principles contained in the Regulations and supported by the application of general legal principles lead the members of the DRC to pass decisions which, as confirmed by CAS, in most of the cases bear up against a more detailed and profounder legal appreciation. Considering all of these points, one might say that the appreciation of the various litigations by the DRC is a very practice oriented one, supported by the necessary legal framework, whereat abundance by the provisions of the Regulations is strictly maintained.

*c) The specificity of sport*

Long before it found its way in the treaty of the European Union,<sup>58</sup> the term “*specificity of sport*” was included in the Regulations. Like the law of the country concerned also the specificity of sport shall be duly considered by the deciding authority when assessing the amount of compensation payable. To this day, the relevant term is still lacking of concrete and perceivable contours. The DRC has never given any clear clarification with respect to what it actually understands under specificity of sport. However, it is regularly using that aspect in order to adjust the compensation due in case of termination of a contract without just cause. Actually, it is precisely by means of taking into consideration the specificity of sport that the DRC has found its appropriate vehicle to let slip in the aforementioned practical aspect, to which it likes to give so much attention.

And for all those that would now like to start shouting and claim “*we always knew it, specificity of sport just allows the dispute resolution bodies of the football structures to pass decisions that do not comply with applicable law*”, here comes the immediate, vehement and motivated objection. In the first part of the assessment and appreciation of the affair, the members of the chamber proceed to a calculation of the compensation payable following exclusively the other elements (other than the specificity of sport) provided for by the Regulations and the pertinent legal framework. Strict adherence to the various fundamental provisions and principles concerned is always maintained. Once they have established an amount on this basis, as required by the Regulations, they take into consideration the specificity of sport and seek elements, particularities or case-specific aspects, which, in the concrete matter at stake could justify an increase or reduction of the calculated compensation. Such elements could, for example

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<sup>57</sup> Cf. point 1.2 above.

<sup>58</sup> Cf. art. 165 para. 1 of the Treaty on the functioning of the European Union (TFEU), C 83/120: “*the specific nature of sport*”.

and without being exhaustive, be, a particularly mean behaviour of the party at fault, in particular, from a sporting point of view, the time of the premature termination of the contract in relation to the existing and applicable registration periods, the role of the player in the squad (in both cases, the player or the club breaching the contract), the commitment of the player to the club prior to the early termination (again in both cases, the player or the club breaching the contract) etc. These are all, as one will note, sport-related aspects, specific to the game of football. As a result, all decisions of the DRC have to be qualified as fair and appropriate legally speaking, and passed to the best of the knowledge and in all conscience of the members of the chamber concerned. And once again, one should never forget that representatives of players and clubs sit in the relevant deciding body, both sides certainly with the clear objective of best possibly taking into account the general interests of the group they are representing. Yet, while perfectly knowing their role, i.e. the one of a judging authority and not the one of the representative of a specific party to the dispute.

As a final remark, and just to give some additional indications as to what could be understood to be the specificity of sport, reference shall be made to a CAS award, in which the relevant panel addressed in detail that topic.<sup>59</sup>

#### *d) Other objective criteria*

Besides advising the deciding authorities to duly take into consideration the law of the country concerned as well as the specificity of sport, the Regulations establish that compensation for terminating a contract without just cause shall also be calculated by taking into account “*any other objective criteria*”.<sup>60</sup>

The Regulations do not content themselves with this general indication but go on with providing a series of such objective criteria. Yet, here once again the relevant provision is constructed in a way to grant the deciding authority the already repeatedly mentioned considerable scope of discretion. In fact, the list of objective criteria enumerated is not exhaustive.<sup>61</sup>

Furthermore, a second aspect is worth being once more reiterated. The principle of reciprocity is reflected also in this particular aspect of the provision at stake. There is no distinction about which objective criteria should be applied in case the early termination of a contract without just cause is committed by a club or a professional player respectively. The same objective criteria shall, in principle,<sup>62</sup>

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<sup>59</sup> CAS 2007/A/1358 FC Pyunik Yerevan v/ Carl Lombe, AFC Rapid Bucuresti & FIFA and CAS 2007/A/1359 FC Pyunik Yerevan v/ Edel Apoula Edima Bete, AFC Rapid Bucuresti & FIFA, para. 104 and 105, respectively paras. 107 and 108.

<sup>60</sup> Cf. art. 17 para. 1 of the Regulations.

<sup>61</sup> “... *These criteria shall include, in particular, the remuneration ...*” (emphasis added), art. 17 para. 1 of the Regulations.

<sup>62</sup> Obviously, the concrete and particular circumstances of each specific affair, which the deciding authority is in a position to duly take into consideration within the granted wide margin of discretion, may lead to a different weighting of the various objective criteria, or even to the situation, where the

be applied when calculating the compensation payable, irrespective of who is the party at fault.

Looking at the various objective criteria mentioned in the provision concerned individually, first the remuneration and other benefits due to the player under the existing contract and/or the new contract are referred to.

In case of a club prematurely terminating a contract without just cause, in principle, the calculation of the compensation to be paid to the player can be based on the classical notion of damage in the strict economic sense, like it is applied for example also in the Swiss Code of Obligations (CO).<sup>63</sup> That is, the player shall basically be compensated with an amount corresponding to what he would have earned until the ordinary termination of the contract minus what he earned or could have earned elsewhere. In doing so, both the aforementioned objective criteria mentioned in the Regulations are taken into account.

In case of a player prematurely terminating a contract without just cause, basically, the DRC always starts its calculation of the compensation to be paid to the club on the basis of the remaining value of the existing contract.<sup>64</sup> This definitely does not correspond to the classical notion of damage in the strict economic sense, since the club will not be damaged by not having to pay specific remuneration to the player anymore. However, the DRC starts from the premise that the relevant amount can be used as a reliable indicator with regard to the economic value that the services of the player had for the damaged club, by means of an objective criterion.

If we start from this proposition, it would not appear to be tenable for the DRC not to take into consideration also the remuneration due to the player under the new contract (second objective criterion mentioned in art. 17 par. 1 of the Regulations). First of all, art. 17 par. 1 of the Regulations clearly stipulates that the remuneration due to the player under the new employment contract should be taken into consideration for the calculation of the compensation due in case of a contractual breach. This decision of the “legislator”, which, as already mentioned earlier, was reached after consultation with all stakeholders of the world of football, needs to be respected. Furthermore, and at least equally important, the remuneration that a new club is ready to pay to the player is a very appropriate indication to establish the value attributed to the services of a player by a club at the moment of the signing of the new contract. Within the specificity of sport, the economic value attributed to the services of a player is an element which needs to be taken into consideration when assessing the amount of compensation payable to the player’s former club.

The next objective criterion explicitly referred to in the Regulations is

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deciding body has to conclude that one or the other of the pertinent criteria cannot be taken into account for this or another reason (e.g. the claiming party did not (sufficiently) specify one (or several) of the aspects at stake).

<sup>63</sup> Cf. art. 337c of the CO.

<sup>64</sup> “... *the remuneration and other benefits due to the player under the existing contract* ...”.

the time remaining on the existing contract up to a maximum of five years.<sup>65</sup>

As could no doubt be recognised from the few previous paragraphs dedicated to the remuneration due to a player under the former and the new contract, the time remaining on the existing contract is closely linked to these two other objective criteria and, obviously, plays a fundamental role when calculating the remaining value of the contract that was breached. Equally, the remaining duration of the contract that was prematurely terminated needs to be taken into account when addressing the fourth objective criterion mentioned in art. 17 par. 1 of the Regulations, i.e. the fees and expenses paid or incurred by the former club amortised over the term of the contract. In summary, it can be concluded that this particular criterion does not really have an independent importance with respect to the calculation of compensation for breach of contract.

Turning our attention to the fourth objective criterion that can be found in art. 17 par. 1 of the Regulations,<sup>66</sup> as a first conclusion, it cannot be disputed that in case a club, without any fault of its own, does not have the possibility to completely amortise the investment made in order to obtain the services of the player, this constitutes a financial damage in the economic sense.

A debatable question could be, if the relevant fees and expenses should be amortised not over the whole term of the employment contract, but only over the protected period<sup>67</sup> of the employment contract that was breached. In its constant jurisprudence the DRC does not follow this approach and with valid reasons.

First and foremost, art. 17 par. 1 of the Regulations clearly and unambiguously stipulates that the fees and expenses paid by the former club shall be amortised over the term of the contract, and not over the time of the protected period only. Furthermore, the expenses paid or incurred by the former club have been invested in order for the club concerned to sign an employment contract with the professional player in question with a specific duration that might be longer than the protected period. When signing the relevant employment contract, in good faith any club (like obviously also the professional player) can and must be able to rely on the fundamental legal principle of *pacta sunt servanda*. After all, the whole discussion relating to the calculation and payment of compensation for a contractual breach precisely constitutes a core element of the principle of maintenance of contractual stability, or, in other words, of the efforts made and measures taken in order to guarantee full respect of the contracts by clubs and professional players. Congruously, the club needs to be protected in its considerations that it will have to amortise the invested amount over the entire period of the agreed employment contract and not already until the end of the protected period. This is, when signing the employment contract with the

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<sup>65</sup> Cf. the maximum of five years is congruent with the maximum length of a contract between a professional player and a club as established by art. 18 para. 2 of the Regulations.

<sup>66</sup> “The fees and expenses paid or incurred by the former club (amortised over the term of the contract)”.

<sup>67</sup> Cf. point 7 of the Definitions section of the Regulations and point 2.2.1 above.

professional player, the club is in its good and legitimate rights to count on the fact that the player will remain at the club for the entire duration of the relevant contract and not just for the protected period. A different approach would mean to accept that a player might choose to act unlawfully, disrespect the principle of *pacta sunt servanda*, and this to the sole detriment of the club. Consequently, the DRC is absolutely right when it considers that the respective amount of fees and expenses is to be amortised over the whole term of the initially agreed employment contract, and not only over the time of the protected period.

The last objective criterion stipulated in the Regulations is the protected period.<sup>68</sup>

The outstanding and primary importance that the protected period has as regards the possible imposition of sporting sanctions on clubs and professional players was exposed in detail previously.<sup>69</sup> However, by explicitly including this element also in the list of objective criteria mentioned for the calculation of the compensation payable in case of unjustified early termination of a contract, the Regulations make it clear that it can and should also play a role with respect to the latter aspect. This makes perfect sense, if we consider once again that it is one of the paramount objectives of the provisions concerning the maintenance of contractual stability of the Regulations to ensure that contracts are respected in full by professional players and clubs, and within that scope, to provide for appropriate measures and means creating a particularly strong deterrent for a party to breach a contract during the first part of its term, i.e. during the protected period. Therefore, any party, being it a club or a professional player, considering the early termination of a contract without just cause during the protected period should be aware that, firstly, on top of having to pay compensation it will risk the imposition of sporting sanctions,<sup>70</sup> and secondly, when assessing the compensation due the competent authority will duly take into account the fact that the contractual breach occurred within the protected period which may result in an additional increase of the amount due.

Obviously, the DRC may not and does not use this last of the explicitly mentioned objective criteria to arbitrarily increase the compensation payable just for the fact that the contractual breach occurred during the protected period. However, mainly in the interaction with other objective criteria it will certainly and regularly refer to that particular aspect.

First of all, it has to be pointed out that, for obvious reasons, the fact that a contract is breached within the protected period will already have an impact on the calculation of the compensation due when considering the time remaining on the existing contract (which will be normally longer if the breach occurs during rather than after the protected period), and thus on the assessment of the residual value of the contract that was prematurely terminated. Secondly, the circumstance

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<sup>68</sup> "... whether the contractual breach falls within a protected period".

<sup>69</sup> Cf. point 2.2.1. above.

<sup>70</sup> Cf. art. 17 para. 3 and 4 of the Regulations.

that a club or a professional player decide to put an end to a contract without any valid reason during the protected period may be seen as an especially reproachable stance, bearing in mind the high degree of contractual stability that the Regulations aim at guaranteeing, in particular during the protected period. As already indicated previously, the DRC tends to take the parties' specific behaviour into account in relation to the specificity of sport.<sup>71</sup>

The last aforementioned point could possibly, and under the light of Swiss law, in particular justify awarding additional compensation to the professional player. In fact, the Swiss Code of Obligations provides that in case of early termination of an employment contract without just cause by the employer, the deciding authority may, *inter alia*, oblige the employer to pay the employee compensation, which the deciding body can assess with absolute discretion with due consideration of all pertinent circumstances. Such additional compensation may, however, not go beyond the value of six monthly salaries.<sup>72</sup> While the appreciation of all pertinent circumstances would not appear to justify considering such complementary compensation if the breach occurs after the protected period, it might well be taken into account if the unjustified premature termination of a contract occurred during the protected period. Obviously, it would be up to the professional player concerned to duly claim such additional amount in front to the competent authority and to provide the necessary arguments in order to satisfy the deciding body that he indeed is entitled to it. It remains to be said that, to this day, the DRC has never granted any supplementary compensation on the basis of such considerations.

### *e) Conclusions*

By strictly adhering to the provisions of the Regulations and taking into account all of the pertinent elements,<sup>73</sup> it is the firm will and constant ambition of the DRC to assess an amount of compensation which adequately compensates the damage actually suffered by the counterparty, not more and not less than that. Since one thing is certain: the calculation of the compensation for the premature termination of a contract without just cause may not and should not lead to the damaged party obtaining any additional benefit or gain, i.e. beyond the effective harm it had to sustain, from the unlawful behaviour of the counterparty.

The DRC regularly makes use of the wide margin of discretion that the wording of art. 17 par. 1 of the Regulations grants, and in particular, utilises this assigned freedom of manoeuvre to let slip in the practical aspect, to which it certainly feels committed and to which, therefore, it gives special attention. Yet,

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<sup>71</sup> Cf. point 2.2.5 c) above.

<sup>72</sup> Cf. art. 337c para. 3 of the CO.

<sup>73</sup> Cf. art. 17 para. 1 of the Regulations and point 2.2.5. a), b), c) and d) above; as already mentioned, the concrete and particular circumstances of each specific affair may lead to a different weighting of the various objective criteria, or even to the situation, where the deciding body has to conclude that one or the other of the pertinent criteria cannot be taken into account for this or another reason (e.g. the claiming party did not (sufficiently) specify one (or several) of the aspects at stake).

once again, it does so without ever neglecting the guidelines of the Regulations, which it is bound to respect, and the applicable legal framework.

And finally, bearing in mind all of the above considerations,<sup>74</sup> it would appear that the currently existing controversial discussions on the contents and wording of art. 17 of the Regulations, which actually are mainly limited to par. 1 of the said provision, i.e. the calculation of the compensation due in case of termination of a contract without just cause, in reality do not concern the contents and wording of the said provision but rather have their origins in the application of the terms in question by the various deciding authorities (in particular, what is an objective criterion?), which, depending on the different points of view, take into account elements that are considered to be or not to be covered by the pertinent wording anymore.

### 3. *The relevant case law of the Dispute Resolution Chamber*

After having analysed in detail the various provisions of the Regulations pertaining to the contractual stability, in the following part of the present brief article a few selected decisions passed by the DRC over the last 9 years will be mentioned and shortly addressed, so as to illustrate the existing case law of the chamber relating to this central aspect of the Regulations and the world of football in general. The samples aim at covering all major elements referred to in the preceding part of this essay.<sup>75</sup>

#### 3.1 *Existence of just cause / Breach of contract (no just cause)*

##### 3.1.1 *General remarks*

It has already been emphasised on various occasions in this short essay,<sup>76</sup> and also in the introduction to the present publication, but its importance certainly justifies a further mention. The maintenance of contractual stability between professional players and clubs constituted one of the central pillars of the agreement reached between FIFA/UEFA and the European Commission in March 2001 and is certainly to be considered the core of the Regulations. It is of paramount importance for the entire world of football and forms an essential prerequisite for a well-functioning transfer system. The competitive balance decisively depends from it.

The message is thus very clear: Also in football the principle of *pacta sunt servanda* applies in full and a premature termination of a contract by one party (club or player) will only be considered acceptable as an *ultima ratio* action. As long as less far-reaching or incisive measures are at disposal, the latter need to have been exercised without success prior to a party proceeding to put an early

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<sup>74</sup> Cf. point 2.2.5 above.

<sup>75</sup> Cf. point 2. above.

<sup>76</sup> Cf. in particular, points 2.2.1 and 2.2.3 above.

end to the contractual relationship.

These are some excerpts from pertinent DRC decisions:

- “(...) In particular, the Chamber emphasized that, in connection with infringements of disciplinary standards, such as those alleged in the matter at hand, the party concerned should only have the right to terminate the contract as *ultima ratio*, i.e. a case of repeated and grave incidents, which, under the circumstances, would still require that the Claimant be warned beforehand, of the eventual consequences of the actions, if they were to be repeated.<sup>77</sup>”
- “The members of the Chamber deemed appropriate to [emphasize] that, as a general rule, the termination of a labour relationship has to be considered as the “*ultima ratio*” and that the maintenance of the contractual stability has to be protected by the parties in first place.<sup>78</sup>”
- “(...) Furthermore, the Chamber recalled that the unilateral termination of an employment contract being the most severe penalisation in contractual relationships should be applied as *ultima ratio* only. Consequently, and since milder sanctions, such as for example a fine, could have been applied, the Chamber deemed that the unilateral termination cannot be considered as in conformity with the said legal principle of proportionality.<sup>79</sup>”

### 3.1.2 The most frequent constellations

Despite every single and concrete dispute having to be considered in the light of its specific particularities, in the course of time the DRC has elaborated clear and well-established answers to certain recurring circumstances. These are the most important ones.

#### a) Low sporting performance

The low sporting performance of a player cannot constitute a just cause for a club to terminate a contract:

- “Por último, los miembros de la Cámara desearon destacar, en aras de preservar la seguridad jurídica y de mantener un buen orden administrativo, la jurisprudencia firme de esta Cámara en cuanto a que el posible bajo rendimiento de un jugador no es causa válida para la terminación de un contrato laboral.<sup>80</sup>”
- “(...) In addition, the Chamber deemed that the allegedly bad performance of a player during a match can be no valid reason for

<sup>77</sup> DRC meeting of April 2009, decision no. 49339 on FIFA.com, consideration 13.

<sup>78</sup> DRC meeting of October 2008, decision no. 108727[1] on FIFA.com, consideration 26.

<sup>79</sup> DRC meeting of September 2007, decision no. 97748 on FIFA.com, consideration 11.

<sup>80</sup> DRC meeting of March 2008, decision no. 38804 on FIFA.com, consideration 13.

*the termination of [an] employment contract.<sup>81</sup>*”

#### b) Outstanding salaries

With respect to outstanding salaries as a just cause for a player to terminate his contract, the DRC has adopted a quite differentiated approach.

The following excerpt illustrates what can be seen as something like the general rule:

- *“The Dispute Resolution Chamber deemed appropriate to point out that, in the past, it had on numerous occasions upheld the unilateral termination of an employment contract by players who had, depending on the particular circumstances of the relevant case at stake, not received their salaries for two or more months.<sup>82</sup>”*

In another of its decisions, the DRC had considered that a delay of five days in the payment of a player’s salary does not constitute a just cause for the player to terminate his contract:

- *“(…) Yet, a minor delay of merely five days could not be considered as a just cause, in particular in a case like the one at hand, where the club had fully and properly complied with its financial obligations for almost an entire year and the player never put the club in default regarding outstanding payments (…).<sup>83</sup>”*

And even arrears of one monthly salary were not considered to be a just cause for a player to terminate his contract:

- *“[20] (…) This meant that, at the time the contract was unilaterally terminated by the Claimant, the Respondent still owed him the amount of EUR 9,191, i.e. representing just over a monthly salary under the terms of the contract (…). [25] In view of all of the above, the Chamber was convinced that the Claimant had had no reason to terminate his contract with the Respondent.<sup>84</sup>”*

#### c) Medical examinations

The validity of a contract between a professional player and a club may not be made subject to a successful medical examination<sup>85</sup>. The DRC has constantly applied this provision in a very strict way and has never tolerated any flexibility.

- *“[13] In this context, the members stated that the contents of art. 18 par. 4 of the Regulations was of mandatory nature and could not be contractually amended or circumvented. The Chamber therefore stated*

<sup>81</sup> DRC meeting of January 2006, decision no. 16695 on FIFA.com, consideration 9.

<sup>82</sup> DRC meeting of December 2008, decision no. 128557 on FIFA.com, consideration 13.

<sup>83</sup> DRC meeting of December 2008, decision no. 128557 on FIFA.com, consideration 13.

<sup>84</sup> DRC meeting of May 2009, decision no. 59269 on FIFA.com, considerations 20 and 25.

<sup>85</sup> Cf. art. 18 para. 4 of the Regulations.

*that the argument of the Respondent had no legal grounds.<sup>86</sup>*

*d) Work or residence permit*

The validity of a contract between a professional player and a club may not be made subject to the grant of a work permit.<sup>87</sup> Also in this respect, the chamber has always made it very clear that it is not possible for a club to put forward that it was not able to obtain a valid work permit for the player in order to justify a premature termination of a contract.

- “[10] *In this context, the members of the Chamber referred to art. 18 par. 4 of the Regulations which stipulates, inter alia, that the validity of a contract may not be made subject to the grant of a work permit. [11] In this respect, the members stated that the contents of art. 18 part. 4 of the Regulations were of mandatory nature and could not be contractually amended or circumvented (...).*<sup>88</sup>”

*3.2 Financial compensation in case of terminating a contract without just cause*

As mentioned in the introductory part of the present short essay, the most arduously debated questions within the DRC, are doubtlessly those concerning the calculation of the compensation due in case of an early termination of a contract between a professional player and a club without just cause.

While with respect to the calculation of the compensation payable by a club that has terminated a contract without just cause to the relevant professional player the principles applied by the chamber have in the meantime led to a quite tightened approach,<sup>89</sup> the same can certainly not be said for the calculation of the compensation due by a professional player to his club in case of unjustified contractual termination.

In view of this fact, the DRC decisions chosen for the illustration of this element of the Regulations all refer to disputes where the termination of contract without just cause was committed by a player. However, this shall not distract anybody from the undisputable reality that contractual breaches are committed in much higher number by clubs than by professional players.

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<sup>86</sup> DRC meeting of February 2008, decision no. 28195 on FIFA.com, considerations 8 et seqq..

<sup>87</sup> Cf. art. 18 para. 4 of the Regulations.

<sup>88</sup> DRC meeting of May 2010, decision no. 510836 on FIFA.com, consideration 10 et seq..

<sup>89</sup> Cf. point 2.2.5 d) above: In case of a club prematurely terminating a contract without just cause, in principle, the calculation follows the following reasoning. The player shall basically be compensated with an amount corresponding to what he would have earned until the ordinary termination of the contract minus what he earned or could have earned elsewhere.

### 3.2.1 General remarks

The DRC is never tired of emphasising that, in view of the importance of contractual stability for the world of football and the well-functioning of sporting competitions, the reciprocal obligation to compensate the other party in case of a contractual breach is of striking significance.

- “[28] *In this respect, awarding compensation in favour of the damaged party (either the player or the club, as the case may be) has proven to be an efficient means and has always found a widespread acceptance since it guarantees that the fundamental principle of the respect of the contracts is duly taken care of. [29] Above all, it was emphasised that the criteria contained in article 17 of the Regulations are applied with the principle of reciprocity for clubs and players, signifying that both clubs and professionals who are seen to have committed a breach of contract without just cause will in all cases be subject to pay compensation and, under specific circumstances, also subject to the imposition of sporting sanctions.*<sup>90</sup>”

### 3.2.2 Calculation of compensation in case of termination of contract without just cause by a player – selected criteria

The DRC is convinced that the unpredictability of the compensation payable by a player is of paramount importance for the protection of the contractual stability. For this precise reason it is of the firm opinion that the relevant compensation should not be calculated in accordance with a predetermined formula. In this respect, it always refers to the wide margin of discretion that art. 17 par. 1 grants the deciding authority. If players started playing with a price tag hanging around their neck, this would be the end of contractual stability, since potential new clubs would be in a position to evaluate in advance whether it is more convenient for them to negotiate a transfer and pay a transfer compensation or wait for the player to breach the contract and have to pay an already known compensation (obviously, this reasoning mainly concerns the time after the protected period, when sporting sanctions cannot be applied anymore). The chamber therefore adheres to the principle that the compensation should not be foreseeable.

- “(...) *In this respect, the DRC acknowledged that the First Respondent deemed that the compensation payable to the Claimant should correspond to the remaining value of the contract concluded between him and the Claimant. (...) In the Chamber’s opinion, giving credit to such argument would allow any party to ‘calculate’ how much a breach of contract would cost and would not only go against the*

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<sup>90</sup> DRC meeting of April 2009, decision no. 49194 on FIFA.com, consideration 28 et seq.; for the deterrent effect of the obligation to pay compensation see also DRC meeting of April 2007, decision no. 47936 on FIFA.com, consideration 29 et seqq..

*aforementioned principle but also against the very rationale of art. 17 of the Regulations and its non-exhaustive criteria for calculating compensation. In other words, by allowing a party to walk out of its or his contractual obligations by paying the remaining value of the relevant contract to the other party would, in the Chamber's view, render the principle of contractual stability meaningless.<sup>91</sup>*

- *"(...) limiting the compensation for breach of contract to the residual value of the contract not only is not in line with the jurisprudence of the Dispute Resolution Chamber, but would also undermine the principle of maintenance of contractual stability, reducing to a mere formula the legitimate right of the damaged party to receive compensation.<sup>92</sup>"*

Looking at the criteria for the calculation of the compensation referring to the remuneration and other benefits due to the player under the existing contract and/or the new contract respectively, the DRC in its well-established jurisprudence constantly takes into account both values, since it considers them to be valuable and reliable indications for the value to be attributed to the services of the player at the time of the contractual breach.<sup>93</sup> Consequently, remarkable significance has to be attributed to these criteria. Furthermore, and in application of a further criterion mentioned in art. 17 par. 1 of the Regulations, i.e. the time remaining on the existing contract, the DRC with incessant regularity starts its considerations pertaining to the calculation of the compensation payable by establishing the remaining value of the contract that was early terminated without just cause, but, moreover, by putting that figure in relation to the value of the new contract for the same period of time.

- *"[17] In continuation, the Dispute Resolution Chamber agreed that, in addition to the remaining value of the contract the First Respondent concluded with the Claimant, the value of the First Respondent's new contract with the Second Respondent should also be taken into account. The remuneration under the new contract was, in the Chamber's view, a clear indication of the real value of the services rendered by the First Respondent to the Second Respondent. In this context, the Chamber was keen to underline that art. 17 par. 1 of the Regulations allows it to take into consideration both the "existing contract and/or the new contract" in the calculation of compensation for breach. [18] In this regard, the members of the Chamber acknowledged that the value of the new contract signed between the First Respondent and the Second Respondent for the period spanning from the signature of the new contract until the end of the previous contract, i.e. 30 June 2009, amounted to EUR 1,200,000. Accordingly,*

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<sup>91</sup> DRC meeting of May 2009, decision no. 59738 on FIFA.com, consideration 13.

<sup>92</sup> DRC meeting of April 2007, decision no. 47936 on FIFA.com, consideration 48.

<sup>93</sup> Cf. point 2.2.5 d) above.

*the Chamber concluded that a first benchmark on which to calculate compensation ought to be situated between the remaining amount that the Claimant would have had to pay for the services of the First Respondent had the contract not been breached, and the amount that the Second Respondent would eventually have to pay to the First Respondent during that same period of time. Consequently, the Dispute Resolution Chamber held that this first benchmark should amount to EUR 980,000 and represented the average figure the Claimant and the Second Respondent had placed on the value of the services rendered by the First Respondent to them respectively.<sup>94</sup>*

For the fact that the DRC takes into account the specificity of sport to evaluate whether the specific circumstances of the dispute under scrutiny justify awarding an additional amount of compensation on top of the sum calculated with due consideration of all objective criteria of relevance, reference shall be made to the following excerpt from a further decision of the chamber.

- *“In continuation, the Chamber went on to consider the aspect relating to the specificity of sport also mentioned in art. 17 of the Regulations and recalled that such a criterion has repeatedly been referred to by the CAS for the purposes of calculating the amount of compensation for breach of contract, ensuring that the decisions taken are not only just and fair legally speaking, but that they also correspond to the interest and specific needs of the football world’s actors. On that basis, the members of the Dispute Resolution Chamber unanimously agreed that an additional amount of compensation should be granted to the Claimant for the damage it had suffered as a result of the termination of the contract without just cause by the First Respondent.<sup>95</sup>”*

With respect to compensation clauses contained in a contract concluded between a professional player and a club it has to be stated that, to this day, the DRC actually did not yet have so many occasions to address them. However, the following section of a quite recent decision of the chamber appears to be particularly illustrative.

- *“[23] In application of the relevant provision, the Chamber held that it first of all had to clarify as to whether the relevant employment contract between the Respondent 1 and the Claimant contains a provision by which the parties had beforehand agreed upon an amount of compensation for breach of contract. Upon careful*

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<sup>94</sup> DRC meeting of May 2009, decision no. 59738 on FIFA.com, considerations 17 et seq.; for the relevance of the salaries both under the existing and the new contract see also DRC meeting of November 2007, decision no. 117623 on FIFA.com, consideration 31, DRC meeting of April 2009, decision no. 49194 on FIFA.com, consideration 34 et seqq., and DRC meeting of December 2009, decision no. 129641 on FIFA.com, consideration 26 et seqq..

<sup>95</sup> DRC meeting of May 2009, decision no. 59738 on FIFA.com, consideration 19.

*examination of the employment contract concluded between the Respondent 1 and the Claimant, the members of the Chamber took note that art. X of the second contract provides for a compensation of USD 160,000 in case of termination of the contract without just cause or without mutual agreement of the parties concerned. [24] As a consequence, on account of the above-mentioned consideration, the members of the Chamber determined that the amount of compensation for breach of contract without just cause to be paid by the Respondent 1 to the Claimant is USD 160,000, in accordance with art. X of the contract at the basis of the dispute.<sup>96</sup>”*

### 3.2.3 Calculation of compensation in case of termination of contract without just cause by a player – older affairs

In order to better understand the reasoning of the DRC in more recent affairs, it is certainly of interest and worth having a look at older decisions of the chamber. In doing so, one will note that the DRC from the very first cases where it had to calculate the compensation payable by a professional player to the club he had prematurely left without just cause, consistently took into account, as far as possible, all of the objective criteria mentioned in art. 17 par. 1 of the Regulations, the specificity of sport as well as general legal principles.

In the following decision particular emphasis was given to the fact that the breach occurred during the protected period, to the payments made by the player’s former club, to the remaining period of validity of the player’s contract with his former club as well as the remuneration due to the player under his previous contract.

- *“art. 22 of the FIFA Regulations for the Status and Transfer of Players lists the factors that are to be taken into account when establishing the compensation for the breach of contract;*
- *not only did the player O. breach the employment contract in the protected period, i.e. in the first year of its validity, but he also abandoned the club mid-season, which is contrary to art. 21.1 (c) of the transfer regulations;*
- *understandably so, this will have had a detrimental impact on the performance and the planning of the club F.;*
- *moreover, the Chamber noted that the club F. paid USD 2,500,000 to the foreign club P. and USD 5,000,000 to the foreign club R. P., in order to obtain the federative rights to the player O.;*
- *additionally, and in spirit of art. 22 (3), the Chamber recognised that the club F. had paid the required 15% participation to the association of the player’s former club amounting to USD 750,000, as foreseen in the pertinent collective bargaining agreement, and that it cancelled*

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<sup>96</sup> DRC meeting of May 2009, decision no. 59674 on FIFA.com, considerations 23 et seq..

- tax payments, stamp duties and fees for bank guarantees amounting to around USD 590,630;*
- *aside of these expenses, the club F. remunerated the company “XY” with USD 1,500,000 so as to obtain the image rights to the player,*
  - *in the sense of art. 22 (2) of the transfer regulations, the Chamber took into consideration that the player O. would have had 3 years and 3 months remaining on his employment contract with the club F.;*
  - *the player was receiving a salary of USD 1,000,000 per season as well as USD 2,000,000 per season as compensation for his image rights;*
  - *taking into account the expenses of the club F. and, on the other hand, the fact that the player O. had performed for the club F. during nine months, the Chamber concluded that the compensation for the breach of contract that the player O. is liable to reimburse to the club F. amounts to USD 11,000,000.<sup>97</sup>”*

The remuneration and other benefits due to the professional player under the existing contract and under the new contract, the “investment” made in the player by the former club, the practical aspects concerning the world of football and the specific specialist knowledge gained by the members of the chamber in the course of time (was this the beginning of what the DRC considers to be the specificity of sport today?) as well as the training and the education received from the former club during the time the professional player spent with them, were the core elements of the following decision.

- *“Therefore, the Chamber examined the objective criteria listed in Article 22 of the Regulations, in order to verify their relevance in the case at stake.*
- *The first factor taken into consideration was the remuneration and other benefits under the existing contract and under the new contract.*
- *The Chamber noted that, in accordance with the contract concluded between the club A. and the player M. on 15 December 2002, but deposited at the relevant league on 18 July 2003, the player would have earned EUR 60,980 gross per month in the season 2002/2003, EUR 68,602 gross per month in the following season, whereas he would have earned EUR 76,225 gross per month and EUR 91,469 gross per month respectively in the last two seasons of his contract. In addition to that, the player would have received the amount of EUR 228,674 gross as outstanding salaries for the period July to December 2002, as well as an amount of EUR 1,173,858 gross in three instalments to be paid in January and July 2003 and July 2004. Also, the club A. paid to the player’s agent, Mr J., a commission amounting to EUR 239,200.*

<sup>97</sup> DRC meeting of June 2003, decision no. 63159 on FIFA.com, 5.

- *The Chamber thus ascertained that the club A. made an investment amounting to EUR 5,209,044 gross (EUR 6,500,000 including social security contribution, as reported by the club A.) in the scope of the contract concluded with the player M. on 15 December 2002 and deposited at the relevant league on 18 July 2003.*
- *Above all, the Chamber considered that the remaining value of the employment contract between the club A. and the player M. was of EUR 2,403,614.*
- *As regards the financial conditions of the employment contract concluded between the player M. and his new club R., the Chamber acknowledged the fact that the player would receive EUR 2,965,000 gross per year in the season 2004/2005, EUR 3,057,000 gross per year in the season 2005/2006, EUR 3,150,000 gross per year in the season 2006/2007, and EUR 3,243,000 gross per year in the season 2007/2008.*
- *The Chamber concluded its analysis of the objective criteria listed in Article 22 of the Regulations, by acknowledging that the player, by the time when the contractual breach occurred, was still bound to the club A. by two further years of contract.*
- *Subsequently, the Chamber stated that it falls under its responsibility to estimate the prejudice suffered by the club A., not only in accordance with the above-stated criteria, but also with its specific knowledge of the world of football, as well as with the experience the Chamber itself has gained throughout the years.*
- *The Chamber outlined that, in the football environment, the club A. is renowned worldwide as a club formateur, i.e. a club whose key activity is to train and educate young talented players and whose main source of income is represented by the transfer of such players.*
- *...*
- *It was observed that the player M. was 15 years old when he first registered with the club A. and that the club A. played a fundamental role in the player's training and education. In actual fact, it is not contested that the player M. has been trained and developed by the club A. during seven years, i.e. between the ages of 15 and 22.*
- *...*
- *Moreover, it is imperative to recall that the club A. showed their very high consideration for the player, by offering him a new contract at considerably high financial conditions, especially taking into account the player's young age.*
- *...*
- *In particular, the Chamber deemed that, in the assessment of such prejudice, the starting factor to be taken into account is the remaining value of the employment contract between the club A. and the player*

*M., i.e. EUR 2,403,614.<sup>98</sup>*”

In a rather atypical decision the DRC focused stronger on the remuneration due to the player under the previous employment contract without considering the remuneration under the new contract.

- *“In this context, the Chamber first focussed its analysis on the amount of compensation for the unjustified breach of contract due by the player to the club P. and examined the objective criteria listed in art. 17 par. 1 of the Regulations for the Status and Transfer of Players. According to this provision, these criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract and/or the new contract, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period.*
- *The first criteria the Chamber took into consideration was the remuneration under the employment contract between the player and the club P., and the length of time remaining on the said contract, i.e. the rest value of the employment contract. In this regard, the Chamber took note of the fact that the player would have been entitled to receive from September 2005 to 1 March 2006 on account of salaries the amount of USD 7,200 (USD 1,200 per month).*
- *Furthermore, the Chamber emphasised that the alleged offer of EUR 250,000 for the services of the player by another club cannot be taken into consideration as the club P. failed to provide FIFA with any evidence about transfer offers from other clubs. In this respect, the deciding body referred to the legal principle of the burden of proof, which is a basic legal principle in every legal system, according to which a party deriving a right from an asserted fact has the obligation to prove the relevant fact (cf. art. 12 par. 3 of the Rules Governing the Procedures of the Players’ Status Committee and the Dispute Resolution Chamber).<sup>99</sup>”*

#### 3.2.4 Joint and several liability of the new club

As already mentioned, with impressive constancy the DRC has stated that the joint and several liability of the new club for the payment of compensation due by the professional player to his former club is independent from the question of possible inducement or other involvement of the new club in the contractual breach.<sup>100</sup>

- *“In continuation, the DRC focused on the further consequences of*

<sup>98</sup> DRC meeting of May 2005, decision no. 55503 on FIFA.com, page 7 et seqq..

<sup>99</sup> DRC meeting of April 2007, decision no. 47932C on FIFA.com, considerations 14 et seqq..

<sup>100</sup> Cf. point 2.2.2 above.

*the breach of contract in question, and in this respect, first of all decided that, in accordance with art. 17 par. 2 of the Regulations, the new club of the player (...) must be jointly and severally responsible for the payment of the above-mentioned amount of compensation. In this respect, the DRC was eager to point out that the joint liability of the player's new club is independent from the question as to whether the new club has committed an inducement to contractual breach (...).<sup>101</sup>*"

However, on one occasion, under very specific and exceptional circumstances, i.e. the contract with the "new club" had been signed prior to the contract that was finally breached by the player, the DRC renounced to apply the joint and several liability of the new club. In fact, it considered that, under the given facts, it could actually not consider the club that the player joined after the contractual breach to be the "new" club in the sense of the Regulations.

- *"Furthermore, and with regard to the joint and several liability of the Respondent 2 / Counter-Claimant and the Respondent 1 for the payment of compensation for the breach of contract, the Chamber referred to art. 17 par. 2 of the Regulations, according to which the professional and his new club (emphasis added) shall be jointly and severally liable to pay compensation. In this context, the Chamber recalled that the contract concluded between the Respondent 1 and the Respondent 2 / Counter-Claimant was signed prior to the contract concluded between the Respondent 1 and the Claimant (cf. point II.12 above). Consequently, the Chamber established that the Respondent 2 / Counter-Claimant shall not be jointly and severally liable for the payment of compensation by the player, since the Respondent 2 / Counter-Claimant is not the new club of the Respondent 1.<sup>102</sup>"*

### 3.3 Sporting sanctions

#### 3.3.1 General rule in case of sporting sanction imposed on the player

The sporting sanction to be imposed on a player found to have terminated his contract during the protected period without just cause shall be a four-month restriction on playing in official matches. Furthermore, the DRC does not have any discretion to go below the aforementioned degree of penalty.<sup>103</sup>

- *"[41] (...) Consequently, the Chamber decided that, by virtue of article 17 par. 3 of the Regulations, the player had to be sanctioned with a restriction of four months on his eligibility to participate in any official*

<sup>101</sup> DRC meeting of November 2007, decision no. 117294 on FIFA.com, consideration 28.

<sup>102</sup> DRC meeting of May 2009, decision no. 59674 on FIFA.com, consideration 31.

<sup>103</sup> Cf. art. 17 para. 3 of the Regulations and point 2.2.1 above.

*football match. In this context, the DRC recalled that this is the minimum sanction provided for by the Regulations and the Chamber does not have any scope of discretion to diminish the duration of the suspension (...).*<sup>104</sup>

### 3.3.2 *Sporting sanction imposed on the player in case of aggravating circumstances*

In case of aggravating circumstances, the restriction on playing in official matches imposed on the player shall last six months.<sup>105</sup> To this day, only on one occasion the DRC deemed it appropriate to impose the more severe sporting sanction on a player. The latter had twice breached his contract during the protected period, namely two consecutive contracts.

- “[33] *In addition, the Chamber emphasized that this is the second time that the player in question is recognised by the Dispute Resolution Chamber as to have breached an employment contract during the protected period. Therefore the Chamber concluded that the fact that the player Razek is a repeat offender should be taken into account. [34] In view of the above and considering the aggravating circumstances existing in this case, the members of the Chamber decided that the player had to be sanctioned with a restriction of six months on his eligibility to participate in any official football matches (...)*<sup>106</sup>”

### 3.3.3 *Rule in case of sporting sanction imposed on the club for breach of contract or inducement to breach of contract*

The sporting sanction to be imposed on a club found to be in breach of contract or found to be inducing a breach of contract during the protected period shall be a ban from registering any new player, either following a national or an international transfer, for two entire and consecutive registration periods. Also in this case, the DRC does not have any discretion to go below the aforementioned degree of penalty. One will furthermore note that, contrary to the situation for player, the Regulations do not provide for a more severe sanction in case of aggravating circumstances.<sup>107</sup>

- “[45] *The foregoing led the Dispute Resolution Chamber to conclude that the club C. has clearly induced the player to breach his contract*

<sup>104</sup> DRC meeting of August 2009, decision no. 89733 on FIFA.com, considerations 40 et seq.; for sporting sanctions imposed on a player see also DRC meeting of April 2009, decision no. 49194 on FIFA.com, consideration 44, and DRC meeting of August 2007, decision no. 871322 on FIFA.com, consideration 31.

<sup>105</sup> Cf. art. 17 para. 3 of the Regulations.

<sup>106</sup> DRC meeting of November 2007, decision no. 117923 on FIFA.com, considerations 33 et seq..

<sup>107</sup> Cf. art. 17 para. 4 of the Regulations and point 2.2.1 above.

*with the club L., and, concretely, that the club C. has actually not been able to reverse the respective presumption contained in article 17 par. 4 of the Regulations. [46] In view of the above, the Chamber decided that in accordance with article 17 par. 4 of the Regulations, the club C. shall be banned from registering any new players, either nationally or internationally, for the two next entire and consecutive registration periods following the notification of the present decision. Also with regard to this sporting sanction, the DRC stressed that this is the minimum sanction provided for by the Regulations and the Chamber does not have any scope of discretion to diminish the extent of such sanction.<sup>108</sup>*

Moreover, one may recall the presumption contained in the Regulations, which leads to a reversal of the burden of proof. Unless established to the contrary, the club signing a professional player who has early terminated his contract with his previous club without just cause during the protected period shall be deemed to have induced the player to breach his contract.<sup>109</sup> The reversed burden of proof means that it will be up to the new club of the player to demonstrate that it did not induce the player to commit the breach and not for the former club to provide evidence for the inducement by the new club.

- *“In this respect, the Chamber recalled that, in accordance with the aforementioned provision, it shall be presumed, unless established to the contrary, that any club signing a professional player who has terminated his previous contract without just cause has induced that professional to commit a breach.<sup>110</sup>”*

- *“In this respect, the Chamber recalled that, in accordance with the aforementioned provision, it shall be presumed, unless established to the contrary, that any club signing a professional player who has terminated his previous contract without just cause has induced that professional to commit a breach. Consequently, the Chamber pointed out that the party that is presumed to have induced the player to commit a breach carries the burden of proof to demonstrate the contrary (reversal of the burden of proof) (...).<sup>111</sup>”*

And finally one example where the DRC was satisfied with the argumentation provided by the new club to prove that it did not induce the professional player to commit the contractual breach, and therefore concluded, that the relevant club had not to suffer any sporting sanction.

- *“In this respect, taking into consideration the particular circumstances of the case at stake as well as the explanations of the club A-H, the*

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<sup>108</sup> DRC meeting of August 2009, decision no. 89733 on FIFA.com, considerations 44 et seqq..

<sup>109</sup> Cf. art. 17 para. 4 of the Regulations and point 2.2.3 above.

<sup>110</sup> DRC meeting of April 2009, decision no. 49194 on FIFA.com, consideration 46.

<sup>111</sup> DRC meeting of August 2009, decision no. 89733 on FIFA.com, consideration 43; for the reversal of the burden of proof see also DRC meeting of May 2009, decision no. 59674 on FIFA.com, consideration 30, and DRC meeting of April 2007, decision no. 47932C on FIFA.com, considerations 24 et seqq..

*DRC decided that the presumption contained in the Regulations cannot be upheld, and that therefore, no sporting sanctions shall be imposed on the club A-H for inducement to breach of contract (...).<sup>112</sup>*

### 3.4 *Sporting just cause*

As already mentioned, to this day, the DRC only had very few occasions to clarify and concretise the contents of the provision of the Regulations pertaining to the sporting just cause.<sup>113</sup> What follows is an excerpt of the so far only decision which contains at least certain indications, although some of the thoughts of the DRC were not backed by the CAS in the relevant appeal procedure.

- “[20] (...) *Therefore this legal remedy authorizing to terminate a labour relationship with a valid reason has to be set at high level and under clear and objective conditions in order to preserve the legal security. [21] Equally, the deciding authority was eager to emphasize that it is the first time it had to address the question whether a professional has terminated the relevant employment contract prematurely on the grounds of sporting just cause in the sense of art. 15 of the Regulations, and thus, no jurisprudence has been established so far. [22] Yet the Chamber remarked that under the Regulations and following a grammatical interpretation of the relevant provision, the sporting just cause is established mainly taking in consideration a floor of 10 % of the official matches in which the player in question participated and not the minutes.*<sup>114</sup>”

### 4. *Final remarks*

These were, in short, the main aspects of the provisions of the Regulations pertaining to the maintenance of contractual stability between professional players and clubs, as well as some excerpts from existing case law of the DRC (by far not all decisions of relevance, of course) to better illustrate them. For sure this fundamental element of the rules of FIFA concerning the international transfer of players will continue to play a central role in (legal) discussions between the main stakeholders of competitive football at club level, i.e. players and clubs, as well as their legal representatives. No doubt the positions of the clubs on the one side and the players on the other side will never be congruent. But as long as both parties will recognise that without reciprocal contractual stability the system by which football is played today will not survive and that both sides need to be ready to compromise for the sake of a well-functioning system, the mutual respect should prevail and, were necessary, constructive ways forward should be reachable. The DRC, by means

<sup>112</sup> DRC meeting of November 2007, decision no. 117294 on FIFA.com, consideration 33.

<sup>113</sup> Cf. point 2.2.4 above.

<sup>114</sup> DRC meeting of August 2007, decision no. 871322 on FIFA.com, consideration 18 et seqq..

of its jurisprudence and the work spirit of its members, certainly goes ahead as a good example. If the exchanges between the stakeholders under the auspices of FIFA should generate proposals and measures apt at further fostering an already quite well-functioning system, then they should certainly be supported and further developed.

I hope that this short essay will help provide a better understanding of the aims and purposes of the Regulations and, within that scope, the considerations and way of thinking of the DRC. In fact, they have just one common and essential goal: preserve the so important contractual stability!



**CONTRACT STABILITY:  
THE CASE LAW OF THE COURT OF ARBITRATION OF SPORT**

by *Richard Parrish\**

SUMMARY: 1. Introduction – 2. Termination for just cause – 3. Termination on the grounds of sporting just cause – 4. Restriction on terminating a contract during the season – 5. The consequences of terminating a contract without just cause – 6. Article 17 Key Cases – 6.1 Webster – CAS Decision Rendered 30<sup>th</sup> January 2008 – 6.2 Matuzalem – CAS Decision Rendered 30<sup>th</sup> May 2009 – 6.3 El-Hadary – CAS Decision Rendered 1<sup>st</sup> June 2010 – 6.4 de Sanctis – CAS Decision Rendered 28<sup>th</sup> February 2011 – 7. The reasoning of the CAS in determining compensation amounts – 7.1 The ‘law of the country concerned’ – 7.2 ‘Unless otherwise stated in the contract’ – 7.3 The ‘specificity of sport’ – 7.4 ‘Any other objective criteria’ – 7.4.1 Remuneration and benefits due – 7.4.2 Replacement costs/loss of a transfer fee – 7.4.3 Fees and expenses incurred – 7.4.4 The time remaining on the contract – 7.4.5 Whether the breach falls within a protected period – 7.4.6 The specificity of sport – the player’s behaviour and position – 7.4.7 The specificity of sport – The player’s commercial value – 7.5 ‘Jointly and severally liable’ – 8. Conclusions

*1. Introduction*

The principle of *pacta sunt servanda* means that a party which freely enters into an agreement and assumes obligations under it must perform as agreed unless excused by reasons beyond its control.<sup>1</sup> Maintaining this principle in professional football came under pressure following the European Court’s judgment in *Bosman*.<sup>2</sup> Enhanced labour mobility, coupled with significantly increased remuneration, acted as incentives for players to maximise their earning potential by seeking to extricate themselves from existing contracts. Establishing order within this system became a pre-occupation of FIFA and UEFA following the judgment in *Bosman*. This quest was complicated by the issuance in 1998 by the European Commission of a

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<sup>1</sup> Beloff, M., Kerr, T., Demetriou, M., (1999), *Sports Law*, Oxford: Hart, 9.

<sup>2</sup> Case C-415/93 *Union Royale Belge Sociétés de Football Association and others v Bosman and others* [1995] ECR I-492, hereafter referred to as *Bosman*.

statement of objections to FIFA which *inter alia* complained about the prohibition of players from transferring to another club following their unilateral termination of contract, even if the player had complied with national law governing the penalties for breach of contract. The eventual 2001 agreement satisfied the Commission that the most restrictive elements of the FIFA Regulations had been removed and that ‘the new rules find a balance between the players’ fundamental right to free movement and stability of contracts together with the legitimate objective of integrity of the sport and the stability of championships’.<sup>3</sup> On this basis, the Commission closed its investigation by way of an informal exchange of letters.<sup>4</sup>

The 2001 agreement provided for contract stability through the application of Articles 13-18 of the FIFA Regulations on the Status and Transfer of Players (the FIFA Regulations). The general principle that contracts must be respected is outlined in Article 13 which states ‘a contract between a professional and a club may only be terminated upon expiry of the term of the contract or by mutual agreement’. The FIFA Regulations seek to protect contract stability through the idea that contracts contain a ‘protected period’. This is a period of three entire seasons or three years, whichever comes first, following the entry into force of a contract, where such contract is concluded prior to the 28<sup>th</sup> birthday of the professional, or two entire seasons or two years, whichever comes first, following the entry into force of a contract, where such contracts concluded after the 28<sup>th</sup> birthday of the professional.

Focussing on the interpretation of Article 17 of the FIFA Regulations (the consequences of terminating a contract without just cause), this article reviews four key cases of the Court of Arbitration for Sport (CAS) – *Webster*,<sup>5</sup> *Matuzalem*,<sup>6</sup> *El-Hadary*<sup>7</sup> and *de Sanctis*.<sup>8</sup>

## 2. Termination for just cause

The *pacta sunt servanda* principle is not absolute. Article 14 provides that a

<sup>3</sup> IP/02/824, 05/06/2002, ‘Commission closes investigations into FIFA regulations on international football transfers’.

<sup>4</sup> Letter from Mario Monti to Joseph S. Blatter, 05/03/01, D/000258. See also IP/02/824, 05/06/2002, ‘Commission closes investigations into FIFA regulations on international football transfers’.

<sup>5</sup> CAS 2007/A/1298 Wigan Athletic FC v/ Heart of Midlothian & CAS 2007/A/1299 Heart of Midlothian v/ Webster & Wigan Athletic FC & CAS 2007/A/1300 Webster v/ Heart of Midlothian, award of 30 January 2008, hereafter referred to as *Webster*.

<sup>6</sup> CAS 2008/A/1519 FC Shakhtar Donetsk (Ukraine) v/ Mr.MatuzalemFrancelino daSilva (Brazil) & Real Zaragoza SAD (Spain) & FIFA CAS 2008/A/1520 – Mr.MatuzalemFrancelino da Silva (Brazil) & Real Zaragoza SAD (Spain) v/ FC Shakhtar Donetsk (Ukraine) & FIFA, hereafter referred to as *Matuzalem*.

<sup>7</sup> CAS 2009/A/1880 FC Sion v. FIFA & Al-Ahly Sporting Club & CAS 2009/A/1881 Essam El-Hadary v FIFA & Al-Ahly Sporting Club, hereafter referred to as *El-Hadary*.

<sup>8</sup> CAS 2010/A/2145 Sevilla FC SAD v. UdineseCalcioS.p.A. & CAS 2010/A/2146 Morgan de Sanctis v. UdineseCalcioS.p.A & CAS 2010/A/2147 UdineseCalcioS.p.A v. Morgan de Sanctis&Sevilla FC SAD, hereafter referred to as *de Sanctis*.

contract can only be terminated by either party without consequences, such as payment of compensation or the imposition of sporting sanctions, where there is 'just cause'. No further guidance is provided as to the meaning of 'just cause' although the commentary accompanying the FIFA Regulations provides illustrative examples.<sup>9</sup> The commentary explains that behaviour that is in violation of the terms of an employment contract cannot justify the termination of a contract for just cause, unless such behaviour is persistent. The jurisprudence of the FIFA Dispute Resolution Chamber (DRC) and the Court of Arbitration for Sport has progressively clarified the meaning of just cause. De Weger's study on the jurisprudence of the DRC presents a range of possible 'just causes' available to clubs and players.<sup>10</sup>

### *3. Termination on the grounds of sporting just cause*

Article 15 regulates the termination of a contract for 'sporting just cause'. This covers circumstances in which an 'established professional' has, in the course of the season, appeared in fewer than ten per cent of the official matches in which his club has been involved. These circumstances are to be considered on a case-by-case basis and if sporting just cause is established sporting sanctions cannot be imposed, although compensation may be payable. In order to rely on Article 15 to prematurely terminate a contract, the player must notify the club within 15 days following the last official match of the season of the club with which he is registered.

### *4. Restriction on terminating a contract during the season*

In order to ensure that a club can rely on the services of its players during the course of the season, Article 16 provides that a contract cannot be unilaterally terminated during the course of a season. Only situations governed by Article 14 (termination for just cause) permit a party to unilaterally terminate a contract during a season.

### *5. The consequences of terminating a contract without just cause*

The consequences of terminating a contract without just cause are specified in Article 17. If a contract is terminated without just cause the party in breach shall pay compensation. Unless otherwise stated in the contract of employment, the level of compensation is calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria such as the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum

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<sup>9</sup> Commentary on the Regulations for the Status and Transfer of Players, 39-40. Accessed at [www.fifa.com](http://www.fifa.com).

<sup>10</sup> DEWEGER, F., (2008), *The Jurisprudence of the FIFA Dispute Resolution Chamber*, The Hague: T.M.C Asser Press, 84-95.

of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period. Article 17(1) also provides that the level of compensation is subject to the FIFA Regulations on training compensation. Article 17(2) requires that the player and his new club shall be jointly and severally liable for its payment and that the amount may be stipulated in the contract or agreed between the parties.

Article 17(3) allows for, in addition to the obligation to pay compensation, sporting sanctions to be imposed on a player found to be in breach of contract during the protected period. The player can be prohibited from playing in official matches for four months, with an additional two month ban in the case of aggravating circumstances. The ban takes effect immediately once the player has been notified of the decision although sporting sanctions are suspended in the period between the last official match of the season and the first official match of the next season, in both cases including national cups and international championships for clubs. The suspension of the sporting sanctions shall, however, not be applicable if the player is an established international player and his team is participating in the final competition of an international tournament in the period between the last match and the first match of the next season. If a player unilaterally breaches his contract without just cause or sporting just cause after the protected period, he will not incur any sporting sanctions. Disciplinary measures may, however, be imposed outside the protected period for failure to give notice of termination within 15 days of the last official match of the season (including national cups) of the club with which the player is registered. The protected period starts again when, while renewing the contract, the duration of the previous contract is extended.

Clubs who breach a contract with a player, or who are found to be inducing a breach of a contract during the protected period must also pay compensation and sporting sanctions can also be imposed upon them. In effect, if a club recruits a player who has breached a contract with his former employer without just cause, the acquiring club is deemed to have committed the offence of inducement to breach unless it can establish otherwise (Article 17(4)). In such circumstances, the club shall be banned from registering any new players, either nationally or internationally, for two registration periods. Article 17(5) provides that any person subject to the FIFA statutes and regulations, such as club officials, players' agents and players, who acts in a manner designed to induce a breach of contract between a professional and a club in order to facilitate the transfer of the player shall be sanctioned.

## 6. *Article 17 Key Cases*

### 6.1 *Webster - CAS Decision Rendered 30<sup>th</sup> January 2008*

In 2001 Scottish Premier League side Heart of Midlothian (Hearts) paid £75,000 for eighteen year old Andy Webster from Scottish Second Division club Arbroath.

Webster's contract with Hearts was due to expire in June 2005 although in July 2003 he agreed to enter into a new four year employment contract with the club effective until June 2007. During his time at Hearts, Webster became an established centre-back and he was selected to represent Scotland in 2003. He ultimately won twenty-two caps for Scotland. In 2005, the club offered to extend Webster's contract until 2009. The offer was not accepted by Webster who felt 'pressured' into signing a contract on terms not acceptable to him.<sup>11</sup> Rumours were also circulating in the media linking him with a move away from Hearts and his refusal to agree to the new contract led, in April 2006, to public criticism of the player and his agent by Hearts' Lithuanian owner Vladimir Romanov and to his temporary non-selection for the team.<sup>12</sup>

Webster initially considered terminating his contract on the grounds of breach of contract and Article 15 of the FIFA Regulations. However, for expediency, in May 2006 Webster notified Hearts of his intention to unilaterally terminate his contract on the basis of Article 17. Webster was of the belief that as his contract termination was outside the protected three year period, he would not face a sanction and that the compensation his new employer would be liable for would only amount to approximately £200,000. Webster's agent communicated this view to a large number of English clubs. In the meantime, Hearts rejected an offer of £1.5 million from Southampton Football Club believing his transfer value to be higher.<sup>13</sup>

In August 2006 Webster signed for English Premier League side Wigan Athletic without payment of a transfer fee or compensation. Hearts responded by filing a claim against Webster before the FIFA DRC.<sup>2</sup> The claim for compensation for breach of contract, without just cause, against Webster and Wigan totalled £5,037,311. The FIFA DRC partially accepted the claim of Hearts. Webster was found to have unilaterally breached the employment contract with Hearts without just cause but outside the Protected Period. This entitled the club to compensation and this was set by the DRC at £625,000. In determining this figure, the Chamber considered that limiting compensation to the residual value of the contract (£199,976) would not be sufficient for the purpose of maintaining the principle of contract stability as outlined in Article 17 and nor would it be consistent with the jurisprudence of the DRC. This would not be fair and equitable as it would sanction players being able to 'buy-out' their contract. The Chamber considered that other factors should be taken into account such as the time the player spent at the club and the contribution of the club to Webster's improvement and current standing. These considerations were justified with reference to the statement contained in Article 17 that calculation of compensation for breach of contract may include, in addition to national law and the specificity of sport, 'any other objective criteria'. Beyond

<sup>11</sup> FIFA DRC 4 April 2007, no.47936, para. 39.

<sup>12</sup> GORDON, P. (2006), 'Webster on way out at Tynecastle', *The Times*, 27/04/06.

<sup>13</sup> Facts from Webster.

<sup>14</sup> FIFA DRC 4 April 2007, no.47936.

that explanation, it remains unclear how the DRC arrived at the sum. Wigan Athletic was jointly and severally liable for this payment. The DRC also found that Webster had failed to give Hearts sufficient notice of termination, as required by the FIFA Regulations, and consequently he was banned from participation in official matches for a period of two weeks as from the beginning of the next national league championship for which he will be registered.

Webster, Wigan and Hearts filed Statements of Appeal with the CAS in May 2007 arguing collectively that the DRC misapplied Article 17 when determining the compensation payable and failed to explain how the total of £625,000 was arrived at. The CAS agreed with the submission of the parties regarding the failure of the DRC to provide reasons for the award and on those grounds the CAS declared the DRC's decision invalid. This necessitated the CAS rendering a new decision on the level of compensation to be awarded on the basis of Article 17. In doing so the CAS rejected the submission of Hearts in relation to the calculation of compensation owed and set the sum at a level equivalent to the residual value of the contract which was £150,000.

## *6.2 Matuzalem – CAS Decision Rendered 30<sup>th</sup> May 2009*

In June 2004, Ukrainian side Shakhtar Donetsk purchased Brazilian player Matuzalem Francelino da Silva (hereafter Matuzalem) for Euro 8,000,000 from Italian club Brescia. Matuzalem agreed a fixed term employment contract for the period July 2004 to July 2009. The contract contained a clause to the effect that 'in the case the Club receives a transfer offer in amount of Euro 25,000,000 or exceeding the sum above the club undertakes to arrange the transfer within the agreed period'. Matuzalem established himself as an important first team player and during the 2006/07 season, he became club captain. His performances were such that in June 2007 the Italian club Palermo offered Shakhtar Dollar 7,000,000 for the player. This was rejected.

In July 2007, Matuzalem informed Shakhtar in writing that he had unilaterally terminated his contract with the club with immediate effect in accordance with Article 17 of the FIFA Regulations. Matuzalem indicated that the notification was served within 15 days following the last game of the Ukrainian season and at the end of the protected period. Shakhtar disputed the player's ability to rely on Article 17 and considered the contract still in force. Further, they referred the player to the Euro 25,000,000 transfer clause in his contract. In July 2007, Matuzalem signed a three year contract with Spanish club Real Zaragoza but one year later he was loaned to Italian side Lazio with an option for the Italian to make the loan permanent.

In July 2007, Shakhtar initiated proceedings before the FIFA DRC requesting a decision that the player and Real Zaragoza are liable for the payment of Euro 25,000,000 compensation. Matuzalem and Real Zaragoza asked the DRC to reject the claim and establish the amount of compensation at Euro 3,200,000. The

DRC awarded Shakhtar compensation of Euro 6,800,000.<sup>15</sup> In doing so it found that the Euro 25,000,000 clause could not be interpreted as a penal clause applicable in case of abreach of contract by the player. The DRC established that the appropriate formulation to be employed in determining the compensation amount was three-fold. First was the residual value of the contract. Second, was the non-amortised value of the initial transfer fee paid by Shakhtar. Third, was the compensation as a result of the poor conduct of the player (justified under the ‘specificity of sport’ criteria).

On appeal, the CAS agreed with the DRC that the club and player did not agree in advance on a compensation amount in the event of termination of the contract without just cause. This left the panel to consider whether the compensation amount set by the DRC was correct. The panel first calculated the value of the lost services of the player for Shakhtar. This was set at Euro 11,258,934, a figure arrived at with reference to the player’s remuneration in the two seasons following his departure from Shakhtar and the cost of replacing the player. Because the player was the club captain and best player and due to the timing of his departure, the panel considered it appropriate to set an additional indemnity amount equal to six months of salary paid by Shakhtar (Euro 600,000). This figure was set despite the panel recognising that the exact damage could not be quantified. The total compensation to be paid by the player to Shakhtar was therefore Euro 11,858,934. The player and Real Zaragoza were held jointly and severally liable for the payment of the compensation due to Shakhtar.

### *6.3 El-Hadary – CAS Decision Rendered 1<sup>st</sup> June 2010*

In January 2007, Egyptian goalkeeper Essam El-Hadary signed a contract with Egyptian side Al Ahly effective until the end of the 2009/10 season. In February 2008 negotiations took place between the player, his club and the Swiss club FC Sion with a view to transferring the player to Switzerland. Although details of that meeting are contested, no evidence of an agreement to transfer the player was provided. However, the following day El-Hadary signed for Sion. The player then informed Al Ahly that he had terminated his contract with them.

The dispute was heard by the FIFA DRC. The player and FC Sion were required to pay Euro 900,000 to Al Ahly. As the breach was found to be without just cause and during the protected period, sporting sanctions were imposed on the club and the player. The compensation amount was composed of the remuneration and other benefits due to the player under the previous and the new contract and the value attributed to his services by both clubs (totalling Euro 300,000). The panel trebled the award under the specificity of sport criteria having considered the sports-related damage caused to the club by the player as being very significant.<sup>16</sup> The DRC decision was then appealed to CAS.

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<sup>15</sup> FIFA DRC Decision, 2<sup>nd</sup> November 2009, no.117549.

<sup>16</sup> FIFA DRC Decision, 16<sup>th</sup> April 2009, no.49194.

CAS determined that the correct formula to be employed when determining the compensation owed by the player was (1) Dollar 488,500 which was the value of the player's new contract, over the same period of time of that remaining on the contract that was breached and (2) Dollar 600,000 which represents the loss of a transfer fee. Deducted from this amount should be the residual value of the player's breached contract (Dollar 292,000) which represents the amount saved by the Egyptian club. Therefore, the panel determined that an amount of Dollar 796,500 would allow Al Ahly to acquire a replacement of similar quality.<sup>17</sup> Consequently, the panel lowered the DRC's amount of compensation owed by the player to this amount. El-Hadary also received a four month suspension as the breach occurred within the protected period. In imposing the sanction, the panel explained that the FIFA Regulations mandated them to impose a ban given the word 'shall' rather than 'may' impose sanctions was used in the Regulations at Article 17(3).<sup>18</sup> The same wording is employed in relation to the imposition of sanctions on clubs who induce a breach of contract during the protected period.

#### 6.4 *de Sanctis – CAS Decision Rendered 28<sup>th</sup> February 2011*

In July 1999, Italian side Udinese signed goalkeeper Morgan de Sanctis from fellow Italian side Juventus for a five year period. Over the next few years the player signed a series of further contracts with Udinese, the final one being for a five year period with effect from 1 July 2005. Under the terms of this final contract de Sanctis was paid a gross annual salary of Euro 630,000 plus bonuses, along with an annual contribution towards his rent of Euro 9,700. Also included in the agreement was a loyalty bonus under which the player would receive the gross sum of Euro 350,878 for each year he remained at Udinese. In June 2007, de Sanctis informed Udinese that he had terminated his contract under the terms of Article 17 of the FIFA Regulations. The termination took place outside the protected period. A month later, de Sanctis signed for Spanish side Sevilla on a four year contract. This contract provided for an annual gross salary of Euro 331,578 and a gross contract premium payment of Euro 1,050,000. In addition, the Sevilla contract contained a clause stating that if the player sought to terminate the Sevilla contract before its expiry, he would be liable to pay Euro 15,000,000 compensation to Sevilla.

In April 2008, Udinese filed a complaint with FIFA's DRC claiming Euro 23,267,594 compensation for the player's breach. The amount was arrived at through an attempt at quantifying the club's losses. The DRC partially accepted Udinese's claim although it set the compensation amount owed by de Sanctis to Udinese at Euro 3,933,134. The player and Sevilla were held jointly and severally liable for the payment of that sum.<sup>19</sup> Euro 3,547,134 of this amount reflected the average remuneration and other benefits due to de Sanctis under the previous and

<sup>17</sup> CAS *El-Hadary*, paras. 224-227.

<sup>18</sup> CAS *El-Hadary*, para. 247.

<sup>19</sup> FIFA DRC, 10<sup>th</sup> December 2009, no.129641.

the new contract and the value attributed to his services by both clubs, as well as Euro 36,000 being the non-amortized agent fee over the term of the contract. Added to this was Euro 350,000 reflecting the sports related damage caused to Udinese by the player in the light of the specificity of sport. In June 2010, Sevilla, de Sanctis and Udinese all filed appeals with the Court of Arbitration for Sport.

The CAS panel set the total replacement costs at Euro 4,510,000 for the three years left remaining on the contract and then deducted salary savings over the three year period remaining on the player's contract (Euro 2,950,000). Added to this was a specificity of sport uplift set at Euro 690,000 resulting in compensation being set at Euro 2.25 million.

## 7. *The reasoning of the CAS in determining compensation amounts*

### 7.1 *The 'law of the country concerned'*

Article 17(1) of the FIFA Regulations stipulates that '...compensation for breach shall be calculated with due consideration for the law of the country concerned'. Article 25(6) of the same regulations provides that the DRC shall, when taking its decision, apply the regulations 'whilst taking into account all relevant arrangements, laws and/or collective bargaining agreements that exist at national level, as well as the specificity of sport'. The 'law of the country concerned' is taken to mean the law governing the employment relationship between the player and his former club. According to the commentary accompanying the FIFA Regulations this refers to 'the laws of the country where the club is domiciled'.<sup>20</sup>

Article 62(2) of the FIFA statutes reads '[t]he provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law'.<sup>21</sup> Therefore, it would appear that FIFA intended the interpretation and validity of its regulations and decisions to be governed by Swiss law. From that perspective, it would seem logical that when determining compensation sums for unilateral termination, the DRC and CAS should not necessarily prioritise and follow national law over the other criteria established in Article 17. This is significant in so far as national rules on contractual damages vary.

It is a well-established principle that parties to a contract are free to choose the applicable law. In the case of football contracts, this is often explicitly stated as being the law of the state concerned. However, football contracts also provide that the parties subject themselves to the rules and regulations of the relevant governing bodies, including FIFA. The rules and regulations of private organisations would not normally be considered 'law' and therefore the choice of law available to the contracting parties lies within the terrain of state law. However, in the case

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<sup>20</sup> Commentary on the Regulations for the Status and Transfer of Players, 47, footnote 74. Accessed at [www.fifa.com](http://www.fifa.com).

<sup>21</sup> FIFA Statutes, 2010 Edition.

of international football, the FIFA regulations are well developed and comprehensive and there is academic debate as to whether this body of regulation can be correctly termed law, or *lex sportiva*.<sup>22</sup> From this perspective the contracting parties have chosen their relationship to be regulated by two ‘laws’, one the law of the state specified in the contract or most closely connected to the dispute, the other the FIFA Regulations. What law prevails?

The CAS has been prepared to set aside national law in favour of the FIFA Regulations.<sup>23</sup> However, this approach may be tempered by two considerations. First, in a case concerning whether FIFA Regulations could trump Swiss law, the Federal Supreme Court of Switzerland found that whilst the FIFA Regulations can form part of a contractual agreement, they are subordinate to mandatory Swiss law.<sup>24</sup> Second, where the agreement engages EU law, EU law must be followed even in circumstances in which the parties choose a non-EU law to govern their agreement.

The type of national law and its weight in proceedings is not specified in the FIFA Regulations and in *Webster* the CAS found that reference to national law contained in Articles 17 and 25 are not ‘properly speaking, choice-of-law clauses’.<sup>25</sup> Rather, the regulations remind the DRC not to apply the FIFA Regulations in a ‘vacuum’.<sup>26</sup> So whilst in *Webster* the law of the country concerned was Scottish law, the panel considered that it was the FIFA Regulations, as interpreted by Swiss law, that should apply and not Scottish law. The panel observed that Hearts were seeking to rely on general rules and principles of Scottish law on damages for breach of contract. These general rules were, in the opinion of the panel, ‘neither specific to the termination of employment contracts nor to sport or football’.<sup>27</sup> The panel contrasted this with Article 17 of the FIFA Regulations which was adopted precisely with the goal of finding ‘special solutions’ for unilateral termination of football contracts.<sup>28</sup> On these grounds, the panel decided that Scottish law was subordinate to the FIFA Regulations.

In *Matuzalem*, the CAS panel determined that the parties did not agree on the application of any specific national law but through their submissions referred exclusively to the FIFA Regulations. As a result, the panel found that those

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<sup>22</sup> It is beyond the scope of this chapter to review this debate. See FOSTER, K. (2003), *Is There a Global Sports Law?*, 2 Entertainment Law, Spring, 1-18; FOSTER, K. (2006), *Lex Sportiva and LexLudica: The Court of Arbitration for Sport’s Jurisprudence*, in Blackshaw et al., *The Court of Arbitration for Sport 1984-2004*, The Hague: T.M.C Asser Press; ERBSEN, A. (2006), *The Substance and Illusion of LexSportiva*, in Blackshaw et al., *The Court of Arbitration for Sport 1984-2004*, The Hague: T.M.C Asser Press.

<sup>23</sup> See DE WEGER, F., (2008), *The Jurisprudence of the FIFA Dispute Resolution Chamber*, The Hague: T.M.C Asser Press, 23-24.

<sup>24</sup> Decision of the Federal Supreme Court of Switzerland of 20 December 2005, BGE 132 III 285.

<sup>25</sup> CAS *Webster*, para. 20.

<sup>26</sup> CAS *Webster*, para. 21.

<sup>27</sup> CAS *Webster*, para. 63.

<sup>28</sup> CAS *Webster*, para. 63.

regulations apply, with Swiss law applying complementarily.<sup>29</sup> The panel added that neither of the parties in *Matuzalem* submitted ‘any compelling legal arguments according to which a national law could have an effect on the calculation of the compensation due, nor have they specified in particular any arguments of Ukrainian (or of Swiss) law which – within the meaning of the criterion – should be taken into due consideration by the Panel’.<sup>30</sup>

In *El-Hadary*, the CAS panel found ‘that law of the country concerned may be relevant in favour of the player or in favour of the club, or be utterly irrelevant. It is up to the party which believes that such factor could be in its favour to make sufficient assertions in this regards. If it does not, the judging authority will not take that factor into account in order to assess the amount of compensation. In no way does this mean that the judging authority failed to properly evaluate this matter’.<sup>31</sup> As the parties had not agreed on the application of any specific national law and that the FIFA Regulations and Swiss law would apply to the case as the parties referred to them in their submissions.<sup>32</sup> This logic was also followed in *de Sanctis*.<sup>33</sup>

The approach of CAS appears to be that the construction of Article 17 requires only ‘due consideration’ to be given to national law. Furthermore, prioritising national law could lead to inconsistent awards given that national laws on contract damages vary and would render reference to ‘any other objective criteria’ redundant. For CAS, where there is conflict of laws, reference to the specificity of sport criteria contained in Article 17 justifies an interpretation of the relevant rules which is tailored to the needs of football. From this perspective CAS doesn’t merely enforce the terms negotiated by the parties or imposed by the governing body but establishes a normative interpretative framework. This approach may be attacked in circumstances in which the parties to a contract have explicitly chosen mandatory national law to regulate their relationship.

## 7.2 ‘Unless otherwise stated in the contract’

The amount of compensation payable for unilateral termination of contract can be ‘provided for in the contract’ (Article 17(1)) or ‘agreed between the parties’ (Article 17(2)). In *Webster*, the CAS confirmed the primacy of the parties’ contractual intentions but found that Webster’s contract with Hearts contained no such agreement.<sup>34</sup> In *Matuzalem*, the CAS agreed with the DRC that the Euro 25,000,000 clause cannot be interpreted as a penalty or liquidated damages clause in the

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<sup>29</sup> CAS *Matuzalem*, para. 52.

<sup>30</sup> CAS *Matuzalem*, para. 147.

<sup>31</sup> CAS *El-Hadary*, para. 208.

<sup>32</sup> CAS *El-Hadary*, para. 134.

<sup>33</sup> CAS *deSanctis*, paras. 94-95.

<sup>34</sup> CAS *Webster*, paras. 56-59.

meaning of Article 17. That clause referred to a situation in which the club received a 'transfer offer'. It was not designed to regulate unilateral termination. Given that the parties had not specified in the contract the compensation amount payable on unilateral termination, the CAS panel then explored how the compensation owed by the player should be calculated. In *El-Hadary*, the CAS panel noted the absence of a contractual provision relating to compensation for unilateral breach.<sup>35</sup> Nor could the panel find any evidence, as asserted by the player, that his club had allowed him to sign for another club without a compensation package being payable.<sup>36</sup> As a result, the contract was not terminated by mutual consent. As the panel considered that reasons of just cause or sporting just cause were not relevant, the player was deemed to have unilaterally breached his contract. This left the panel with the task of determining the amount of compensation payable by the player for the breach as required by Article 17. In *de Sanctis*, the panel noted that the parties did not agree a contractual remedy, such as a penalty clause or a liquidated damages clause, for a breach of contract.<sup>37</sup>

### 7.3 The 'specificity of sport'

Article 17(1) provides that in determining compensation amounts for unilateral breaches, due consideration should be given to the specificity of sport. The definition of this term, and its application in regulatory proceedings, remains one of the most challenging features of the current FIFA Regulations given the lack of guidance on the issue. Brief mention of the term is provided in the commentary accompanying the FIFA Regulations. In a discussion on suitable criteria for determining compensation in the case of a unilateral breach of contract, the commentary states that 'there was also the possibility of awarding additional compensation. This additional compensation may, however, not surpass the amount of six monthly salaries'.<sup>38</sup>

In *Webster*, CAS defined the specificity of sport as 'the goal of finding particular solutions for the football world which enable those applying the provision to strike a reasonable balance between the needs of contractual stability, on the one hand, and the needs of free movement of players, on the other hand, i.e. to find solutions that foster the good of football by reconciling in a fair manner the various and sometimes contradictory interests of clubs and players'.<sup>39</sup>

In *Matuzalem*, the CAS panel was guided by the jurisprudence of the CAS in *Pyunik*.<sup>40</sup> In this case the panel argued that the application of the specificity

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<sup>35</sup> CAS *El-Hadary*, para. 198.

<sup>36</sup> CAS *El-Hadary*, paras. 187-195.

<sup>37</sup> CAS *deSanctis*, para. 64.

<sup>38</sup> Commentary on the Regulations for the Status and Transfer of Players, 47, footnote 75. Accessed at [www.fifa.com](http://www.fifa.com)

<sup>39</sup> CAS *Webster*, para. 67.

<sup>40</sup> CAS 2007/A/1358, *FC Pyunik Yerevan v/ Carl Lombe, AFC Rapid Bucaresti & FIFA*, N 104-105;

of sport criteria allows the panel to ‘verify that the solution reached is just and fair not only under a strict civil (or common) law point of view, but also taking into due consideration the specific nature and needs of the football world’.<sup>41</sup> In *Pyunik*, the panel considered that the specificity of sport criteria directs a panel to consider the ‘specific nature of damages that a breach by a player of his employment contract with a club may cause’.<sup>42</sup> The panel went on to explain that the ‘specific nature of the damages’ refers to the sporting and economic value of the player, including their merchandising potential and their transfer value. For the panel, ‘the asset comprised by a player is obviously an aspect which cannot be fully ignored when considering the compensation to be awarded for a breach of contract by a player’.<sup>43</sup>

The *Matuzalem* panel also observed that under the Swiss law (Code of Obligations), a judging authority is allowed to grant a certain ‘special indemnity’ to the employee, in the event of an unjustified termination by the employer, and to the employer, in the event of an unjustified termination by the employee.<sup>44</sup> This led the panel into a discussion on the relevance of the specificity of sport statement contained in Article 17. The panel observed that under normal employment relations, the employee is considered the weaker party and as such any indemnity would be expected to be significantly smaller than if this breach were perpetrated by the stronger party, namely the employer. However, due to the specific nature of sport, the panel considered that ‘it may be often wrong to treat the players as being the weak party *per se*’.<sup>45</sup> This could justify increasing the amount of compensation payable although this criteria should be subordinate to the other compensable damage heads as the specificity of sport criteria should only be employed to verify the solution for compensation reached.

In *El-Hadary*, the CAS panel noted that the focus contained in Article 17 on the specificity of sport was designed to ensure that not only were the interests of clubs and players balanced, but that the wider interests of the football community were also given due consideration.<sup>46</sup> Based on the same wording found in *Matuzalem*, the panel took this to mean that when assessing the compensation owed by the player, special consideration should be given to the fact that the dispute is taking place in ‘the somehow special world of sport’.<sup>47</sup> It went on to say that this should not detract from the need to make a judgment that is ‘legally correct’.<sup>48</sup> Given the facts of the case, the panel concluded that there was no

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2007/A/1359, *FC Pyunik Yerevan v/ EdelApoulaEdimaBete, AFC Rapid Bucuresti & FIFA*, N 107-108; confirmed in CAS 2008/A/1568, *Tomas Mica & Football Club Wil 1900 v/FIFA & Club PFC Naftex AC Bourgas*, N 6.46 and 6.47.

<sup>41</sup> CAS *Pyunik*, para. 40.

<sup>42</sup> CAS *Pyunik*, para. 41.

<sup>43</sup> CAS *Pyunik*, para. 41.

<sup>44</sup> CAS *Matuzalem*, para. 156.

<sup>45</sup> CAS *Matuzalem*, para. 156.

<sup>46</sup> CAS *El-Hadary*, para. 233.

<sup>47</sup> CAS *El-Hadary*, para. 233.

<sup>48</sup> CAS *El-Hadary*, para. 233.

reason to increase or decrease, because of the specificity of sport, the compensation that the injured party was ready to accept as a suitable transfer fee at the moment of the player's transfer to Switzerland.<sup>49</sup> To do otherwise would result in the injured party being returned to a better position than it would have been in had the termination been mutually agreed.

In *de Sanctis*, the panel agreed with previous CAS panels that the specificity of sport is not an additional head of compensation, nor a criteria allowing to decide in equity, but a correcting factor which allows the panel to take into consideration other objective elements which are not envisaged under the other criteria of Article 17.<sup>50</sup> In this respect, the panel was not convinced that the direct replacement costs awarded to Udinese fully compensated the club for the loss it suffered as a result of the breach. At the hearing, the club submitted that the specificity of sport criteria allows the market value of the player to be used to ensure that the club is fully compensated. However, the panel decided that 'the specificity of sport is a correcting factor, and not one that enables a transfer fee through the back door'.<sup>51</sup>

From the above, it would appear that the approach of the CAS is to consider the specificity of sport as informing the analysis under 'any other objective criteria'. Accordingly, this issue is dealt with below.

#### 7.4 'Any other objective criteria'

Article 17(1) provides that, in addition to the criteria discussed above, compensation may be calculated on the basis of 'any other objective criteria', including the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period. Each of these are considered in turn:

##### 7.4.1 Remuneration and benefits due

The logic behind this criteria is that the remuneration under the existing and the new contract may provide an indication as to the value of the services of the player for the club and therefore give an indication as to the cost of replacing that player. If the remuneration is higher under the new contract, this may also reveal the motive behind the decision of the player to unilaterally terminate his contract.

In *Webster*, Hearts' claim that the remuneration and benefits due under Webster's new contract should form part of the calculations with regards to determining compensation was rejected by the CAS panel. Hearts had claimed

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<sup>49</sup> CAS *El-Hadary*, para. 240.

<sup>50</sup> CAS *deSanctis*, para. 96.

<sup>51</sup> CAS *deSanctis*, para. 99.

£330,524 based on the difference between the value of the old and new contract. The panel found that this approach would be potentially punitive on the player as it would focus not on the terms of the breached contract, terms that are known to both parties, but on the player's future financial situation.<sup>52</sup> Consequently, in *Webster*, the panel found that the most appropriate criteria for determining the compensation owed to Hearts was the residual value of the contract, which was £150,000. Residual value refers to the remuneration remaining due to the player under his contract.

In *Matuzalem*, the panel was guided by the *positive interest* principle. This principle, the equivalent of the concept of *restitutio in integrum* found in some legal systems, means that in determining the compensation amount, the judging authority will return the injured party to the position that the party would have had if the contract was performed properly without the contractual breach.<sup>53</sup> Consequently, the panel in *Matuzalem* sought to construct the total value of the services lost to the club as a consequence of the player's actions. Part of this 'total value' related to the value of player's new contract, minus the salary savings made by Shakhtar due to the player's departure.<sup>54</sup> The panel noted that the player had two years remaining on his old contract. It regarded his salary under his new contract, for the equivalent period of time, as the value attached to securing the services of the player. This figure could legitimately form part of the calculation of the overall loss suffered by Shakhtar.<sup>55</sup> However, the panel went on to explain that the remuneration element forms just one element of the total value of the services lost to the club.<sup>56</sup> The approach to remuneration and other benefits due taken in *Matuzalem* was subsequently followed in *El-Hadary* and *de Sanctis*.

#### 7.4.2 Replacement costs/loss of a transfer fee

The remuneration element of the compensation award seeks to compensate the injured club for the wages they will have to outlay to recruit an equivalent player to the one departed. If one accepts the positive interest argument, the club will also need compensating for costs, such as a transfer fee, incurred in seeking the replacement player's release from his club. Similarly, due to the player's unilateral termination, the club has lost the opportunity to receive a transfer fee.

In *Webster*, the CAS panel did not consider it appropriate to allow the replacement value of the player to form part of the calculations for determining compensation. The *Webster* panel found that Article 17 does not explicitly entitle a club to this. Consequently, 'subject to it being validly agreed by an enforceable contract... there is no economic, moral or legal justification for a club to be able to

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<sup>52</sup> CAS *Webster*, para. 85.

<sup>53</sup> CAS *Matuzalem*, para. 86, CAS *El-Hadary*, para. 204, CAS *de Sanctis*, para. 66.

<sup>54</sup> CAS *Matuzalem*, para. 124.

<sup>55</sup> CAS *Matuzalem*, para. 101.

<sup>56</sup> CAS *Matuzalem*, para. 102.

claim the market value of a player as lost profit.<sup>57</sup> To do so would be to imply into the Regulations such an entitlement and this would contradict the principles of fairness and legal certainty.<sup>58</sup> This conclusion was arrived at by the panel considering the balance of rights between clubs and players underpinning Article 17. The CAS considered that the clubs' legitimate need for contract stability was provided for by way of the protected period and the means of enforcing it. Furthermore, Article 16 strengthened this position by prohibiting unilateral termination during the course of a season.<sup>59</sup> Given these protections, the panel argued that compensation for unilateral termination without cause should not be punitive or lead to enrichment and should be calculated in such a way that places clubs and players on an equal footing in terms of the compensation sought or owed.<sup>60</sup>

As the level of compensation was not agreed on by way of the contract, to allow replacement value to feature in the criteria for determining compensation would lead to the enrichment of the club and would be punitive *vis-à-vis* the player.<sup>61</sup> In Hearts' calculation, Webster's value had appreciated considerably as a player. Having been purchased for £75,000, the club, at the time of the breach, valued him at £4,000,000. The CAS panel did not find it convincing that this appreciation was solely down to the training efforts of the club. The panel pointed out that if this submission were accepted then legitimately players would be able to seek compensation for a decrease in their market value caused by such factors as having an incompetent trainer or by being employed as a substitute.<sup>62</sup> In addition, the CAS pointed out that Article 20 of the FIFA Regulations governs training compensation and to allow replacement value into the compensation criteria would amount to double counting. The training compensation criteria also only makes reference to the actual training costs incurred by the club and not to the player's market value. The connection between actual cost and compensation amounts was critical in the CJEU's assessment of such schemes in *Bernard*.<sup>63</sup>

In *Matuzalem*, the CAS panel once again adopted a different approach. It considered it important to calculate the full amount of the value of the services lost. However, the mere fact that a club has lost the opportunity to receive a transfer fee does not necessarily equate with damage. Whilst this was acknowledged by the panel, it went on to argue that the loss of a possible transfer fee can be considered a compensable damage if the usual conditions are met – 'in particular, if between the breach or the unjustified termination of the agreement and the lost opportunity to realize a certain profit there is the necessary logical nexus'.<sup>64</sup> Establishing this connection can take different forms but for the panel,

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<sup>57</sup> CAS *Webster*, para. 76.

<sup>58</sup> CAS *Webster*, para. 80.

<sup>59</sup> CAS *Webster*, para. 72.

<sup>60</sup> CAS *Webster*, para. 73.

<sup>61</sup> CAS *Webster*, para. 74.

<sup>62</sup> CAS *Webster*, para. 78.

<sup>63</sup> Case C-325/08, *Olympic Lyonnais v Bernard & Newcastle United*.

<sup>64</sup> CAS *Matuzalem*, para. 117.

transfer offers made by third parties may be relevant in determining the damage suffered. Also worthy of consideration is whether the club can establish the connection between the termination and the claimed damage.<sup>65</sup> For example, the club may have taken steps, by way of transfer activity, to replace the player.

The *Matuzalem* panel therefore considered it appropriate to not only take into consideration the remuneration element, but how much it would cost the club, by way of a transfer fee, to acquire a similar player.<sup>66</sup> In this regard, the panel was assisted by some firm evidence as to the value attached to the player. In particular, the loan agreement between Zaragoza and Lazio contained an option clause providing Lazio with the right to make the transfer permanent on payment of a stated transfer fee (between Euro 13-15 million). In the same loan agreement the parties also agreed that an insurance policy covering the disablement of the player and valued at approximately the same as the options clause must be put in place.<sup>67</sup> Therefore, in addition to the remuneration element, it would cost between Euro 13-15 million to obtain the services of the player. The panel did however remind injured parties, in this case the club, that they are under a duty to mitigate the damage suffered.<sup>68</sup>

For a club, mitigating the damage suffered means taking reasonable steps to find a replacement for the player. In *Matuzalem*, the panel argued that in order to claim that fee, or part of it, as part of the compensation due by the player, the club would need to demonstrate that the new player was hired in substitution of the departed player, which requires not only that the players are playing in similar positions but also that the club decided to hire the new player because of the termination by the departed player. In determining whether an injured party has taken steps to mitigate the damage suffered, DRC and CAS panels will clearly be mindful that clubs are generally not able to recruit players outside of the normal transfer window periods. The club must also prove that there is a link between the amount of the transfer fee paid for the new player and the premature termination by the other player.<sup>69</sup> In *Matuzalem*, the panel considered whether it should take into account the actual costs incurred by Shakhtar to replace Matuzalem. The club bought, for a fee of EUR 20 million, Nery Alberto Castillo. However, beyond the fact that Castillo was, like Matuzalem, a midfield player, Shakhtar were unable to convince the panel that his transfer was linked to the gap left by the Matuzalem or that the costs of hiring the Castillo have been increased by Matuzalem's actions.<sup>70</sup>

In *El-Hadary*, the panel heard witness evidence that the Swiss club was prepared to pay a transfer fee of Dollar 600,000 for the player. Corroborating this figure was the fact that 18 months later the player was transferred back to another club in Egypt for the same sum.<sup>71</sup> The player's subsequent unilateral termination

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<sup>65</sup> CAS *Matuzalem*, para. 120.

<sup>66</sup> CAS *Matuzalem*, para. 102.

<sup>67</sup> CAS *Matuzalem*, paras. 105-106.

<sup>68</sup> CAS *Matuzalem*, para. 113.

<sup>69</sup> CAS *Matuzalem*, para. 136.

<sup>70</sup> CAS *Matuzalem*, para. 138.

<sup>71</sup> CAS *El-Hadary*, paras. 220-222.

of his contract therefore denied Al-Ahly the opportunity to receive this sum.

In *de Sanctis*, the panel agreed with Udinese's claim that it incurred total replacement costs comprising three elements. First, the club loaned out one of its goalkeepers with an option for the new club to acquire the player for a fee of Euro 1.2 million. This fee had to be waived once the goalkeeper was recalled due to the breach by *de Sanctis*. Second, as part of the loan agreement, any recall of the goalkeeper triggered a recall fee of Euro 250,000. Third, the recalled goalkeeper was considered too inexperienced to initially replace *de Sanctis*, so the club also recruited a more experienced interim goalkeeper. Consequently, the club incurred the salary costs of these two players. The total replacement costs were therefore calculated at Euro 4,510,000 for the 3 years left remaining on the Udinese contract. On the question of a loss of a transfer fee, the *de Sanctis* panel observed that the parties had not produced any evidence of any offers made or pending for the player. Udinese had merely produced the details of three other international goalkeepers that had transferred between clubs over the previous couple of years. The panel did not consider this sufficient evidence of loss suffered by the club. On these grounds, the panel did not use loss of transfer fee as part of assessing the compensation due to Udinese although it would appear that the panel would have done if the evidence was supplied.<sup>72</sup>

#### 7.4.3 Fees and expenses incurred

Article 17 also permits compensation amounts to be calculated with reference to fees and expenses paid or incurred by the former club, and in particular those expenses made to obtain the services of the player. These costs are to be amortized over the period of the contract. In *Webster*, Hearts' claim with respect to recovering the £75,000 transfer fee initially paid for Webster was rejected by the CAS. Article 17 states that whilst fees and expenses paid or incurred by the former club can be taken into account when determining compensation amounts, these sums are amortised over the term of the contract. In Webster's case, the player remained with the club for a longer period in total than the initially agreed fixed term of four years.<sup>73</sup> In addition, the panel declared itself unconvinced that beyond the protected period it is admissible for a club to reclaim a portion of this fee as compensation for unilateral termination unless such form of compensation is stipulated in the employment contract.<sup>74</sup>

In *Matuzalem*, Shakhtar paid Euro 8 million to secure the service of Matuzalem for five years. As he had two years remaining on his contract, the non-amortized amount was two-fifths of the transfer fee, or Euro 3.2 million. However, the panel did not add this sum to the compensation amount since it was able to calculate the value of the lost services of the player at the moment of the

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<sup>72</sup> CAS *de Sanctis*, paras. 76-78.

<sup>73</sup> CAS *Webster*, para. 83.

<sup>74</sup> CAS *Webster*, para. 84.

breach. Within this value, the value of the fees to acquire such services had been incorporated.<sup>75</sup>

In *El-Hadary*, the CAS panel did not consider the fees and expenses incurred as these had already been amortised over the period of the contract, which was first entered into in 1996. The club provided no evidence that it had incurred fees or expenses when it entered into the 2007 contract with the player.<sup>76</sup> It has to be assumed that the panel would, when determining the compensation amount, have taken into account any non-amortised fees and expenses incurred.

In *de Sanctis*, the player had signed a series of contracts with Udinese and the club had argued that the initial fees paid to acquire the player should be amortised over the entire period of the player's employment with the club. The DRC disagreed by deciding that the fees paid to Juventus had been amortised over the first five years of the player's time with Udinese, but Euro 36,000 was allowed as part of the compensation for the agent's fees. However, at the CAS hearing, Udinese no longer pursued a claim for agent fees and consequently this element was not considered as part of the compensation amount.<sup>77</sup>

#### 7.4.4 *The time remaining on the contract*

The rationale for taking the time remaining on the contract into account relates to the legitimate expectation of the parties to a contract that they can rely on the stability of the employment relationship. In *Matuzalem*, the CAS panel considered the time remaining on the contract as a specificity of sport issue. The panel considered more 'criticisable' when a player leaves a substantial part of the contract unfulfilled, in *Matuzalem's* case two years out of the five year contract.<sup>78</sup> The panel does not, however, explain why professional football is different in this respect to any other employment relationship. In *El-Hadary*, the CAS panel did not take the time remaining on the contract into account as it assumed that this factor was taken into account in the sum awarded to Al-Ahly concerning the loss of a transfer fee.<sup>79</sup> Similarly, in *de Sanctis*, the panel found that the time remaining on the old contract had been taken into account when looking at the replacement costs.<sup>80</sup>

#### 7.4.5 *Whether the breach falls within a protected period*

The jurisprudence of the CAS on this point would seem to indicate that when unilateral termination occurs outside the protected period, no additional compensation under this heading should be awarded.<sup>81</sup> In *El-Hadary*, the player

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<sup>75</sup> CAS *Matuzalem*, para. 131.

<sup>76</sup> CAS *El-Hadary*, para. 215.

<sup>77</sup> CAS *deSanctis*, paras. 90-91.

<sup>78</sup> CAS *Matuzalem*, para. 159.

<sup>79</sup> CAS *El-Hadary*, para. 229.

<sup>80</sup> CAS *deSanctis*, para. 88.

<sup>81</sup> CAS *Matuzalem*, para. 167.

breached the contract within the protected period. The CAS panel considered unilateral breaches within the protected period as an aggravating factor when determining compensation amounts. If this were not the case, it would be ‘difficult to understand why this element has expressly been listed as a criterion to take into consideration when assessing such compensation’.<sup>82</sup> However, the panel decided not to award further damages under this heading as the player was of advanced age for a footballer (37) and that sporting sanctions were suitable punishment for the player. An additional amount, argued the panel, would over-compensate the Egyptian club.

#### 7.4.6 *The specificity of sport – the player’s behaviour and position*

In *Webster*, the CAS declared itself unconvinced that the concept of aggravating factors or contributory negligence are legally relevant or applicable to the calculation of compensation under the criteria of Article 17.<sup>83</sup> In any event, the CAS concluded that the parties had not clearly established the existence of aggravating factors on the part of the player or contributory negligence on the part of the club and that accordingly these considerations were not relevant when determining compensation amounts.<sup>84</sup> In *Matuzalem* the panel adopted a different approach by considering it relevant to take into account the status and behaviour of the player. The panel observed that *Matuzalem* was an important player for the club, being not only the player through which the team directed much of its play, but also club captain. However, the panel was not satisfied that the fact that the player was playing in the central midfield makes his loss more critical, in sporting terms, than the loss of another member of the team, although ‘it may be possible to consider whether a player in breach or terminating prematurely his contract was a player of the *core team* of the club or not’.<sup>85</sup> Therefore, the panel concluded that the player’s position should not normally have an impact on the damage caused and the compensation to be paid.

With regard to *Matuzalem*’s behaviour, the panel observed that the player left the club just a few weeks before the start of the UEFA Champions League qualifying rounds. It is widely accepted that both in terms of prestige and financial reward, that the Champions League is of vital importance to clubs. The panel also noted that *Matuzalem* had accepted an increase in his salary on 1 April 2007 and by deciding shortly afterwards to leave the club had offended the good faith of Shakhtar. The player had also allegedly left the club without indicating in advance his wish to move to another team.<sup>86</sup>

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<sup>82</sup> CAS *El-Hadary*, para. 231.

<sup>83</sup> CAS *Webster*, para. 45.

<sup>84</sup> CAS *Webster*, para. 49.

<sup>85</sup> CAS *Matuzalem*, para. 174.

<sup>86</sup> CAS *Matuzalem*, para. 169.

The Panel declared itself not satisfied that the reasons submitted by Matuzalem could be accepted as full justifications of the player's behaviour even though it was the player's submission that his move was designed to save his marriage given that his wife was unhappy about living in Donetsk. This submission is somewhat corroborated by the fact that the player signed a new contract with Zaragoza with remuneration equivalent to his terms at Shakhtar. This indicates that the player did not move for economic reasons.

In *El-Hadary*, the panel rejected the notion that the player's position (goalkeeper) and his eminent status should be used against the player in determining compensation. Indeed, the fact that the player greatly contributed to the sporting success of the club should be taken in the player's favour.

#### 7.4.7 The specificity of sport – the player's commercial value

In *Webster*, Hearts claimed sporting and commercial losses relating to, for instance, a loss of merchandising opportunities stemming from the breach of contract. The panel found that Hearts had failed to establish the causality of the player's termination nor the existence of the damage.<sup>87</sup> In *Matuzalem*, the panel left open the possibility of considering damage incurred by a club because of the premature termination. For example, the club could be harmed as it is no longer in a position to fulfil some obligations towards a third party, such as a sponsor or an event organiser to whom the presence of the player was contractually warranted.<sup>88</sup> However, as it did not form part of Shakhtar's submission that it had suffered any particular additional damage because of the player's actions, the panel did not take account of any such additional damages when assessing the compensation amount.

The *de Sanctis* panel noted that during the DRC proceedings, Udinese had attempted to quantify losses such as the special role of the player in the eyes of sponsors, fans and his colleagues at Udinese, the position he played on the pitch and the success he had brought to Udinese. The panel conceded this was 'a near impossible task'.<sup>89</sup> However, the panel then went on to explain that the player was a senior professional, with whom the club had enjoyed some of their greatest successes. It added, 'fans and sponsors of all clubs demand immediate success and results. The Panel believes that at any club, when a key player is sold or goes and time is required for a new *hero* to materialise, revenues will be affected, the injured party will suffer losses which it may not be able to prove in Euros. This, in the opinion of the Panel, is where the specificity of sport can be used and should be used'.<sup>90</sup> In doing so, the *de Sanctis* panel decided to follow the specificity of sport reasoning detailed in *Matuzalem* and determined that the additional

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<sup>87</sup> CAS *Webster*, para. 90.

<sup>88</sup> CAS *Matuzalem*, para. 150.

<sup>89</sup> CAS *deSanctis*, para. 100.

<sup>90</sup> CAS *deSanctis*, para. 100.

compensation for Udinese shall be Euro 690,789, a figure representing six months remuneration under the new contract.

### 7.5 'Jointly and severally liable'

Article 17(2) states that the player and his new club shall be jointly and severally liable for the payment of compensation and that the amount may be stipulated in the contract or agreed between the parties. In *Webster*, the CAS found Wigan to be jointly and severally liable for the payment of compensation. Wigan had submitted that they should not be so because they played no part in the breach. Despite finding no evidence of fault on the part of Wigan, the panel considered that Article 17(2) is not conditional on a finding of fault and that the liability provision in Article 17(2) should be considered a form of strict liability.<sup>91</sup> The justification for this appears to lie in the difficulty of establishing fault and the need to better guarantee payment of the compensation to the injured party.<sup>92</sup> This approach has been followed by subsequent panels.

## 8. Conclusions

In *Webster* the CAS panel calculated the compensation with reference to (1) the residual value of the contract, although (2) the panel would have taken into account the fees and expenses incurred in initially recruiting the player, had these not already been amortised over the period of his employment with the club. However, even here, the panel declared itself unconvinced that beyond the protected period it is admissible for a club to reclaim a portion of this fee as compensation for unilateral termination unless such form of compensation is stipulated in the employment contract. In *Matuzalem*, guided by the *positive interest* principle, the CAS panel calculated the total value of the lost services of the player for the club. This figure was arrived at with reference to (1) the player's remuneration in the two seasons following his departure from the club (2) deducted from this the salary savings made by his club (3) the cost of replacing the player calculated by determining how much a club was prepared to pay for the player by way of a transfer fee and (4) an additional specificity of sport indemnity amount equal to six months of salary. In *El-Hadary*, the CAS panel determined that the formula to be employed when determining the compensation owed by the player was (1) the value of the player's new contract, over the same period of time of that remaining on the contract that was breached and (2) a sum representing the loss of a transfer fee (3) deducted from this amount should be the residual value of the player's breached contract which represents the amount saved by the club. The panel determined that this formula would allow the injured party to acquire a replacement of similar quality. In *de Sanctis*, the CAS panel (1) sought to construct the total

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<sup>91</sup> CAS *Webster*, paras. 94-97.

<sup>92</sup> CAS *Webster*, para. 97.

replacement costs for the three years left remaining on the contract (2) deducted from this the salary savings over the three year period remaining on the player's contract and (3) added to this was a specificity of sport indemnity amount equal to six months of salary.

The Article 17 jurisprudence of the CAS reveals competing visions as to the purpose of the provision. In *Webster*, the CAS panel considered that the construction of the Article 'leaves a substantial degree of discretion to the deciding authority to account for the circumstances of the case'.<sup>93</sup> In exercising this discretion, the panel reflected on the overall purpose of Article 17 and concluded that this was to 'balance appropriately the interests of clubs and players for the good of the game'.<sup>94</sup> This statement appears to confirm the importance of reading the Regulations in the spirit in which they were agreed with the European Commission in 2001.<sup>95</sup> From this perspective, the internal logic of the regulations revolves not around the pure sanctity of the contract of employment, but rather an attempt to balance the interests of clubs, players and the governing bodies. Clubs have a legitimate concern for the protection of contract stability, players have enforceable rights of free movement and the governing bodies pursue the legitimate objective of protecting the integrity of the sport and the stability of championships. The panel noted that, 'because of the potentially high amounts of compensation involved, giving clubs a regulatory right to the market value of players and allowing lost profits to be claimed in such a manner would in effect bring the system partially back to the pre-*Bosman* days when players' freedom of movement was unduly hindered by transfer fees...'<sup>96</sup> In light of this, and the history of Article 17, the *Webster* panel considered allowing any form of compensation that could have such an effect as being 'anachronistic and legally unsound'.<sup>97</sup> Having decided that the compensation payable by Webster should equate with the residual value of the contract, the *Webster* panel appears to have been guided by the principle that the inclusion of a protected period within the 2001 agreement satisfied the clubs' desire for contract stability and that what was left – the unprotected period – was the territory of the player.

In *Matuzalem*, *El-Hadary* and *de Sanctis* the CAS panels adopted a different logic by stating that they would be guided by the principle of *positive interest*. In this connection, the panel maintained that Article 17 'does not provide the legal basis for a party to freely terminate an existing contract at any time, prematurely, without just cause'.<sup>98</sup> Rather, the provision provides for the consequences of what 'remains a serious violation of the obligation to respect an existing contract'.<sup>99</sup> In this regard, the logic of the panel in *de Sanctis* merits brief

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<sup>93</sup> CAS *Webster*, para. 69.

<sup>94</sup> CAS *Webster*, para. 71.

<sup>95</sup> This agreement is discussed elsewhere in this edition.

<sup>96</sup> CAS *Webster*, para. 81.

<sup>97</sup> CAS *Webster*, para. 81.

<sup>98</sup> CAS *Matuzalem*, para. 62.

<sup>99</sup> CAS *Matuzalem*, para. 63.

attention. The panel considered that the list of *objective criteria* contained in Article 17 was not intended to be 'definitive'.<sup>100</sup> Article 17(1) refers to the criteria including, *in particular*, the remuneration and other benefits due... The use of the words 'in particular' would seem to support the panel's view that the list is not definitive. The panel then went on to conclude that 'if the positive interest principle is to be applied, then other objective criteria can and should be considered, such as loss of a possible transfer and replacement costs, as were considered in the *Matuzalem* and *El-Hadary* cases'.<sup>101</sup> However, this logic does not account for why, if positive interest was in the minds of the 2001 drafters, it did not appear in the text of Article 17. If the purpose of Article 17 was to return the injured party to the position that the party would have had if the contract was performed properly without the contractual breach, then the current construction of Article 17 is redundant. A statement to the effect that all quantifiable losses can be factored into the calculation of the compensation payable by the party unilaterally terminating the contract would have sufficed.

The existence of Article 17 and the jurisprudence of the CAS confirm that a player now has the ability to unilaterally terminate a contract outside the protected period and take up employment with another club, without a transfer fee being paid or sporting sanctions being imposed. A case could therefore be made that the Commission's concerns, as expressed in the 1998 Statement of Objections, have been addressed. However, the purpose of Article 17 is to provide for the 'consequences' of unilateral termination. In this regard, implicit in the 2001 agreement lies the assumption that a player should understand in advance the consequences of his actions. It is a common principle of law that when exercising regulatory functions, an association correctly applies its own regulations and arrives at decisions that are made in a predictable and cognisable manner. It was clear that in *Webster* the DRC failed to discharge this duty. In particular, it failed to meet the requirements of Article 13(4) of the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber which requires the body to give reasons for its findings. On the basis of this decision, players and clubs would not be able to amend their behaviour in order to avoid a situation leading to proceedings before the DRC or CAS. Nor would a party to proceedings know what arguments to submit. On the contrary, some commentators have cautioned against 'infusing a legal provision with certainty' which could result in 'interpretative rigidity, thus rendering that provision ineffective'.<sup>102</sup>

The jurisprudence of CAS since *Webster* has added uncertainty for those wanting to know the financial consequences for unilaterally breaching a contract. Whilst in *Webster* the CAS rejected replacement cost as a relevant criteria for determining compensation, subsequent decisions suggest otherwise. Commenting on the CAS decision in *de Sanctis*, the European Club Association's (ECA) Legal

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<sup>100</sup> CAS *deSanctis*, para. 66.

<sup>101</sup> CAS *deSanctis*, para. 66.

<sup>102</sup> ANDERSON, J., (2010), *Modern Sports Law*, Oxford: Hart, 317.

Advisory Panel Chairman Ivan Gazidis stated that ‘CAS continues to recognise that the financial consequences of a breach of contract must be analysed on a case by case basis. We welcome this approach, which means that a party in breach of a contract must take responsibility for the damages caused to the innocent party. Further, the uncertainty of outcome in any individual case encourages respect of contracts and stability in the game, which we support.’<sup>103</sup> Gazidis is Chief Executive of Arsenal FC and a club representative on the FIFA DRC panel. Furthermore, in *Matuzalem*, the CAS panel reflected on the broad scope of the compensation criteria contained in Article 17 and advised a party considering a unilateral termination ‘to respect an existing contract as the financial consequences of a breach or a termination without just cause would be, in their size and amount, rather unpredictable’.<sup>104</sup>

Promoting uncertainty of outcome in individual cases as a means of encouraging respect of contracts and stability in the game is problematic. The predictability of the law, albeit the internal laws of sport, is an important tool for minimising litigation and a pre-requisite for ensuring fairness and the integrity of the legal process. In sport, litigation is costly, time-consuming and divisive. The development of a legal system internal to sport and embodied in the CAS, reflects the anxiety with which sport views the role of the ordinary courts. However, the promotion of legal uncertainty as a tactic may be counter-productive in that it encourages recourse to the ordinary courts and thus impedes the development of a respected body of *lex sportiva*.

In particular, the requirements of EU law would be tested if it transpired that the jurisprudence of the DRC and the CAS were so uncertain as to discourage a player’s engagement with dispute resolution. In particular, a player may be deterred from exercising his right of free movement should he have no cognisance of the implications of unilaterally terminating a contract. For the purposes of Article 45 TFEU, this would amount to a non-discriminatory restriction which, to save it from condemnation, would require the party imposing the restriction to justify it. Whilst maintaining contract stability is likely to be considered a legitimate objective, the means of achieving it – through the inconsistent application of the rules – is clearly inappropriate.<sup>105</sup>

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<sup>103</sup> ECA Statement on the *de Sanctis* Case, 04/03/2011. Accessed at [www.ecaeurope.com](http://www.ecaeurope.com).

<sup>104</sup> CAS *Matuzalem*, para. 89.

<sup>105</sup> Although in *Mutu*, the player argued that the FIFA regulations governing contract stability give rise to direct discrimination given that they are not binding at national level, but apply exclusively to cases of transfers from one national association to another. As a result, in Mutu’s opinion, the player, ‘by virtue of having a nationality different from that of the Respondent [...], has been subjected to the FIFA Regulations and not to those of the FA, which accord different treatment to British nationals or to players who are transferred at domestic level, at least with regard to the payment of compensation and the criteria which are applied to determine it in case of breach of contract’. In other words, ‘the Player was subject to different rules on compensation and to different treatment from that which would have applied to the proper national comparator (i.e. a UK national transferring to a UK club)’. CAS 2008/A/1644 *Mutu v Chelsea*, paras. 52-53.

Since *Webster*, the CAS has arguably settled on a more consistent approach, based on the reliance on the *positive interest* principle, when calculating compensation for unilateral termination. However, as pointed out by the panel in *Webster*, the reliance on this principle brings with it some uncertainty with regards to its compatibility with EU law. Greater certainty could be achieved through two routes.

First, on entering into an employment relationship, clubs and players could stipulate in the contract of employment the damages to be paid on unilateral termination of the contract. The role of the DRC and CAS would then be to enforce the contractual agreement without the need to overlay its decision with a normative interpretative framework. However, as witnessed in *Matuzalem*, the parties must take care when drafting such a provision. In particular, the DRC and CAS have acknowledged that contractual ‘buy-out’ clauses are unenforceable if they unreasonably penalise the player. The set figure should not simply be inserted into the contract to discourage the player from leaving, or a third party from acquiring him. The stated amount should be proportionate to the salary of the player or the original transfer value and in circumstances where this would lead to a gap between the salary of the player and the stated buy-out fee, the parties should consider adopting a variable indemnity clause which adjusts over time to reflect the players objective performance.<sup>106</sup> The parties could also agree to provide for different compensation sums depending on whether the breach takes place within or outside the protected period. This would remove the need for the DRC or the CAS to consider this criteria in their calculations and also remove the need to consider the application of the specificity of sport criteria.

Second, Article 17 could be reformed to make explicit the consequences of unilaterally terminating a contract. The forum for this re-negotiation could be imposed through litigation, or it could take place co-operatively between the interested parties. For instance, representatives of players, clubs and FIFA could enter into a memorandum of understanding which could provide for an objective framework for determining compensation under Article 17.<sup>107</sup> This negotiation could be facilitated by the EU, either by way of the on-going structured dialogue currently taking place in Europe, or through an agreement of the Social Dialogue Committee for European Professional Football. Either way, such an agreement could lead to the reform of Article 17. The prospects of this occurring are however somewhat slim given that the current jurisprudence of the CAS aligns with the interests of the clubs and FIFA. There are therefore no strong incentives for these parties to re-negotiate Article 17. This leaves litigation by an aggrieved player as the most likely source of reform.

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<sup>106</sup> See COMPAIRE D., (2009), *Contractual Stability in Professional Football: Recommendations for Clubs in a Context of International Mobility*, Master Thesis for the FIFA International Masters in Management, Law and Humanities of Sport.

<sup>107</sup> Such an agreement was referred to in CAS 2007/A/1315, *Ali Bouabé & Sporting Lokeren Oost-Vlaanderen c. Association Sportive des Forces Armées Royales (ASFAR)*, award of January 31, 2008.

## CONTRACTUAL STABILITY FROM A CLUB'S POINT OF VIEW

by *Wouter Lambrecht\**

SUMMARY: 1. Introduction – 2. Unilateral termination of an employment contract & just cause – 3. Just cause & without just cause – 4. Consequences of terminating a contract without just cause, a. General remarks, b. Compensation, c. Positive interest, d. Joint and Several Liability, e. Sporting Sanctions, f. Other discouraging factors/sanctions – 5. Specificity of Sport – 6. Free movement and freedom to perform labour – 7. Threats to contractual stability, a. New Article 64 FIFA Disciplinary Code edition 2011, b. FIFA workload – 8. Conclusion

### *1. Introduction*

It does not come as a surprise when it is said that the principle of maintenance of contractual stability is of paramount importance within the world of football.

The principle of contractual stability as it is known today has been negotiated and agreed upon between FIFA/UEFA and the European Commission in the aftermath of the (in)famous Bosman ruling in order to make the transfer rules of FIFA compatible with European Union law.

The relevant provisions relating to contractual stability are set out in Chapter IV. of the FIFA Regulations on the Status and Transfer of Players, hereinafter “the Regulations”, and in essence reflect the notion “*pacta sunt servanda*”.

As such, contractual stability within the world of sport is nothing more than the reflection of the most basic principle of contract law which seeks to ensure that, in the event a club and a player freely choose to enter into an employment contract, that contract will be honoured.

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In order to support this principle and to ensure its effectiveness, the Regulations foresee several provisions relating to the principle of “*pacta sunt servanda*”.

It is evident that these provisions must discourage both clubs and players to unilaterally and prematurely breach their contract as well as discourage both third clubs and player agents to induce said breach of contract.

In this respect, and as a first important remark, it is to be noted that it is not the principle of contractual stability as such which is opposed by stakeholders and/or causes disrupt amongst them, but rather the consequences in case of failure to respect this principle.

The consequences which aim at discouraging clubs and player to breach their contract without just cause are the obligation to pay compensation in addition to possible sporting sanctions and or disciplinary sanctions.

Needless to say that the obligation to pay compensation greatly depends on the facts of each case as well as on which party to the contract has incurred in a premature and unilateral termination. Therefore one case cannot be compared to another and the outcome will differ from case to case. An outcome which is however always dependant on the same legal principle: *positive interest*.

The Bosman case rightfully brought free movement to the world of football, in that players are free to join the team of their choice after the expiry of their contract and this without any compensation payable, it did not bring the right to terminate a contract without just cause to the world of football.

Free movement and the freedom to perform labour are not equal to the right to terminate a contract, implying that a party incurring in breach of contract must face the appropriate consequences.

## 2. *Unilateral termination of an employment contract & just cause*

According to article 13 and 14 of the Regulations, a contract may only be terminated upon the expiry of a contract or by mutual consent safe in those cases where a just cause would exist.

In this respect it is to be noted that the Regulations do not define what constitutes a just cause, while the FIFA Commentary on the Regulations states that a just cause “*shall be established in accordance with the merits of each particular case. In fact behaviour that is in violation of the terms of an employment contract still cannot justify the termination of a contract for just cause*”.<sup>1</sup>

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<sup>1</sup> Commentary on the FIFA Regulations for the Status and Transfer of Players, [www.fifa.com](http://www.fifa.com).

Consequently it is very hard to define “a just cause” let alone give an overview of situations which would constitute a just cause.

However it widely accepted and confirmed by jurisprudence of both the FIFA Dispute Resolution Chamber, hereinafter “the DRC”, as well as the Court of Arbitration for Sport, hereinafter “the CAS”, that a just cause, alike a just cause in normal labour law, implies that the work relationship has been hindered so severally, that the parties have lost all faith in each other and that they could not reasonably be expected to continue their employment relationship.

The following paragraph of a CAS award<sup>2</sup> clearly confirms the above:

*“For example, in the case CAS 2006/A/1062, the Panel stated that since “the FIFA Regulations do not define when there is such “just cause”. One must therefore fall back on Swiss law. Pursuant to this, an employment contract which has been concluded for a fixed term can only be terminated prior to expiry of the term of the contract if there is good cause (see also ATF 110 I 167). In this regard Art. 337(2) of the Code of Obligations (referred to as “CO”) states - in loose translation: „Particularly any circumstance, the presence of which means that the party terminated cannot in good faith be expected to continue the employment relationship, is deemed to be good cause . The courts have consistently held that a grave breach of duty by the employee is good cause (ATF 121 III 467; ATF 117 II 72)” (CAS 2006/A/1062, para. 13). Additionally, CAS jurisprudence has affirmed that “according to Swiss case law, whether there is “good cause” for termination of a contract depends on the overall circumstances of the case (...). Particular importance is thereby attached to the nature of the obligation. The Swiss Supreme Court has ruled that the existence of a valid reason has to be admitted when the essential conditions, of an objective or personal nature, under which the contract was concluded are no longer present (...). In other words, it may be deemed as a case of application of the clausula rebus sic stantibus. According to Swiss law, only a breach which is of a certain severity justifies termination of a contract without prior warning (...). In principle, the breach is considered to be of a certain severity when there are objective criteria which do not reasonably permit to expect a continuation of the employment relationship between the parties such as serious breach of confidence (...). Pursuant to the jurisprudence of the Swiss Federal Supreme Court, the early termination for valid reasons shall be however restrictively admitted” (CAS 2006/A/1180, para. 8.4).”*

<sup>2</sup> CAS 2008/A/1517 Ionikos FC v. C., [www.tas-cas.org](http://www.tas-cas.org).

*A fortiori*, the disrespect by one party of its contractual obligations does not always entitle the other party to terminate the contract with just cause and a premature termination should therefore always be seen as the *ultima ratio*:

*“the Chamber recalled that the unilateral termination of an employment contract, being the most severe penalisation in contractual relationships, should be used as ultima ratio only.”*<sup>3</sup>

Consequently, a party, be it either a club or a player, should be wary when analysing its right to terminate a contract with just cause and keep in mind that only a repeated offence, in principle, would justify such a breach of contract.

A repeated offence implies that a club or player has informed the other party that it does not tolerate a given disrespect of the employment contract, for example: the absence of a training camp, unpaid salaries or physical violence towards other team players, etc. and that failure to remedy such non-compliance or the occurrence of a similar offence in the future will lead to a termination of contract.

With regards to the recurrent issue of outstanding salary and its relation vis-à-vis just cause to terminate a contract, the Court of Arbitration correctly held:<sup>4</sup>

*“The non-payment or late payment of remuneration by an employer does in principle - and particularly if repeated as in the present case - constitute “just cause” for termination of the contract (ATF 2 February 2001, 4C.240/2000 no. 3 b aa; CAS 2003/O/540 & 541, nonpublic award of 6 August 2004). [H]owever, the latter applies only subject to two conditions. Firstly, the amount paid late by the employer may not be “insubstantial” or completely secondary. Secondly, a prerequisite for terminating the contract because of late payment is that the employee must have given a warning. In other words, the employee must have drawn the employer’s attention to the fact that his conduct is not in accordance with the contract (see also CAS 2005/A/893; CAS 2006/A/1100, marg. no. 8.2.5 et seq.).”*

Both parties to an employment contract need to notify each other of their intention to terminate a contract and where possible provide the counterparty with a limited time frame to remedy the breach of contract.

Hence, by construing and interpreting just cause in such a manner as described

<sup>3</sup> Meeting of the DRC on 28 September 2007, decision no. 97748, consideration 11, [www.fifa.com/mm/document/affederation/administration/97748\\_44573.pdf](http://www.fifa.com/mm/document/affederation/administration/97748_44573.pdf).

<sup>4</sup> CAS 2006/A/1180 Galatasary SK v. Frank Ribéry & Olympique de Marseille, [www.tas-cas.org](http://www.tas-cas.org).

above, the principle of *pacta sunt servanda* is duly protected in that a contract cannot be terminated for whatever reason.

Analysing a potential “just cause” one must keep in mind all factual circumstances and specificities of the case.<sup>5</sup>

### 3. *Just cause & without just cause*

When referring to the notion “just cause” the following is to be noted.

If one party terminated a contract with just cause, it is automatically implied that the other party failed to comply with its contractual obligations and as such incurred in a breach of contract without just cause.

Hence one’s termination of contract with just cause is always linked to counterparties breach of contract without just cause and vice versa.

As such the notions “breach or termination with or without just cause” are to be seen as two side of the same coin and a termination/breach of contract with just or without just cause will always trigger the counterparty to pay compensation.

### 4. *Consequences of terminating a contract without just cause*

#### a. *General remarks*

In the event that a contract was terminated without just cause, the party in breach shall pay compensation in addition to which he might face sporting sanctions.

As already stated in the introduction, the obligation to pay compensation is to be seen as one of the main discouraging factors for a party to incur in a premature and unilateral termination without just cause.

If one wants the principle of *pacta sunt servanda* to be respected, then one must ensure that the compensation payable following a breach of contract truly reflects the damages the counter party suffers.

The compensation payable shall either be based on a liquidated damages clause foreseen in the contract,<sup>6</sup> failing which the FIFA DRC and or CAS shall need to establish the damages.

In this respect, it is a given that that the damages suffered by the harmed party

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<sup>5</sup> CAS 2008/A/1447 E v. Diyarbakispor, [www.tas-cas.org](http://www.tas-cas.org).

<sup>6</sup> Article 17.2 of the FIFA Regulations on the Status and Transfer of Players.

depend on the merits and fact specifics of each case as well as on the successful discharge of the burden of proof when claiming damages.

Consequently, the damages are to be calculated on a case by case approach of which a direct consequence is that damages payable for a breach of contract are not always foreseeable beforehand.

Surprisingly, it is exactly this case by case approach which lies at the hart of so many discussions and which is so heavily contested by FIFPro, being the worldwide representatives of professional football players' trade unions.

Keeping in mind that a case by case approach must be used when establishing the damages following a breach of contract, it is evident and implied that amount of damages shall also depend on which contractual party actually incurred in a termination without just cause.

More precisely, the damages suffered by a club following a breach of contract are not the same as the damages suffered by a player.

Yet again, player representatives heavily contests this given fact, believing that the amount of damages for a breach of contract should be the same regardless of whether a club or player terminated the contract without just cause.

While invoking such "equal treatment", player representatives rely on the principle of reciprocity. In doing so, they however seem to forget that this principle of reciprocity is the very basis of article 17 of the FIFA Regulations as it states that each party in breach of contract, be it a either a club or a player, shall have to pay compensation.

The situation of a club following an unjustified breach of contract by a player is indisputably not the same as the situation of a player following a breach of contract by a club.

More precisely, a club, when securing the services of a player, has incurred several expenses, such as the payment of a transfer fee, training compensation, solidarity contribution, agent fees, scouting fees, and even signing on fees.

Clearly the above mentioned expenses are expenses that solely clubs make; implying that the (economic) situation of a player and a club are different following an unjustified breach of contract.

It cannot be denied that in the world of football, players are the main asset of a club, both in terms of their sporting value in the services for the teams for which they play, but also from an economic view, like for instance in relation of their

valuation in the balance sheet of a certain club.<sup>7</sup>

The value of the services of a player is therefore never merely represented by the (remaining) value (salary) of his contract.

Players form part of a team, a team which has been formed and worked with intensively in order for that team to perform at its best and to obtain sporting success.

Each player has its role to play in a team and a player leaving a club evidently influences, in one way or another, the performances of the team. Although any possible damage to the team and its sporting success is difficultly quantifiable, it does yet again show that a club and a player are not in the same position in the event of a breach of contract.

Stating the contrary and holding that an employment contract between a football player and a club is the same as an employment contract between a cleaning company and a cleaner is closing one's eyes for the reality and economic dimensions involved in modern day football.

Finally, before dealing with the criteria taken into account for compensation, it seems desirable to make two final remarks as the application of article 17 of the Regulations.

Firstly, article 17 only applies in those cases where FIFA has jurisdiction to adjudicate a case. In this respect it is to be noted that FIFA's competence is without prejudice to the right of any player or club to seek redress before a civil court for employment related disputes. Moreover, FIFA's judicial bodies only have the power to adjudicate in employment related disputes of an international dimension. More precisely, if a breach of contract occurred in one country and all parties involved are of the same country, FIFA is not competent to hear that dispute.<sup>8</sup>

Only once both parties accepted to have their case heard by FIFA, will article 17 of the FIFA Regulations form the legal basis for analysing the breach of contact.

Secondly, it is to be noted that professional football today is not an activity which is bound to national territories. More precisely, professional players travel the world and clubs employ players from all continents and countries.

Consequently, in order to protect the key principle of *pacta sunt servanda*, there is a clear need to have a harmonised approach vis-à-vis breaches of contract

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<sup>7</sup> CAS 2007/A/1359 FC Pyunik Yerevan v. E, AFC Rapid Bucuresti & FIFA, [www.tas-cas.org](http://www.tas-cas.org).

<sup>8</sup> Art 22 point b) of the FIFA Regulations on the Status and Transfer of Players.

occurring in country X, Y or Z.

More precisely, if the principle of contractual stability is to be preserved, the consequences for a failure to comply with a contract should be quite similar regardless of the country in which the breach of contract occurred. That is to say, a breach of contract in one country should not be punished more lightly or more severely than if that breach of contract would have occurred in another country.

*b. Compensation*

In order to calculate the damages following a breach of contract, article 17 foresees in a list of criteria that are to be taken into account by the deciding body.

Important to note is that these criteria were negotiated and agreed upon by FIFA/UEFA with the European Commission when establishing the FIFA Transfer Rules edition 2001. These negotiations took place in the aftermath of the Bosman case in order to bring the Regulations in compliance with European Union law.

For the sake of this article, rather than merely copying the well known provision containing the criteria on how to calculate the compensation, it seems more interesting to see how article 17 has been interpreted by CAS.

In this respect reference is made to a CAS award<sup>9</sup> in which the Panel stated the following:

*“The Article (article 17) bears the hallmark of a compromise to which the proposals of all parties whose interests diverge has contributed. The result is a hotch potch of criteria. The criteria cited which are to be taken into account are exemplary and not exhaustive with no priority or means of reconciliation identified. The concept of compensation suggests the sum should equate as closely as possible to the loss and damage suffered by the Club, but not all of the criteria e.g. the remuneration to the Player under the existing contract, seem to us to be directly relevant to such an exercise [there are, however, provisions in some national labour laws, e.g. in Holland, where such amount (remaining value) is the indemnification for the employer in cases where the employee is held to have breached his contract]”*

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<sup>9</sup> CAS 2008/A/1453–1469 Elkin Soto Jaramillo & FSV Mainz 05 v. CD Once Caldas & FIFA, [www.tas-cas.org](http://www.tas-cas.org).

*Webster establishes at least the following propositions:*

- (1) *What is in issue is the interpretation of the FIFA Regulations governed by Swiss law (paras. 115 and ff.).*
- (2) *Compensation is not intended to deal directly with Training Compensation, which is specifically regulated elsewhere (para. 84).*
- (3) *Any provisions in the employment contract have primacy (para. 121).*
- (4) *Three categories of factor must be considered:*
  - (i) *the law of the country concerned.*
  - (ii) *the specificity of sport.*
  - (iii) *any other objective criteria (with examples) (para. 125).*
- (5) *As to (i) the Panel has discretion as to whether to apply such law (para. 126).*
- (6) *As to (ii) it seeks a reasonable balance between the needs of contractual stability and the need of free movement of players (para. 132).*
- (7) *With regard to the other objective criteria (iii) the deciding authority has a substantial degree of discretion (para. 134).*
- (8) *Art. 17 para. 1 provides a broad range of criteria, many of which cannot in good sense be combined, and some of which may be appropriate to apply to one category of case, and inappropriate to apply in another (para. 135)."*

As stated before, the above once again underwrites the fact that each breach of contract must be analysed on its fact specifics and that while the basic principles for calculating compensation are always the same, more precisely it is guided by the notion of positive interest, the final result evidently can differ from case to case.

*c. Positive interest*

The aim of article 17 is to put the "injured party in the position that the same party would have had if the contract was performed properly.

In other words, the criteria listed in article 17 enable the deciding body to establish the damages based on the legal principle of "positive interest".

This is confirmed by several CAS<sup>10</sup> awards and also by the Swiss Federal Tribunal:

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<sup>10</sup> CAS 2010/A/2132 FC Shakhtar Donetsk v. Ilson Pereira Dias Junoir, *unpublished*, CAS 2010/A/2145-2146-2147 Sevilla FC & Morgan de Sanctis v. Udinese Calcio S.p.A., CAS 2008/A/1519-20 FC Shakhtar Donetsk v. Matuzalem Francelino da Silva, Real Zaragoza SAD & FIFA, [www.tas-cas.org](http://www.tas-cas.org).

*“The Panel also remarks that, given that the compensation to be granted derives from a breach or unjustified termination of a valid contract, it will be guided in calculating the compensation due by the principle of the so-called “positive interest” or “expectation interest”; accordingly, the Panel will aim at determining an amount which shall basically put the injured party in the position that the same party would have had if no contractual breach had occurred (see CAS 2008/A/1519-1520, at para. 86; CAS 2006/A/1061, at para. 40; see also the decisions of the Swiss Federal Tribunal ATF 97 II 151, ATF 99 II 312; in the legal literature, see STREIFF/VON KAENEL, Arbeitsvertrag, Art. 337b no. 4 and Art. 337d no. 4; STAEHELIN, Zürcher Kommentar, Art. 337b no. 7 and Art. 337d no. 7; WYLER, Droit du travail, 2nded., 522). CAS.”<sup>11</sup>*

When correctly applying the principle of positive interest enshrined in the FIFA Regulations, to a breach of contract by a player without just cause, the following elements must at least be taken into account:

- Non-amortized value of the transfer fee;
- Non-amortized value of the signing-on fee and or agent fees.

Additionally and depending on the proof brought forward by a club and the fact specifics of the case, a Panel could also analyse and compensate a club for the:

- Loss of a possible transfer fee;
- Replacement costs;
- Loss of the economic value of the services of the Player.

With regards to replacement costs, it is to be noted that a logical nexus needs to exist between the breach and the loss claimed.

In the El Hadary award, compensation was awarded for loss of a possible transfer fee as both clubs had indeed negotiated a transfer fee while in the De Sanctis award, the Panel awarded replacement costs as Udinese had satisfactorily proven that two keepers had been hired in direct substitution of De Sanctis.

With regards to the economic value of the services of a player the following paragraph of the Matuzalem award perfectly illustrates what should be understood:

*“The value of the services of a player at a given point of time may be lower, higher or equal to the one when the player had started to play for a club. In the event of a breach by a player, a panel has therefore to analyze the amount necessary to acquire and keep the working force of the player. In doing so, the Panel CAS*

<sup>11</sup> CAS 2009/A/1880 FC Sion & El-Hadary v. Al-Ahly Sporting Club & FIFA, [www.tas-cas.org](http://www.tas-cas.org).

*2008/A/1519-1520, page 28 only acknowledges 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 an 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.*

The fact that the principle of positive interest is an objective criteria and does not favour clubs vis-à-vis player or vice versa, was evidenced by the Appiah award; a case which certain stakeholders repeatedly fail to mention when challenging the nature of article 17 and the application of this principle.

In this case, the Player Stephan Appiah was found to have breached his contract without just cause. However, the Panel held that *“the club cannot be expected to be awarded any compensation for the loss of the Player’s services as the Player was not in a condition to play without exposing himself to major health complications, at least not before the expiry of the agreed term of the contract signed with Fenerbahce”*. Therefore, these exceptional circumstances lead the Panel to start considering the situation from the perspective of the money saved by Club X. due to the early termination of the contract by the Player. Such an approach is consistent with the principle of the so-called positive interest.<sup>12</sup>

#### *d. Joint and Several Liability*

Another important provision of the Regulations is that whenever a player has to pay compensation for breach of contract, the new club of the player shall be jointly and severally liable for its payment.<sup>13</sup>

The new club is the club with which the player is registered following the breach of contract<sup>14</sup> and its joint and several liability is an automatic consequence which is regardless of whether or not the new club induced the player to breach his contract.

Important to know is that while article 17.2 states that a player and a club shall be jointly and severally liable, at the end of the day it is almost always if not always

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<sup>12</sup> CAS 2009/A/1856 Club X. v. A & CAS 2009/A/1857 A. v. Club X, paragraphs 193 & 203, [www.tas-cas.org](http://www.tas-cas.org).

<sup>13</sup> Article 17.2 of the FIFA Regulations on the Status and Transfer of Players.

<sup>14</sup> CAS 2007/A/1429 & 1442 Bayal Sall & ASSE Loire v. FIFA & IK Start: *Article 17 para. 2 of the FIFA Regulations for the Status and Transfer of Players is mandatory. This means that the new club cannot be relieved from the obligation to pay compensation for breach to the former club even though it can prove that it has not induced the breach of contract*, [www.tas-cas.org](http://www.tas-cas.org).

the new club who pays the compensation.

Reference can be made to the Matuzalem award which taught us that the transfer amount payable by Lazio to Zaragoza following the transfer of the player was dependant on the amount of damages CAS would establish for the breach of contract by the player with Shakhtar:

*“In the event that the pending award of the Court of Arbitration for Sport decides that the indemnity to be paid to FC Shakhtar Donetsk by the player and collaterally by Real Zaragoza, should be higher than seven millions Euro (7,000,000 EURO), the amount indicated as for the payment for the option for the definitive acquisition of the federative rights of the player shall be raised in one million euro (1,000,000 EURO)(...).”*

It stands to reason that players who have breached a contract will only sign with a new club if there is a contractual clause which stipulates that the new club will pay any and all possible compensation payable following the breach of contract.

Hence, although player representatives often comment that the amount of damages payable for a breach of contract would contravene the free movement and freedom to perform labour, it are not the players who carry the burden of paying compensation but their respective new club.

*e. Sporting sanctions*<sup>15</sup>

The second very important provision which aims at discouraging players and clubs to unilaterally breach a contract or clubs to induce such breach are sporting sanctions.

More precisely, according to the Regulations, in addition to pay compensation, sporting sanctions shall also be imposed on any player or club found to be in breach of contract during the protected period and on any club found to be inducing a breach of contract during the protected period.

A sanction which shall be a four or six month restriction on playing official matches for players and a ban for clubs on registering players either nationally or internationally for two registration periods, in case of breaches of contract.

It is moreover presumed that, unless established to the contrary, any club signing a professional who breached his contract without just cause had induced that player to commit a breach.

<sup>15</sup> Article 17 point 3 and 4 of the FIFA Regulations on the Status and Transfer of Players.

It is clear that such possible sanction strengthens the principle of *pacta sunt servanda* as no club or player likes to run the risk of not being able to play or register new players.

A ban on registering players being one of most heavy sanctions a club can face when competing.

The application of sporting sanctions is however limited to breaches which occurred during the protected period.

The protected period being definable as the period which starts as of the signing of a contract,<sup>16</sup> and is a period of either two/three entire seasons or two/three years, whichever comes first, following the entry into force of a contract, where such contract was concluded prior to or after the 28<sup>th</sup> birthday of the player respectively.

It is important to note that the differentiation between a protected period and a non-protected period does however not give either party to the contract the right to terminate without just cause.

Some practitioners wrongly believe that from article 17.3 it can be concluded that players have the option/right to terminate a contract after the protected period. Clearly this is not the case! A premature and unilateral termination of a contract by a player in or outside the protected period will always remain a breach of contract for which compensation shall be payable and for which disciplinary sanctions might be imposed as well.

Regardless of the being in or outside the protected period, the principle of *pacta sunt servanda* applies. The mere difference is that the consequences of disregarding this principle are different if a breach occurred in or outside the protected period.

While analysing this figure of sporting sanctions it also interesting to note that not only sport regulations contain such a sanction. More precisely, Belgian Labour Law foresees in a more stringent provision than the FIFA Regulations.

More precisely, according to the Belgian Law of 1978 governing the employment contracts of professional sportsman, if a player/sportsman terminates his contract without just cause or a club does so with just cause, this player/sportsman shall not

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<sup>16</sup> CAS 2009/A/1909 RCD Mallorca SAD & A v. FIFA & UMM Salal SC: *It cannot be implied from the definition of the Protected Period that a breach committed after the signature of the contract and before its entry into force is not within the Protected Period. An employment contract is binding on the parties as of its signature even if an initial deadline is set for its applicability*, [www.tas-cas.org](http://www.tas-cas.org).

be allowed to participate in the same competition/exhibition of the same sport, including play-offs, during the remaining duration of the sport season.<sup>17</sup>

Important to note is that this law does not make a distinction between a protected period or non-protected period and that it only foresees in sporting sanctions for a player and not for clubs. Hence any player representatives making the remark that FIFA Regulations would contravene free movement if sporting sanctions are enforced after the protected period should note that a stricter rule could be possible.

Finally, it is also to be noted that although the Regulations tend us to believe that sporting sanctions are applied without exception, this is not the case.

Although not very well known, it appears that players can invoke exceptional circumstances in order not to face sporting sanctions:

*“In the mentioned CAS Precedents, FIFA observed that is stable, consistent practice of FIFA and of the DRC in particular, to decide on a case by case basis whether to sanction a player or not. The CAS Panel was in those cases satisfied that there is a well accepted and consistent practice of the DRC not to apply automatically a sanction as per Article 17.3 of the Regulations. The Panel then followed such an interpretation of Article 17.3 of the Regulations which appears to be consolidated practice and represents the real meaning of the provision as interpreted, executed and followed within FIFA”.*<sup>18</sup>

Consequently, if such exceptional circumstances can be invoked by a player, clubs should equally be allowed to do so; one specific circumstance to take into account for clubs breaching a contract without just cause is without a doubt the current economic crisis. Football clubs have not been immune to this crisis and breaches of contract based on outstanding payments should therefore not always lead to sporting sanctions.

*f. Other discouraging factors/sanctions*

In addition to the above mentioned factors there are two other provisions of the Regulations that aim at strengthening the principle of contractual stability.

<sup>17</sup> Wet van 24 Februari 1978 betreffende de arbeidsovereenkomst voor betaalde sportbeoefenaars, [www.ejustice.just.fgov.be/cgi/welcome.pl](http://www.ejustice.just.fgov.be/cgi/welcome.pl).

<sup>18</sup> CAS 2009/A/1909 RCD Mallorca SAD & A. & FIFA UMM Salal SC, paragraph 68, [www.tas-cas.org](http://www.tas-cas.org).

<sup>19</sup> Article 17 point 5 of the FIFA Regulations on the Status and Transfer Players.

More precisely, article 17 point 5 states that any person subject to the FIFA Statutes and Regulations who acts in a manner designed to induce a breach of contract between a professional and a club in order to facilitate the transfer of the player shall be sanctioned.<sup>19</sup>

Keeping in mind the reliance of players (and clubs) on player agents and how some agents often act in their own (monetary) interest, this provision is there to enable sanctions against those parties which can negatively influence a player.

Additionally, according to article 18 point 3 of the Regulations, a club intending to conclude a contract with a player must inform the player's current club in writing before doing while a player shall only be free to conclude a contract with another club if his contract with his present club has expired or is due to expire within six months.

Again, this article clearly aims at ensuring contractual stability in that it pushes clubs towards transfer negotiations with the concerned club in order to sign a player.

#### 5. *Specificity of sport*

According to the Regulations, the compensation for breach of contract shall be calculated with due consideration for the law of the country concerned, the specificity of sport and any other objective criteria.

Given that the specificity of sport is not defined in the Regulations nor by the jurisprudence of the FIFA DRC, it is somehow unclear how FIFA applies this criteria to its decisions.

However, analysing CAS jurisprudence, the specificity of sport must obviously take into account the independent nature of sport, the free movement of the players but also football as a market.

Such analysis by CAS is in line with the interpretation given to the "specificity of sport by the European Commission". More precisely, according to the White Paper sport is subject to European Union law when it constitutes an economic activity but that it has specific characteristics which are to be referred to as the specificity of sport.

The specificity of sport, as defined by the Commission, clearly does not enable the DRC to deviate from European Union law. However it does grant sport deciding bodies with a discretionary power to take into account the specific characteristics of football when establishing the compensation for breach of contract.

Important to note is that when deciding on how the specificity of sport is to be taken into consideration, both sides of labour are equally represented.

Needless to say that this equal representation at FIFA level and CAS is the best guarantee that the interest of both players and clubs are duly taken into account and that the specificity of sport it is not applied in arbitrary manner:

*“The criterion of specificity of sport shall be used by a panel to verify that the solution reached is just and fair not only under a strict civil (or common) law point of view, but also taking into due consideration the specific nature and needs of the football world (and of parties being stakeholders in such world) and reaching therefore a decision which can be recognised as being an appropriate evaluation of the interests at stake, and does so fit in the landscape of international football.”<sup>20</sup>*

Specific criteria which have been taken into account by a CAS Panel when awarding damages under the specificity of sport are:

- the moment of a breach of contract, for instance 2 weeks prior to the commencement of the UEFA Champions League;
- breaching the contract after having received a significant salary raise;
- the position of the player and his role within the squad.

These examples clearly illustrate that football has specific characteristics which are unknown in other fields of labour relationships and which should duly be taken into account when calculating compensation for breach of contract.

For example, in the Matuzalem award the Panel took into account that the player had left the club just a few weeks before the start of the qualifying rounds of the UEFA Champions League, *the UEFA Champions League being an event of major importance for all European clubs*, and after the season in which he became the captain of Shakhtar Donetsk and was also elected best player of the team.

Consequently, it can be concluded that the application of the specificity of sport, alike the way of calculating damages, will depend very much on the circumstances of the case and the (faulty) behaviour of the parties.

Hence, when taking into account the specific nature of an employment relationship between clubs and players and while applying this in a fair and appropriate manner as in the above case, the specificity of sport goes hand with what the EU Commission understands under the specificity of sport.

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<sup>20</sup> CAS 2007/A/1359 FC Pyunik Yerevan v. E, AFC Rapid Bucuresti & FIFA, [www.tas-cas.org](http://www.tas-cas.org).

## 6. Free movement and freedom to perform labour

Not rarely do player representatives comment that the amount of damages payable for a breach of contract by a player without just cause, would limit a player's right to free movement and freedom to perform labour.

In doing so, two important facts are rarely mentioned.

Firstly, in general, not the player but the player's new club who will finally pay the compensation for a breach of contract.

Secondly, and more importantly, whenever a player unilaterally terminates his employment contract and his old club opposes<sup>21</sup> the issuance of the International Transfer Certificate enabling the player to register for a new team, that player can seek a provisional registration with a new club.

In seeking such provisional registration, the player and or his new club can address the Single Judge of the FIFA Player Status Committee.<sup>22</sup>

While one would tend to think that in obtaining a provisional registration a player would need to meet the prerequisites for the granting of provisional measures, this is not the case.

According to the FIFA Commentary<sup>23</sup> and the well established CAS jurisprudence,<sup>24</sup> a provisional measure, such as a provisional registration can only be granted if:

- the action is not deprived of any chance of success on the merits (*"likelihood of success" test*);
- the measure is useful to protect the applicant from irreparable harm (*"irreparable harm" test*);
- the interest of the applicant outweigh those of the opposite party and of third parties (*"balance of interest" test*).

These prerequisites are cumulative and should be met without exception.<sup>25</sup>

However, the Single Judge, to my personal knowledge, does not duly evaluate the likelihood of success of the player when seeking his provisional registration and

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<sup>21</sup> Mostly, clubs oppose the issuance of the ITC in favour of new club because they do not agree with the just cause invoked by the player.

<sup>22</sup> Article 22 and 23 para. 1 of the Regulations on the Status and Transfer of Players.

<sup>23</sup> Annex 3, *Administrative procedure governing the transfer of players between associations*, of the FIFA Commentary on the Regulations for the Status and Transfer of Players.

<sup>24</sup> CAS 2010/A/2266 *Meszaros & Poleksic v. UEFA*, unpublished, CAS 2006/A/1157 *Club Atlético Boca Juniors v. Genoa Cricket and Football Club S.p.A.*, unpublished.

<sup>25</sup> CAS 2007/A/1677, CAS 2009/A/1918, unpublished.

not many requests for provisional registrations have been denied.

On the contrary, the Single Judge of the Player Status Committee, unlike what is stipulated in the FIFA Commentary, does not address these prerequisites separately but always finds an argument, be it justifiable or not, to state in a general way:

*“These circumstances led the Single Judge to conclude that X club does not seem to be genuinely and truly interested in maintaining the services of the player concerned, but that club X rather appears to be looking for financial compensation.”*

As such, it should be noted that a player, after a unilateral and premature breach of contract, does not suffer any limitation to his free movement and freedom to perform labour as a provisional registration is almost always granted by the Player Status Single Judge.

In order to strengthen contractual stability, it would be advisable that the Single Judge of the Player Status Committee would more carefully examine the provisional registration of a player and the prerequisites set out above.

## 7. *Threats to Contractual Stability*

Although the Regulations contain ample provisions strengthening the principle of contractual stability, there are two elements which slightly undermine it.

### a. *New article 64 of the FIFA Disciplinary Code edition 2011*

Firstly, by recently amending article 64 of the FIFA Disciplinary Code,<sup>26</sup> FIFA has changed its policy vis-à-vis the enforcement of CAS-awards. More precisely, since the 1<sup>st</sup> of August 2011, the FIFA Disciplinary Committee will no longer enforce decisions rendered by the CAS in Ordinary procedure.

Irrespective of the numerous legitimate questions which can be posed as to the conformity of new article 64 of the FIFA Disciplinary Code with the FIFA Statutes, one other special remark needs to be made.

More precisely, while introducing this amendment FIFA failed to provide for transitional measures. As such, employment contracts which were concluded prior to 1 August 2011 and which contain a jurisdictional clause in favour of the CAS to deal with the dispute in Ordinary Procedure are hugely affected.

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<sup>26</sup> FIFA Circular no. 1270, *Amendments to the FIFA Disciplinary Code*, [www.fifa.com](http://www.fifa.com).

That is to say, if such contract would be breached without just cause by either a player or a club and the CAS would render an ordinary award condemning the breaching party to pay a certain amount of compensation, FIFA, based on its new article 64 of the Disciplinary Code, will no longer enforce the decision on party in breach.

Failing the enforcement by FIFA, clubs and players will need to address national courts in order to seek enforcement by means of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>27</sup>

Keeping in mind the public policy defences contained in the New York Convention vis-à-vis the enforcement of foreign arbitral awards on employment related matters, the time and cost that it will bring about to seek such enforcement, it is very clear that parties suffering a breach of contract are in a worse position than before.

*A fortiori*, parties breaching a contract which foresees in a forum clause installing direct jurisdiction on CAS can terminate their contract with the belief (possibly justified) that they, relying the New York Convention, will not have to pay compensation due to the unenforceability of the CAS award.

As such, the well acclaimed principle of contractual stability has been undermined.

*b. FIFA Workload*

Secondly, it can be reasoned that contractual stability is not served by the time it takes the FIFA DRC to render its decisions; especially keeping in mind that a provisional registration is almost always granted, irrespective of the likelihood of success of a player's claim.

Although it must be appreciated that the workload of the FIFA DRC is quite substantial, rendering decisions two or three years after a breach of contract occurred, does not help to create the correct "awareness".

More precisely, keeping in mind the simple nature of obtaining a provisional registration and the fact that the compensation and the sporting sanction for a breach of contract, such as a restriction on playing, shall only be faced three years down the road, players do not always properly evaluate the possible consequences of their actions.

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<sup>27</sup> UNICITRAL Convention on the Recognition and Enforcement of Foreign Arbitral Awards, United Nations, New York, 1958, [www.uncitral.org](http://www.uncitral.org).

## 8. Conclusion

In conclusion it can be said that the current FIFA Regulations have established a legal framework in which contractual stability is duly protected; a legal framework which follows the principles acceptable to the Commission.<sup>28</sup>

The principle of positive interest aims to arrive at a compensation which reflects a party's actual losses; losses which differ whether it is the club or the player who is suffering the unjustified breach of contract.

Article 17 of the Regulations grants the deciding body a wide range of discretion in order to properly take into account any relevant criteria which aims to reflect a party's actual loss.

The fact that the issue of compensation is guided by the principle of positive interest and greatly depends on the fact specifics and the merits of each case, leads to a situation where there is a certain level of uncertainty as to the possible monetary consequences of a breach of contract.

This uncertainty however strengthens the principle of contractual stability as a both clubs and players must think twice whether they have a justified cause to terminate their employment contract.

Although the Bosman case brought free movement to the world of football, it did not bring about the right for players (and clubs) to unilateral terminate their contract without just cause.

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<sup>28</sup> Cf. Statement IP/02/824 of 5 June 2002 of the then Competition Commissioner Mario Monti: "FIFA has now adopted new rules which are agreed by FIFpro, the main players' Union and which follow the principles acceptable to the Commission. The new rules find a balance between the players' fundamental right to free movement and stability of contracts together with the legitimate objective of integrity of the sport and the stability of championships.

It is now accepted that EU and national law applies to football, and it is also now understood that EU law is able to take into account the specificity of sport, and in particular to recognise that sport performs a very important social, integrating and cultural function. Football now has the legal stability it needs to go forward."

## CONTRACTUAL STABILITY FROM A PLAYER'S PERSPECTIVE

by *Wil van Meegen*\*

SUMMARY: 1. Introduction – 2. Challenging the system – 3. Negotiations European Commission - FIFA: outcome FIFA Regulations on the Status and Transfer of Players 2001 – 4. Which specificities are laid down in the FIFA Regulations? – 5. Repeating the stability period – 6. The situation after the stability period – 7. Positive interest – 8. Unclear and uncertain – 9. The role of the specificities of sport – Conclusions

### *1. Introduction*

From the very start of professional sporting activities, clubs have looked for ways of strengthening the bond between player and club, with the aim of retaining the player as long as possible. For a long time it remained unclear what the legal relationship was between both parties. As time progressed, it became clear that it was an employment relationship. In a number of countries this has not yet sunk in<sup>1</sup> and in other countries use is made of private contracts alongside employment contracts.<sup>2</sup> Ways of strengthening the bond between player and club were sought not only in labour law but also in the law of associations. The free transfer of a player to another organisation was hindered by rules of the law of associations. A transfer could not be permitted if the club to which the player was linked did not cooperate. The cooperation could often be secured by paying a certain sum of money or by a player exchange, either with or without supplementary payment. Without agreement between the clubs, transfer was simply impossible. Even after the end of the employment contract between the player concerned and the club, the player could still be blocked by the club for a period of two years after the end of his contract. That device proved exceptionally effective. A player, with an average career of 10 years as a professional player, simply cannot permit himself to spend two years on the sidelines.

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\* Legal counsel for FIFPro.

<sup>1</sup> Slovenia, for example, still has no labour contract between player and club.

<sup>2</sup> This is the case in Greece and Cyprus, amongst others.

## 2. *Challenging the system*

It will be obvious that many players did not feel happy in this situation. Doing something about it, however, is a different matter. Combating a system is a difficult task for the underlying party. A successful attempt was made in 1963 by the English footballer George Eastham.

With his contract due to expire Eastham refused to sign a new one and requested a transfer. However, Newcastle refused to let him go. At the time, clubs operated a system known as retain-and-transfer, which meant that teams could keep a player's registration while refusing to pay him if he requested a transfer.

Unable to leave, Eastham went on strike at the end of the 1959-60 season. Finally in October 1960 Newcastle relented and sold Eastham to Arsenal for £47,500. However, Eastham considered the point worth fighting for, and backed by the Professional Footballers Association who provided his legal fees, he took the club to the High Court in 1963.

In his case<sup>3</sup> Eastham argued that blocking his transfer was an unfair restraint of trade, and that Newcastle owed him £400 in unpaid wages and £650 in unpaid bonuses. The judge ruled partly in Eastham's favour, stating that the retain-and-transfer system was unreasonable, although he ruled that as Eastham had refused to play for Newcastle, any payment of wages for the disputed period was at Newcastle's discretion. As a result, although Eastham did not gain personally, he succeeded in reforming the British transfer market. The "retain" element of retain-and-transfer was greatly reduced, providing fairer terms for players looking to re-sign for their clubs, and setting up a transfer tribunal for disputes.<sup>4</sup>

Another champion of players' rights was the American baseball player Curt Flood.<sup>5</sup>

Flood became one of the pivotal figures in the sport's labour history when he refused to accept a trade following the 1969 season, ultimately appealing his case to the U.S. Supreme Court. Although his legal challenge was unsuccessful, it brought about additional solidarity among players as they fought against baseball's reserve clause and sought free agency.<sup>6</sup> In both cases the support of the players' union was adamant.

The major breakthrough didn't come until 15 December 1995. On that day, the European Court of Justice gave its ruling in the Bosman case.<sup>7</sup> In this case, the Belgian player Jean-Marc Bosman challenged the transfer system on

<sup>3</sup> *Eastham v. Newcastle United* [1964] Ch. 413.

<sup>4</sup> [http://en.wikipedia.org/wiki/George\\_Eastham](http://en.wikipedia.org/wiki/George_Eastham).

<sup>5</sup> [http://en.wikipedia.org/wiki/Curt\\_Flood](http://en.wikipedia.org/wiki/Curt_Flood).

<sup>6</sup> *Flood v. Kuhn* (407 U.S. 258) was a 1972 United States Supreme Court decision upholding, by a 5-3 margin, the antitrust exemption first granted to Major League Baseball (MLB) in *Federal Baseball Club v. National League*.

<sup>7</sup> *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* (1995) C-415/93.

the basis of the European law that guarantees free movement to employees. The European Court concluded that the transfer system gave rise to an inadmissible restriction in the free movement of employees and therefore could not be upheld. In fact, from that moment, it was established that the contract between a professional player and his club was an employment contract equal to all other employment contracts within the European Union. Here again, the support of the trade unions, now organised in FIFPro, was crucial for the result achieved.

### 3. *Negotiations European Commission - FIFA: outcome FIFA Regulations on the Status and Transfer of Players 2001*

The ruling in the Bosman case also meant the starting point for deliberations between the European Commission and FIFA. Although the ruling related to the territory of the European Union, it was nevertheless FIFA that took the lead in these discussions and not UEFA. This fact has had far-reaching consequences for professional football worldwide.

What is important in this connection is the fact that by entering into the discussions FIFA accepted that European law was applicable to football contracts. The aim of FIFA was to gain recognition within the boundaries of European law for a number of specificities of the sport.

The discussions between the European Commission and FIFA led in 2001 to the establishment of the Regulations for the Status and Transfer of Players, RSTP. On the one hand these regulations frame the applicability of European law and on the other anchors the specificities of the sport. The fact that the FIFA has anchored the consequences of the Bosman ruling in its regulations and not the European confederation UEFA means that the implemented principles from the Bosman ruling also apply outside Europe. One example of this is the Bueno Rodriguez-case.<sup>8</sup> In this conflict, two players from Uruguay wanted to enjoy the free movement guaranteed to employees in order to be able to play in France. Both the FIFA DRC and the CAS accepted this appeal from the players, contradicting the national legislation that seemed to throw up a barrier to this. This meant that in conflicts with an international dimension, the FIFA regulations take priority over national rules.

### 4. *Which specificities are laid down in the FIFA Regulations?*

In its discussions with the European Commission, the FIFA argued the football demand that the specific characteristics of the sport should be taken into account in the legislation. The Commission complied with this.

The most far-reaching aspect is the introduction of a stability period. For players who, at the moment of signing their contract, are not yet 28 years old,

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<sup>8</sup> CAS 2005/A/983 & 984 *Club Atlético Peñarol c. Carlos Heber Bueno Suarez, Cristian Gabriel Rodriguez Barrotti & Paris Saint-Germain*.

there is a mutual period of three years in which the unilateral breach of the contract without just cause leads to a sporting sanction. For older players, this is two years. The sanction for the player is a worldwide suspension for between four and six months. A club that breaches a contract without just cause within the stability period can be excluded from signing new players for one or two transfer periods.

In practice it has emerged that the introduction of the stability period has been a powerful means of persuading players to keep to their contract. There are hardly any examples of situations in which a player terminates his contract without just cause. Clubs often do not let the possible sanction stop them. The examples in which clubs break their contract with a player are numerous. In most cases, moreover, no sporting sanction is imposed on the club which means that the possible damage to the club can be overlooked.

The same sanctions apply to a club that induces a player to break his contract. In the most high profile case, the Kakuta case, the sanction imposed by FIFA was bought out by the club, Chelsea FC, with support from the Court of Arbitration for Sport.<sup>9</sup> It thus appears that the protection of contracts works out considerably better for clubs than for players.

In addition to the stability period, some other measures were introduced intending to promote the stability of contacts.

A contract can only be unilaterally terminated at the end of a football season.<sup>10</sup> This must take place with a period of notice of two weeks after the end of the last match of the season.<sup>11</sup>

This therefore forms a limitation to the period in which a player can transfer from one club to the other. Only at the end of the football season is there a period in which a transfer can be made. In addition, there is a short period in the middle of the season when this is also possible. Here too players are hindered in exercising their right of free movement. A player cannot leave his club during the season without the cooperation of his club because he does not have the possibility of prematurely terminating the contract.

Further it is forbidden for players to commence negotiations with a new club if their current contract still has more than six months to run.<sup>12</sup> A breach of this prohibition can lead to severe sanctions.<sup>13</sup>

## 5. *Repeating the stability period*

Although this was never discussed with the European Commission or with FIFPro, the system has a repeat of the stability period in the event of a contract being

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<sup>9</sup> [www.tas-cas.org/d2wfiles/document/3947/5048/0/2010.02.04%20PR%20Eng%20\\_Final\\_.pdf](http://www.tas-cas.org/d2wfiles/document/3947/5048/0/2010.02.04%20PR%20Eng%20_Final_.pdf).

<sup>10</sup> Art. 16 FIFA RSTP.

<sup>11</sup> Art. 17 par. 3 FIFA RSTP.

<sup>12</sup> Art. 18 par. 3 FIFA RSTP.

<sup>13</sup> Ashley Cole "tapping up" - case [www.dailymail.co.uk/sport/football/article-350715/Commission-statement-Ashley-Cole-tapping-row.html](http://www.dailymail.co.uk/sport/football/article-350715/Commission-statement-Ashley-Cole-tapping-row.html).

extended prematurely or if it is extended after the end of the contract. This means that the original intention of the regulations, namely making it possible to write off certain transfer sums over a reasonable period, is ignored. This particularly applies in those cases in which the original contract period is exceeded. This principle was endorsed by the Court of Arbitration for Sport in the Webster case.<sup>14</sup> The panel considered that the sum paid by the club was written off over the initial contract term and did not take into account the fact that the parties had agreed to an extension. There has not been any case until now in which the repeat of the stability period has been contested.

#### 6. *The situation after the stability period*

Because the variance from EU law, in particular the stability period in response to the consultation between FIFA and the European Commission, is limited in time, this means that at the end of this period a situation will arise in which the football contract is once again an employment contract like all others within the EU. There can then be absolutely no question of extra protective measures. In practice things are, however, different, in particular after the Webster case in which the player ended his contract (which still had a year to run) after the expiry of the stability period. The CAS ruled in that case that the compensation that Webster must pay for breaking the contract was the amount equal to the residual value of his contract. The club had demanded many times this amount. The most important consideration in this case was: *“There is no economic, moral or legal justification for a club to be able to claim the market value of a player as lost profit.”* The Webster case was decided based on the principles of EU law as formulated in the Bosman case and further clarified in the consultations between the European Commission and FIFA in the lead up to the new FIFA Regulations of 2001.

*Not too long after this case, the CAS reached a decision in the Matuzalem case.<sup>15</sup> This case had a large number of similarities with the Webster case and should have resulted in the same sort of decision in which the player should pay compensation of Euro 2.4 million, the residual value of the contract. This player also terminated his contract after the expiry of the stability period. Finally, the CAS panel came out with more than five times the residual value: EUR 12.4 million.*

The reasons given for this compensation were rather extraordinary. Without taking any account of the fact that the FIFA regulations were determined by European law and the considerations in the Webster case, the CAS based itself on completely different principles.

The panel states that art 17 of the FIFA RSTP does basically nothing else than to reinforce contractual stability and that the calculation of the compensation shall be led by the principle of the so-called positive interest. This is in order to

<sup>14</sup> CAS 2007/A/1298-1300, 30 Jan 2008.

<sup>15</sup> CAS 2008/A/1519 and 1520, 19 May 2009.

compensate the injured party for the damage suffered because of the breach of the contract. In order to make these calculations the panel started a process of assessing value of services – cost of bringing a virtual replacement in – acquisition fee and remuneration.

Here we can clearly see that CAS is neglecting the EU-law principles accepted by FIFA and anchored in the FIFA Regulations. Within EU law there is no provision for extra contractual stability in labour relations. The fact that FIFA succeeded in convincing the European Commission to accept a stability period with a maximum of three years means obviously that after this period there is no longer any stability period that has to be protected. From this moment on the player has the same rights to terminate his contract as any worker within the European Union.

### 7. *Positive interest*

The principle of positive interest was introduced in the Matuzalem case. Briefly this means that a party that suffers damages must be brought into the same position it was in prior to the damages occurring. This principle is based on Swiss law and has no foundation in European Community law. In the context of the discussions between FIFA and the European Commission, the aspect of the unilateral breach of the employment contract after the stability period was emphatically handled. It became quite clear that the Commission adopted the position that the principle should be the residual value of the contract. This is also the reason why it is mentioned in so many words in art. 17 of the FIFA RSTP. The market value or the replacement value is not mentioned in this article.

In this context it is remarkable but explicable that in the last ten years of FIFA Dispute Resolution case law there are few if any examples in which the principle of positive interest is applied. This shows yet again that FIFA has been continuously conscientious that the boundaries of EU law on which the current rules are based, may not be crossed.

The fact that there is a statement to the effect that the list of criteria is non-exhaustive has caused some, in particular CAS, to assume that there is room for using replacement value or market value as a criterion when setting compensation. This position, however, is not tenable. In the cases based on the replacement value, this is, logically enough, the largest component of the compensation. If it were the intention to allow this criterion to play a substantial role when setting the compensation, this would certainly have been stated in art. 17 FIFA RSTP. The fact that this criterion is not stated here shows that this criterion should not be applied.

Furthermore, this criterion does not meet the objectivity condition stated in art. 17. This becomes very clear in the El Hadary case.<sup>16</sup> In this case, the compensation was directly proportionate to the purchasing value of the replacement

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<sup>16</sup> CAS 2009/A/1880 and 1881, 1 June 2010.

player after the breach of contract. The fact that the club chose a player with a transfer value of EUR 750,000.00 is somewhat incidental. If the club had engaged a player who cost five times as much, then the unimpaired application of this principle would mean that that would be the compensation due. A result that naturally cannot be upheld.

The fact that the clubs keep trying to persuade FIFA to amend art. 17 RSTP shows that the clubs are not convinced that the interpretation CAS gave to this provision in recent cases will prove tenable. The fact that the Committee on Culture and Education of the European Parliament proposes setting up a separate CAS branch in Brussels or Luxembourg to handle cases within EU territory demonstrates that the current CAS practice is a thorn in the side for the European Parliament.<sup>17</sup>

This was particularly shown in the *De Sanctis* case, in which an Italian club on the one hand and an Italian player and a Spanish club on the other submitted a conflict to CAS.<sup>18</sup> Although the case fell completely in EU territory and the application of EU law would seem appropriate, the case was settled based on Swiss law. This case completely ignores the fact that the FIFA Regulations have completely conformed with European law since 2001.

#### 8. *Unclear and uncertain*

The consequences of these CAS actions are uncertainty for players about what would happen if they unilaterally breach a contract and no just cause is given.

This uncertainty does not exist for clubs. If a club breaches the contract without just cause, the guiding principle will always be the residual value of the contract. If the player is able to find a new club within the original duration of the initial contract, the earnings from the new contract are deducted from the compensation for damages due.

On several occasions, CAS arbitrators have explained that the intention was actually to leave players in uncertainty about the consequences of a unilateral breach of contract. Every case must be handled in a case-by-case approach. This uncertainty increases the contractual stability of contracts. The readiness of players to breach a contract is after all reduced in the light of this. According to the CAS judicial system, this satisfies the principle of *pacta sunt servanda*. The problem with this is that, through this CAS judicial system, this guiding principle weighs more heavily on football players than on other employees within the EU. After all, those employees do not have to deal with a tribunal that preaches uncertainty for them.

CAS completely ignores the fact that the extra protection of a football contract ceases after the expiry of the stability period. After that, no extra protection is possible because the boundaries of this protection are laid down in the consultation

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<sup>17</sup> Draft report on the European dimension in sport , 22 June 2011 2011/2087(INI).

<sup>18</sup> CAS 2010/A/2145, 2146 and 2147,28 February 2011.

between FIFA and the European Commission. It is therefore not for CAS to offer additional protection to employers in a frame of reference - labour law - that is reputed to be the law of protection for the employees.

That it is the express intention within European law to provide both parties with clarity and transparency is clearly shown in the Bernard case.<sup>19</sup> This case was also about compensation that had to be paid with regard to a football contract. Although it does deal with a payment somewhat different to the compensation after a breach of contract, it is nevertheless about comparable quantities. This case revolved around the payment of a training allowance for a young player that had left the club that had trained him. In a clear and transparent argument, Advocate-General Sharpston reported to the European Court of Justice that both parties had the absolute prior right to clarity about the consequences if the player left the training club.<sup>20</sup> The European Court used much fewer words than the Advocate-General, but completely endorsed this right to clarity and transparency.

Since there is no fundamental difference between the two types of payments, it is clear that the CAS jurisprudence with regard to players that is directed at uncertainty and lack of clarity is no longer sustainable. A return to the Webster doctrine that completely complies with European law would be the only step for CAS. The initiative by the European Parliament to set up a CAS branch within EU territory shows that they are serious about things. Europe cannot permit a different law being systematically applied within the range of the Union that conflicts with the principles laid down by the European Parliament, the European Commission and the European Court of Justice. Any other branch of industry could, after all, do the same and apply arbitrarily any law whatsoever. The unity of Europe, which is already under pressure, would then needlessly come under even fiercer attack.

### 9. *The role of the specificities of sport*

In several of the rulings of CAS mentioned here, the specificities of sport are applied. This term is, indeed, stated in art. 17 RSTP. Specificities of sport, however, do not play such a prominent role as some of the CAS panels assume, in particular in the De Sanctis case. In this case, an additional payment of EUR 690,000.00 was awarded to the club based on the specificities of sport. In her opinion in the Bernard case, Advocate-General Sharpston gives a much more realistic picture of specificities within the sport. It should be about “fine tuning” and not about an independent quantity which allows considerable deviations from what a normal application of labour law should bring about. Finally, the application of the specificities of sport cannot lead to crossing the boundaries that were set pursuant to the discussions between FIFA and the European Commission. The specificities

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<sup>19</sup> ECJ, 16 March 2010, *Olympique Lyonnais v Oliver Bernard and Newcastle United FC*, C-325/08.

<sup>20</sup> Opinion of the AG Sharpston, Bernard.

achieved by FIFA are, on these points, the ultimate border. There is no basis, neither in the FIFA regulations nor in European legislation for extending the norms laid down in 2001. It is time that future CAS panels pay heed to this.

### *Conclusions*

The stability of contracts in professional football has been considerably strengthened thanks to the efforts of FIFA. This strengthening is mainly advantageous to the clubs. There are virtually no players who unilaterally breach their contract without just cause within the stability period. There are, however, a large number of clubs who do not feel themselves hindered by these protective measures. The fact that clubs virtually never suffer a sporting sanction for a breach without just cause doesn't really help matters.

The extensive explanation in recent decisions from CAS of the criteria for compensation as stated in article 17 FIFA RSTP goes too far on the basis of facts, backgrounds and legislation and forms an unintentional extra protection of football contracts for the benefit of the clubs.

The introduction of the positive interest principle by CAS lacks a regulatory or legal basis when viewed from a European legal perspective. The initiative of the Committee on Culture and Education of the European Parliament to demand a CAS branch within EU territory seems a first step in calling a halt to this practice. Perhaps then at the same time an end can be brought to the repetition of stability periods when extending contracts.

In the current system, clubs are over protected compared to players. There is no reason whatsoever for further protection.



## THE SPECIFICITY OF SPORT AS A WAY TO CALCULATE COMPENSATION IN CASE OF BREACH OF CONTRACT

by *Michele Colucci* and *Felix Majani*\*

SUMMARY: Introduction – 1. The specificity of Sport in the EU legislation – 2. The EU institutions and the interpretation of the specificity of sport – 2.1 The Court of Justice – 2.2 The European Commission – 3. International sports institutions and their definition of specificity of sport – 3.1 The scope of specificity – 4. The employment disputes – 4.1 Unilateral termination of contracts – 5. The compensation – Conclusion

### *Introduction*

The so-called “specificity of sport” is quite a vague concept which nevertheless has a significant impact on the application of the EU law to the sports Associations and to those who are registered with them (clubs, players but also coaches and trainers).

In fact, taking into account such specificity both ordinary and sports judges at international and national level have been delivering judgements and awards affecting the employment relationship between clubs and athletes as well as their fundamental rights under the Treaty on the Functioning of the European Union (hereafter TFEU).

Specificity encompasses all characteristics that make sport special, such as for instance the interdependence between competing adversaries or the pyramid structure of open competitions. All these aspects are taken into account when assessing whether sporting rules comply with the requirements of EU law (free movement of workers and services, ban on discrimination, competition, etc.)<sup>1</sup> but

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<sup>1</sup> European Commission, Communication on *Developing the European Dimension in Sport*, COM(2011) 12 final, available on [http://ec.europa.eu/sport/news/doc/communication/communication\\_en.pdf](http://ec.europa.eu/sport/news/doc/communication/communication_en.pdf).

also when – for example – the compensation for the breach of an employment contract between a club and a player must be calculated.

The authors analyse the specificity of sport and its interpretation by the relevant authorities, along two judicial tracks: the ordinary one – at EU level – given by the case law of the Court of justice and the sports one through the decisions of the two major arbitration bodies in the field of football at international level: i.e. the FIFA Dispute Resolution Chamber (hereafter DRC) and the awards of the Court of Arbitration for Sport (hereafter CAS) in Lausanne.

### 1. *The specificity of Sport in the EU legislation*

Up to the entry into force of the Lisbon Treaty on the 1<sup>st</sup> of December 2009, sport at EU level was mainly dealt in the light of its economic dimension, and the specific nature of sport was mentioned only in some political documents which were not legally binding on the Member States, i.e. the 1997 Amsterdam Declaration<sup>2</sup> and the Presidency Conclusions of the European Council of Nice in 2000.<sup>3</sup>

They both underlined the social importance of sport and its role as a source of identity and a means of uniting human beings. They were in favor of the specificity of sport: they referred to the protection of young sportsmen and sportswomen from commercial pressures, the dangers posed by the same operator owning or having economic control of several sports clubs, and the economic and social role of volunteering activities in sport.

In 2007 the European Commission in its *White Paper on Sport*<sup>4</sup> gave its own definition of specificity by referring *inter alia* to the limitations on the number of participants in competitions, the need to ensure uncertainty concerning outcomes as well as to the pyramid sport structure of competitions from grassroots to elite level and the organized solidarity mechanisms between the different levels and operators.

It also affirmed that though «specific», sporting activities must both respect the fundamental rights guaranteed by the Treaty and obey to EU competition rules and that it should not be interpreted in such a way that justifies a general derogation from the enforcement of community law.<sup>5</sup>

In other words, the specificity cannot be used to provide the sports sector with an exception to EU law.

This remains the case even after the entry into force of the Lisbon

<sup>2</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing The European Communities and related acts, in *Official Journal C 340*, 10 November 1997. Declaration n. 29 on Sport, available on <http://europa.eu.int/eur-lex/lex/en/treaties/dat/11997M/htm/11997M.html#0136040046>.

<sup>3</sup> Nice European Council, 7-10 December 2000, Presidency conclusions, available on [www.europarl.europa.eu/summits/nice1\\_en.htm](http://www.europarl.europa.eu/summits/nice1_en.htm).

<sup>4</sup> European Commission, *White Paper on Sport*, COM (2007) 391, available on [http://ec.europa.eu/sport/index\\_en.html](http://ec.europa.eu/sport/index_en.html) (27 January 2011).

<sup>5</sup> European Commission, *White Paper on Sport*, para. 4.1.

Treaty which finally gives the Union the competence to “carry out actions to support, coordinate or supplement the actions of the member states”.<sup>6</sup>

In particular, pursuant to art. 165 TFEU the Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.

The aim of Union action will be to “develop the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.

This basically means that the Union finally has a full-fledged European Sport policy which covers not only professionals, i.e. those who have a written contract and exercise an economic activity but also amateurs, i.e. those who play only for pure fun.<sup>7</sup>

By developing the European Sports policy, the Union remains also respectful of the autonomy of Sports Associations in regulating their activities according to their peculiarities, *rectius* their specificities.

In that regard, after only two months from the entry into force of the Treaty, in January 2010, the Olympic Movement and the major International Sports Associations adopted a “Common position on the Specificity of Sport in the light of the Treaty”.<sup>8</sup> The signatory’s parties underlined that they “must be a key player in defining which sporting rules shall be recognised as specific, and accordingly are to be governed uniquely by sports federations”.

“The intention – it is stated further in the document – “is not to obtain an exemption from EU law, but a specific application of EU law to sport”. Such a statement is not really clear even because – as a matter of fact – the Court of Justice and the European Commission have already defined in their decisions the boundaries between European law and sporting issues especially with regard to the employment relationship and freedom of movement of the athletes.<sup>9</sup>

Nevertheless building up from the definition of Specificity written in the White Paper on Sport, the Olympic Movement along with FIFA and other International Associations substantially broaden the concept of “specificity” and detail various rules (such as dispute-resolution mechanisms, arbitration in sport, collective selling of the commercial and media rights of sports competitions, and even free movement of players) which, they argue, “*define the framework of*

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<sup>6</sup> Treaty on the Functioning of the European Union, art. 6.

<sup>7</sup> Cfr. FIFA Regulations on Status and International Transfer of Players (2010 edition), available on [www.fifa.com/aboutfifa/federation/administration/playersagents/regulationstatus/transfersplayers.html](http://www.fifa.com/aboutfifa/federation/administration/playersagents/regulationstatus/transfersplayers.html) (31 of January 2011).

<sup>8</sup> Olympic Movement, Common position of the Olympic and Sports Movement on the implementation of the new Treaty on the Functioning of the European Union (TFEU) on sport (Lisbon Treaty) available on [www.eurolympic.org/cms/getfile.php?98](http://www.eurolympic.org/cms/getfile.php?98) (30 April 2010).

<sup>9</sup> See *infra* para. 3.

*the specific nature of sport and guarantee stable and balanced sporting competitions as well as their integrity*<sup>10</sup>.

This caused the reaction of the players' representatives who did not recognize themselves in the position taken by the Sports movement and provided the Commission with their own vision about the future of sport in Europe in the light of the Lisbon Treaty and offered a new definition of specificity.<sup>11</sup>

All these definitions testify that that the concept of specificity is quite vague and open to several interpretations. The danger is that each stakeholder could use and abuse it in order to justify some sports measures which could infringe some fundamental principles of EU law.

## 2. *The EU institutions and the interpretation of the specificity of sport*

### 2.1 *The Court of Justice*

The Court of Justice has always taken into account the specificity of sport since its early jurisprudence and its interpretation of the relationship between sports and the EU law, and it has evolved over the years.

In the *Walrave* case<sup>12</sup> the Court for the first time stated that “the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty”.

Sports Associations must respect the fundamental freedoms enshrined in the Treaty but the principle of non discrimination ex art. 45 TFEU, para. 2, does not affect the composition of sport teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity.<sup>13</sup>

Following the same line of reasoning, in the *Donà/Mantero* ruling<sup>14</sup> the Court established that a regulation which excluded players from another Member State could only be justified on non-economic grounds and that it had to be considered as an exception to the principle of non-discrimination based on nationality.

In its landmark *Bosman* judgement<sup>15</sup> the Court declared the transfer compensation systems as well as the nationality quotas in sporting regulations contrary to the principles of freedom of movement of workers.<sup>16</sup>

<sup>10</sup> Olympic Movement, Common position of the Olympic and Sports Movement on the implementation of the new Treaty on the Functioning of the European Union (TFEU) on sport (Lisbon Treaty) available on [www.euoffice.euolympic.org/cms/getfile.php?98](http://www.euoffice.euolympic.org/cms/getfile.php?98) (30 April 2010), 4.

<sup>11</sup> EU Athletes, The Lisbon Treaty and specificity of Sport, (March 2011), available on [www.euathletes.info](http://www.euathletes.info).

<sup>12</sup> ECJ, judgment of 12 December 1974, case C-36/74, para. 4, Rec. 1974, 1405.

<sup>13</sup> ECJ, *Ibidem*, para. 8.

<sup>14</sup> ECJ, Case No. C-13/76 [1976] ECR 1333.

<sup>15</sup> ECJ, Case No. C-415/93[1995] ECR I-4921.

<sup>16</sup> For a detailed analysis of the *Bosman* ruling and its impact on the sporting world, see K. VAN MIERT, ‘*L’arrêt Bosman: la suppression des frontières sportives dans le Marché unique européen*’,

Whereas this compensation was an obstacle to free movement more than a discrimination based on nationality, the judges were willing to agree to derogations so long as these were in pursuit of a legitimate objective, which is compatible with the Treaty, justified by pressing reasons of public interest and proportional to the objective pursued.

The Court recognised the social importance of sport in general, and of football in particular, and therefore accepted that the need to protect the economic equilibrium between clubs was legitimate.

It held on to its position that transfer rules were inappropriate to reach their objectives, as they did not stop the richest clubs from recruiting the best players. Moreover, encouraging the training and searching for new talents, though legitimate objectives, could not be reached via the existing transfer rules.

The possibility to receive compensation would have remained uncertain for players, and the amount paid would have had no relation with the real costs incurred. Not only do these transfer rules fail because they are not adapted to their objective, but also other less restrictive solutions – as for instance the establishment of a solidarity fund – existed which could have fulfilled the same objective.<sup>17</sup>

In the name of the specificity of Sport, the Court in the *Lethonen* case<sup>18</sup> recognised also the so-called “transfer windows” and stated that the delays used by national federations for the transfer of players, to avoid the game being rigged, could be considered a justifiable exception to community law on purely sporting grounds.

In the *Deliège* case<sup>19</sup> the judges broadened the understanding of sport as “economic activity” which could be exercised even by a judoka having an amateur status and making her living with the money coming from sponsors.

The judges found that the selection criteria used by sporting federations in order to participate in international competitions are an obstacle to the freedom of movement of services, but they are legal because of the specificities of the sporting sector.

The *Meca-Medina* case<sup>20</sup> has broadened once more the scope of EU

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(2006) 1 *Revue du Marché unique européen*, 5; P. DEMAERT, ‘*Quelques observations sur la signification de l’arrêt Bosman*’, (1996) 1 *Revue du Marché unique européen*, 11; D. O’KEEFE, P. OSBORNE, ‘*L’affaire Bosman: un arrêt important pour le bon fonctionnement du Marché unique européen*’, (1996) 1 *Revue du Marché unique européen* 17; G. CAMPOGRANDE, ‘*Les règles de concurrence et les entreprises sportives professionnelles après l’arrêt Bosman*’, (1996) 1 *Revue du Marché unique européen*, 45.

<sup>17</sup> CoJ ECJ, Case No. C-415/93[1995] ECR I-4921Cfr. Opinion of the Advocate General paras. 226 and ff.

<sup>18</sup> ECJ, Case No. C-176/96 [2000] ECR I-2681.

<sup>19</sup> ECJ, Case No. C-51/96, [2000] ECR I-2549.

<sup>20</sup> ECJ, Case No. C-519/04 P, OJ C 224/8, 2006. The Court overturned the Court of First Instance’s 2004 judgment in case No. T-313/02 [2004] ECR II-3291, because it gives too narrow an interpretation of EU competition rules, but finds the sporting regulation compatible with EU competition law because of its legitimate objective.

law: in fact even pure sporting rules – such as antidoping rules – can have an economic effect and therefore fall within the scope of the EU law.

In particular, after recalling the difficulty of severing the economic aspects from the sporting aspects of a sport, the Court held that the provisions of community law concerning freedom of movement for persons and freedom to provide services do not preclude rules or practices justified on non-economic grounds which relate to the particular nature and context of certain sporting events.

It has stressed, however, that such a restriction on the scope of the provisions in question must remain limited to its proper objective. It cannot, therefore, be relied upon to exclude the whole of a sporting activity from the scope of the Treaty.<sup>21</sup> *A fortiori* the same principle applies to the general concept of specificity of sport which cannot be construed so as to justify a general exemption from the application of EU law.

The judges gave also clear guidelines on how to evaluate the compatibility of sports rules with EU law: they cannot be assessed in the abstract. Account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produced, its effects and, more specifically, of its objectives. Finally there has to be consideration of whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives and are proportionate to them.<sup>22</sup>

In the recent *Bernard*<sup>23</sup> case, the Court had the opportunity for the first time to refer in an explicit way to the concept of specificity of Sport as enshrined in Art. 165 TFEU.<sup>24</sup>

It held that the rules on training compensation in sport are likely to discourage the player from exercising his right of free movement. Consequently, those rules are a restriction on freedom of movement for workers.

However, as the judges already held in the *Bosman* case, in view of the considerable social importance of sporting activities and in particular football in the European Union, the objective of encouraging the recruitment and training of young players must be accepted as legitimate.<sup>25</sup>

In considering whether a system which restricts the freedom of movement of such players is suitable to ensure that the said objective is attained and does not go beyond what is necessary to attain it, account must be taken of the specific characteristics of sport in general, and football in particular, and of their social and educational function.

In other words, the fact that a rule is purely sporting does not have the

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<sup>21</sup> ECJ, Case No. C-519/04 P, OJ C 224/8, 2006, para.26.

<sup>22</sup> ECJ, Case No. C-519/04 P, OJ C 224/8, 2006, para. 42.

<sup>23</sup> CoJ, Judgment of 11 March 2010, *Olympique Lyonnais SASP v. Olivier Bernard and Newcastle United FC*, case C-325/08, not yet published in the ECR. For a detailed comparison between the *Bosman* and *Bernard* cases see F. HENDRICKX, *Justification of training compensation in European Football: Bosman and Bernard Compared*, in *European Sports Law and Policy Bulletin*, 19

<sup>24</sup> ECJ, *Olympique Lyonnais SASP v. Olivier Bernard and Newcastle United FC*, paragraph 40.

<sup>25</sup> ECJ, *Bosman*, para. 106.

effect of removing it from the scope of the Treaty, but it can be considered as legitimate provided that it passes the test developed first in the *Meca Medina* case with regard to competition law and then in the Bernard case concerning the freedom of movement of workers.

## 2.2 *The European Commission*

The European Commission is the watchdog of the Treaty and proposes to the other institutions new legislative acts to be adopted. As such it has no authority to give guaranties about the compatibility of a sports regulation with the Treaty provisions.<sup>26</sup>

However, in its decisions the Commission has always been prepared to recognise the specificities of sport and to be flexible on a case by case basis, when justified and legally feasible. In doing so, the institution considers the legitimacy of the objectives pursued by the rules such as those of sport organisations may relate, for example, to the fairness of sporting competitions, the uncertainty of results, the protection of athletes' health, the promotion of the recruitment and training of young athletes, financial stability of sport clubs/teams or a uniform and consistent exercise of a given sport (the "rules of the game").

The Commission also evaluates whether any restrictive effects of those rules are inherent in the pursuit of the objectives and whether they are proportionate to them.<sup>27</sup>

In this perspective it is decided that the funds which French local communities paid to professional sporting clubs with training centres for youth, were government subsidies directed at education and training. Nevertheless they were therefore not state aids in the sense of Article 107 TFEU<sup>28</sup> because of the importance of training centres and the educational dimension in sport.

The Commission also found that the FIFA regulations on the Status and transfer of players (RSTP) answered to both the obligations of European law and to the rules of sport organisation. Furthermore, if this regulation were to include restrictions to competition according to Article 101 para 1 TFEU, it would have fulfilled the conditions of Article 101 para.3 TFEU.<sup>29</sup>

In its Communication on the follow up of the White Paper on Sport the Commission announced that soon it will assess the consequences of the UEFA rules on home-grown players according to which there must be at least 8 locally trained players in each team's squad, irrespective of nationality.

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<sup>26</sup> Y. LE LOSTECQUE, '*Le transferts de joueurs*', (2001–2002) 3 *Revue des Affaires Européennes*, 324.

<sup>27</sup> European Commission, *Developing the European Dimension in Sport*, 18 January 2011, COM(2011) 12 final.

<sup>28</sup> European Commission, Decision of 25 April 2001, Case No. 118/2000 – *Aide aux clubs sportifs professionnels français*, OJ C 333/1, 2001.

<sup>29</sup> European Commission, Decision of 28/05/02, cases No. COMP/36.583 – *SETCA+FGTB / FIFA* published on line at <http://ec.europa.eu/comm/competition/antitrust/cases/decisions/36583/fr.pdf>; Case No. COMP/36.726 – *Sport et Libertés/FIFA* published on line at [http://ec.europa.eu/comm/competition/antitrust/cases/index/by\\_nr\\_73.html#i36\\_726](http://ec.europa.eu/comm/competition/antitrust/cases/index/by_nr_73.html#i36_726).

Though this rule is irrespective of nationality it could still be seen as a contravention of the right for Europe-wide freedom of movement for workers. Though the locally trained players can be of any nationality it may still limit the movement of players from foreign countries as the term locally trained, or ‘home-grown’, applies to all players who were trained by a team from that country. Therefore there are bound to be more Italian home-grown players than other nationalities available for Italian team, which will ultimately limit the amount of foreign players that the clubs can sign.

Such a rule aims to encourage the recruitment and training of young players and ensure the balance of competitions, and can be compatible with EU free movement provisions (i) in so far as they are able to achieve efficiently those legitimate objectives, (ii) if there are no other measures available which can be less discriminating and (iii) if the rules in question do not go beyond what is necessary for the attainment of their objectives. The Commission will nevertheless monitor the application of these rules closely on a case by case basis in order to verify that the criteria are met.<sup>30</sup>

It is likely the argument of specificity would override this contravention of the rights of movement for workers, as it would be seen as essential for the future of football that the academy system is developed and young players encouraged. Thus the specific requirements of the footballing industry would be enough to grant it exception to the rule.

### 3. *International sports institutions and their definition of specificity of sport*

#### 3.1 *The scope of specificity*

The term “specificity of sport” is a term which is yet to receive a clear concrete definition in so far as the world of international sports law is concerned. There are however ample expressions which have been laid forth by relevant sports regulations,<sup>31</sup> international sports law scholars,<sup>32</sup> and sports case law<sup>33</sup> to encompass and expound on the full meaning of this term. This term has been recalled by both FIFA and the CAS in their decisions.

Although specificity is also taken into consideration, it is done so on a general basis. There is no indication at all about the content of such a

<sup>30</sup> European Commission, *Staff Working Document accompanying the Communication on Developing the European Dimension in Sport*, 18 January 2011, available on [http://ec.europa.eu/sport/news/doc/communication/swd\\_en.pdf](http://ec.europa.eu/sport/news/doc/communication/swd_en.pdf).

<sup>31</sup> Art. 17 FIFA regulations, *Commentary on the Regulations for the Status and Transfer of Players*, p.47, footnote 75.

<sup>32</sup> R. PARRISH, “*Contractual stability: the case law of the court of arbitration for sport*”, STUTZER HANSJÖRG, “*The world of football – an insight into ‘the specificity of sport’*” and others.

<sup>33</sup> DRC, *Chelsea FC V Adrian Mutu*, CAS, *Webster, Matuzalem, De Sanctis, Pyunik, El Hadary*. ECJ, *Meca Medina Case, Bernard Case*.

concept<sup>34</sup> which nevertheless is used to justify in football the so-called “protected period”, training compensations and solidarity mechanisms.<sup>35</sup>

Even more, the concept of specificity has been used as a criterion to calculate compensation in case of breach of contract together with the player’s economic value, his status, the financial investments made by the club, and the image damages suffered.

All these criteria have been taken and developed by CAS which for instance in CAS 2007/A/1359 FC Pyunik Yerevan vs Edel Apoula Edima Bete, AFC Rapid Bucuresti & FIFA (*Pyunik*) considered that the specificity of sport criteria directs a panel to consider the “*specific nature of damages that a breach by a player of his employment contract with a club may cause*”. The panel went on to explain that the “*specific nature of the damages*” refers to the sporting and economic value of the player, including their merchandising potential and their transfer value. For the panel, “*the asset comprised by a player is obviously an aspect which cannot be fully ignored when considering the compensation to be awarded for a breach of contract by a player.*”

At the same time the CAS has also emphasised that “*specificity of sport is not an additional head of compensation nor a criteria allowing to decide in equity, but a correcting factor which allows the Panel to take into consideration other objective elements which are not envisaged under the other criteria of art. 17 of the Regulations.*” CAS 2010/A/2145, CAS 2010/A/2146 & CAS 2010/A/2147 Sevilla FC SAD v. Udinese Calcio S.p.A & Morgan de Sanctis (*de Sanctis*).

The driving force behind the application of specificity of sport in sports related labour disputes is the need to find particular solutions, especially for the football world, which – at least in theory – should enable to strike a reasonable balance between the needs of contractual stability (*pacta sunt servanda*) on the one hand, and the needs of free movement of players on the other hand. In other words, it aims at finding solutions that foster the good of sport by reconciling in a fair manner the various and sometimes contradictory interests of clubs and players.<sup>36</sup>

The CAS concedes that sports’ specific needs and its nature must be given due consideration so as to attain a solution which takes into account not only

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<sup>34</sup> CAS, *Webster*, para. 131 “*With respect to the “specificity of sport”, article 17(1) of the FIFA Status Regulations stipulates that it shall be taken into consideration, without however providing any indication as to the content of such concept.*”

<sup>35</sup> Pursuant to FIFA regulations “Protected period” is a period of three entire seasons or three years, whichever comes first, following the entry into force of a contract, if such contract was concluded prior to the 28<sup>th</sup> birthday of the professional, or to a period of two entire seasons or two years, whichever comes first, following the entry into force of a contract, if such contract was concluded after the 28<sup>th</sup> birthday of the professional.” The relevant provisions on training compensations and solidarity mechanisms are contained in Annex 4 and 5 of the FIFA regulations on the status and transfer of players.

<sup>36</sup> See CAS *Webster*, para 132.

the interests of the player and the club, but also, more broadly, those of the whole community of football.<sup>37</sup>

This specificity has been held not to conflict with the principle of contractual stability and the right of the injured party to be compensated for all the loss and damage incurred as a consequence of the other party's breach.<sup>38</sup>

In other words, on the basis of "specificity" of sport, the parties could claim (and the sports judges could recognize) rights and compensation that they probably would never have received pursuant to the ordinary rules.

#### 4. *The employment disputes*

Key disputes before FIFA and the CAS wherein the issue of specificity has been called into play have related to the calculation of compensation for unilateral termination of the employment contracts but - this is mainly the case for CAS.

##### 4.1 *Unilateral termination of contracts*

Whereas the power of players continues to rise by the day, the financial, and possibly legal power of the clubs to hold on to, or perhaps to deal with player power, declines by the day.

The modern day player today earns mega-bucks. The modern day club today fights to fend off insolvency and bankruptcy.

Player power has seen a rise in incidents of player's who no longer wish to play for their employer clubs handing in transfer requests or forcing their transfer to clubs willing to pay them more salary. Of course, when their employer clubs refuse to transfer them, the players usually engage in acts of misbehaviour such as refusing to train, disrupting the rest of the team and ultimately colluding with their prospective new employer clubs to unilaterally terminate their contracts. In effect, today's players hold their employer clubs at ransom.

On the other hand, given their financial difficulties, clubs struggle to pay their players or altogether fail to pay, thereby breaching the terms of their contract or leaving the player's with no choice but to approach the sports tribunals for compensation.

It is therefore little wonder that a vast majority of the disputes at the CAS relate to unilateral termination of contracts. But just what is the criteria used in assessing the amount of compensation due for unilateral termination?

In accordance with article 17.1 of the RSTP, "[i]n all cases, the party in breach shall pay compensation. [...] Unless otherwise provided for in the contract, compensation for the breach shall be calculated with due

<sup>37</sup> CAS 2008/A/1644 *Adrian Mutu v Chelsea Football Club Limited*, available on [www.tas-cas.org/d2wfiles/document/3459/5048/0/Award20164420FINAL.pdf](http://www.tas-cas.org/d2wfiles/document/3459/5048/0/Award20164420FINAL.pdf).

<sup>38</sup> CAS 2007/A/1358, *FC Pyunik Yerevan v/ Carl Lombe, AFC Rapid Bucuresti & FIFA*, N 87; 2007/A/1359, *FC Pyunik Yerevan v/ Edel Apoula Edima Bete, AFC Rapid Bucuresti & FIFA*, N 90.

*consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period. (...)*”.

As a whole, this article encompasses the specific nature of football by providing a wide range of criteria to be applied by a deciding body in awarding compensation for unilateral breach of contract.

In the landmark decision in *2007/A/1298, 1299 & 1300 Wigan Athletic v/ Heart of Midlothian & Andrew Webster* (hereinafter *Webster*) the CAS held that its obligation to calculate compensation in accordance with the “specificity of sport” required it to reach a solution “for the football world which would enable those applying the provision to make a *reasonable balance between the needs of contractual stability on the one hand and the needs of free movement of the players on the other hand.*”<sup>39</sup>

At the same time, the panel held that “(...) *compensation for unilateral termination without cause should not be punitive or lead to enrichment and should be calculated on the basis of criteria that tend to ensure clubs and players are put on equal footing in terms of the compensation.*”<sup>40</sup>

Nevertheless the CAS in its award *Shakhtar Donetsk v Matuzalem Francelino Da Silva & Real Zaragoza SAD & FIFA* (hereinafter *Matuzalem*) arrived at exactly opposite conclusions and stated that the factor of specificity of sport may not be misused to compensate the injured party with an amount which would put such party, namely the player, in a better position than it would have if the termination had been mutually agreed.

By doing that, it also emphasized that in football, unlike in other employer-employee relationships where the employee is generally the weaker party; players are not regarded as the weaker party *per se*.

## 5. *The compensation*

Given the specific nature of sport, most CAS panels have been unwilling to apply the law of the country concerned (or national law) when awarding compensation. The reason for this is based on the need to maintain uniform jurisprudence through exclusively applying the FIFA regulations subordinated by Swiss law and also because the national laws on contract damages vary and would render reference to ‘any other objective criteria’ redundant.<sup>41</sup>

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<sup>39</sup> CAS *Webster*, para. 132.

<sup>40</sup> CAS *Webster*, para 138.

<sup>41</sup> Further reading, see R. PARRISH “*Contract Stability: The Case Law of the Court of Arbitration of Sport*”.

In view of this, FIFA and the CAS have considered certain elements, particularities or case-specific aspects, which, in the concrete matter at stake could justify an increase or reduction of the calculated compensation for specificity of sport, i.e. correcting factors specific to sport.

Such elements could, for example and without being exhaustive, be, The player's economic value; The Player's or club's status; Financial investments; Image damage; Team performance and replacement costs and the Player's conduct and behaviour, a particularly mean behaviour of the party at fault, in particular, from a sporting point of view, the time of the premature termination of the contract in relation to the existing and applicable registration periods, the role of the player in the squad (in both cases, the player or the club breaching the contract), the commitment of the player to the club prior to the early termination (again in both cases, the player or the club breaching the contract).<sup>42</sup>

*a. The player's economic value*

Under CAS jurisprudence, a player's market value is one of the determining factors considered in deciding the amount of compensation due to a club in case he unilaterally terminates his contract.

If a player terminates his contract at a time when his market value is reasonably high, this could have an influence on increasing the amount of compensation owed to his former club. The contrary also applies. In other words, a player who unilaterally terminates his contract at a time when his market value is reasonably low could be compelled to compensate his former club with a lesser amount.

This reasoning is based on the fact that players constitute a major part of the club's asset.

In CAS 2005/A/903 & 903, *Mexès & AS Roma v/AJ Auxerre*,<sup>43</sup> (*Mexes*) the panel stated that "(...) *in the world of football, players are the main asset of a club, both in terms of their sporting value in the service for the teams for which they play, but also from a rather economic view, like for instance in relation of their valuation in the balance sheet of a certain club, if any, their value for merchandising activities or the possible gain which can be made in the event of their transfer to another club.*"

Taking into consideration all of the above, the panel stressed that the "(...) *asset comprised by a player is obviously an aspect which cannot be fully ignored when considering the compensation to be awarded for a breach of contract by a player.*"

In *Webster*, Hearts claimed sporting and commercial losses relating to, for

<sup>42</sup> For further reading please see 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", Ch. ..of the present publication.

<sup>43</sup> See also *Mexes* and *Webster* CAS 2007/A/1298, 1299&1300.

instance, a loss of merchandising opportunities stemming from the breach of contract. The panel found that Hearts had failed to establish the causality of the player's termination nor the existence of the damage.<sup>44</sup> In *Matuzalem*, the panel left open the possibility of considering damage incurred by a club because of the premature termination. For example, the club could be harmed as it is no longer in a position to fulfil some obligations towards a third party, such as a sponsor or an event organizer to whom the presence of the player was contractually warranted.<sup>45</sup> However, as it did not form part of Shakhtar's submission that it had suffered any particular additional damage because of the player's actions, the panel did not take account of any such additional damages when assessing the compensation amount.

*b. Status*

On an equal breath, the CAS seems to regard the number of years spent, titles won and/or personal contributions made by a player for his club as another issue which characterizes the specific nature of sport in assessing damages for unilateral termination.

It appears as though a player who rendered personal and important services for the success of his former club could have any possible damages payable by him to his former club reduced on this basis.

Indeed, the panel in *Mexes* recognised the important personal investment and contribution made by players towards their clubs as an element favourable to them in assessing compensation under the sphere of specificity of sport.

The opposite applies, *i.e* in case a club did not benefit much from a player's sporting services, this is taken into account in favour of the club and could see the amount of compensation increased.

Although the panel in CAS 2009/A/1880 FC Sion v. FIFA & Al Ahly Sporting Club & CAS 2009/A/1881 Essam El-Hadary v. FIFA & Al Ahly Sporting Club (*El-Hadary*), appreciated the abovementioned facts by noting that the player (goalkeeper), who had unilaterally terminated his contract had rendered outstanding services to his former club (Al Ahly) for 12 years, featured in over 500 matches and helped the club win important matches, this was however not substantial enough to increase the amount of compensation due from him because the club had also benefited from his outstanding services.

This precedent was also shared in *de Sanctis* where the panel considered the player's position in the pitch, his role in the eyes of sponsors, fans, colleagues, and the success he had brought to his former club in assessing damages under the field of specificity of sport.

The panel in the above case also highlighted that the player was a senior professional, with whom the club had enjoyed some of their greatest successes

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<sup>44</sup> CAS *Webster*, para 90.

<sup>45</sup> CAS *Matuzalem*, para 150.

and that “at any club, when a key player is sold or goes and time is required for a new “hero” to materialise, revenues will be affected, the injured party will suffer losses which it may not be able to prove in Euros. This, in the opinion of the Panel, is where the specificity of sport can be used and should be used”.

There also seems to be an inference that the greater the history and/or status of a club is, the higher the chances of the said club of receiving a higher amount of compensation under specificity of sport. Although not expressly stated, the panel in *Pyunik* considered the former club’s international exposure and the extent to which it was known as compared to the new club in assessing damages for specificity of sport.

### c. *Financial investments*

Sports is a business and the players are a golden asset to the club,<sup>46</sup> most of which depend on their market value for continued financial sustenance.

Unlike normal employer – employee relationships where investments made by employers in developing and/or improving the value of employees is not considered in assessing eventual damages, such investments are considered in sports. They include in particular the transfer fees paid by a club in signing the player.

Indeed, the FIFA DRC in the case of *Chelsea Football Club v Adrian Mutu* stated that “[t]he notion of specificity of sport allows to assess the amount of compensation payable by a player to his former club in case of an unjustified breach of contract not only on the basis of a strict application of civil or common law, but also on the basis of considerations that players are an asset of a club in terms of their sporting value and also from an economic point of view”.

In this regard, the DRC in the *Mutu* case took into account the massive financial investment made by Chelsea in securing Mutu’s services in terms of the transfer fee Chelsea paid Mutu’s former club.

The panel in *Pyunik* implied that a club which loses a player unilaterally and unjustifiably can be compensated by the said player for specificity of sport if the club in question is able to prove that it had a legitimate expectation of gain in respect of a possible transfer of the player and also if it could substantiate the economic damage it suffered as a result of the player’s loss or termination.

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<sup>46</sup> “When weighing the specificity of the sport a panel may consider that (...) in the world of football, players are the main asset of a club, both in terms of their sporting value in the service for the teams for which they play, but also from a rather economic view, like for instance in relation of their valuation in the balance sheet of a certain club, if any, their value for merchandising activities or the possible gain which can be made in the event of their transfer to another club.” see *Mexes and Webster*.

*d. Financial savings*

The FIFA DRC and the panel in CAS 2009/A/1856 & 1857 Fenerbahçe v Stephen Appiah (Appiah) however seems to hold a different opinion. In *Appiah*, the player was found to have unilaterally terminated his contract after disobeying orders from his club Fenerbahçe to resume training. Both FIFA and CAS found him liable but when it came to awarding Fenerbahçe compensation for specificity of sport, they were of the opinion that since it was the player who terminated the contract, “*Fenerbahçe saved more money compared to its losses*” as it no longer had to pay the player’s salary from May 2008 to May 2009, an amount of Euro 2,633,020.85.

*e. Image damage*

Depending on the circumstances under which a player unilaterally terminated his contract, the CAS could consider increasing the amount of damages due from a player to his former club especially if the termination damaged and/or defamed the club’s image. This is however an exception rather than the norm and only occurs in cases where a player’s unilateral termination was caused by the use of prohibited substances.

This was the understanding in the *Mutu* case, where the DRC held that “*(...) the enormous damage suffered by Chelsea in terms of image, on account of the fact that one of its most popular players was tested positive to cocaine, with all the consequences related to social responsibility such as fans in general and grassroots in particular*” should not be disregarded in calculating compensation for unilateral breach of contract.

In the FIFA dispute involving *de Sanctis*, the DRC condemned the player to pay his former club Udinese an additional amount of Euro 350,000, which it said reflected the sports related damage the player caused Udinese in light of specificity of sport.<sup>47</sup>

*f. Team performance and replacement costs*

Football is a team sport. The presence or absence of one regular player could have a major impact in the team’s performance both on and off the pitch in terms of results and commercial standing.

It appears as though a club which heavily relies on a player for good results and to attract sponsors and financial benefits stands to gain additional compensation from the player in case the latter unilaterally terminates his contract. The panel in CAS 2009/A/1840 & CAS 2009/A/1851 PFC Slavia 1913 AD v Kayseri Erciyesspor Kulubu & Zdravko v Kayseri Kulubu (*Kayseri*) denied the

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<sup>47</sup> Further reading, see R. PARRISH “*Contract Stability: The Case Law of the Court of Arbitration of Sport*”.

club compensation under the arm of specificity of sport after the club had failed to plead or substantiate that the income or performance of its football team had declined because it was deprived of the player's contribution.<sup>48</sup>

As a matter of fact, compensation for specificity of sport might not be awarded even if a club substantiates that its income or team performance declined following the player's termination but fails to replace the said player. In other words, a decline in income or team performance following the loss of a player must go hand in hand with a move by the club to replace the said player in order for the club in question to be awarded compensation for specificity of sport.<sup>49</sup>

*g. Player's conduct / behaviour*

Specificity of sport has also been applied to imply that if a party engages in conduct which is bad faith or terminates the contract for its own selfish ends, the party in question can be condemned to pay more damages because of sports' specificity. The opposite applies. In other words, if a party had displayed exemplary behaviour throughout the duration of a contract, this may be considered in lowering the amount of damages payable.<sup>50</sup>

In *Matuzalem*, the panel also observed that Matuzalem was an important player for the club, being not only the player through which the team directed much of its play, but also club captain. However, the panel was not satisfied with the fact that the player playing in the central midfield makes his loss more critical, in sporting terms, than the loss of another member of the team, although 'it may be possible to consider whether a player in breach or terminating prematurely his contract was a player of the *core team* of the club or not'.<sup>51</sup> Therefore, the panel concluded that the player's position should not normally have an impact on the damage caused and the compensation to be paid.

With regard to Matuzalem's behaviour, the panel observed that the player left the club just a few weeks before the start of the UEFA Champions League qualifying rounds. It is widely accepted that both in terms of prestige and financial reward, that the Champions League is of vital importance to clubs. The panel also noted that Matuzalem had accepted an increase in his salary on 1 April 2007 and by deciding shortly afterwards to leave the club had offended the good faith of Shakhtar. The player had also allegedly left the club without indicating in advance his wish to move to another team.<sup>52</sup>

The Panel declared itself not satisfied that the reasons submitted by Matuzalem could be accepted as full justifications for the player's behaviour even though it was the player's submission that his move was designed to save his

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<sup>48</sup> CAS *Kayseri*, para 152.

<sup>49</sup> CAS *Pyunik*, para 111.

<sup>50</sup> See CAS *El-Hadary*.

<sup>51</sup> CAS *Matuzalem*, para 174.

<sup>52</sup> CAS *Matuzalem*, para 169.

marriage given that his wife was unhappy about living in Donetsk. This submission is somewhat corroborated by the fact that the player signed a new contract with Zaragoza with remuneration equivalent to his terms at Shakhtar. This indicates that the player did not move for economic reasons.

In *Webster*, the CAS was however unconvinced that the concept of aggravating factors or contributory negligence are legally relevant or applicable to the calculation of compensation under the criteria of Article 17.<sup>53</sup> The CAS concluded that the parties had not clearly established the existence of aggravating factors on the part of the player or contributory negligence on the part of the club and that accordingly these considerations were not relevant when determining compensation amounts.<sup>54</sup>

### *Conclusion*

Specificity reflects the characteristics of sport which make it special or different from other sectors.

Nevertheless it remains a vague concept which has been defined in different ways by the European Commission and the Court of Justice on one side and the Sports Organizations on the other sides.

In particular the European judges have always taken into account the specificity when examining the compatibility of sports rules with the European legislations.

As such specificity has been used but sometimes also abused in order to justify the positions of some sports stakeholders which claim their autonomy and a special treatment with regard to the application of the EU law.

The sports judges (DRC and CAS) then interpreted this concept in a very peculiar way when deciding about compensation for termination of employment contracts in the football world.

They admitted that under ordinary circumstances, any compensation based on specificity of sport is limited as to its scope of application, since the concept serves only the purpose of verifying the solution for compensation otherwise reached. Therefore, damages awarded under specificity of sport are subordinate to the other damage heads.

In addition, damages awardable under the arm of specificity of sport take into account various factors. These include, as earlier highlighted, the player's economic value, his status, financial investments made by the club and any damage caused to the club's image as a result of the player's termination.

It is therefore distinct from the general contractual principle of restitution. Nevertheless, it is worth noting that the panel in *Webster* referred to the principle of specificity of sport and held that the proper compensation due from the player,

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<sup>53</sup> CAS *Webster*, para 45.

<sup>54</sup> Further reading, see R. PARRISH "Contract Stability: The Case Law of the Court of Arbitration of Sport".

who had unilaterally terminated his contract was the residual value remaining under the said contract.<sup>55</sup>

In view of the above criteria and considerations in specificity of sport, what figure can we possibly or probably say that the CAS or FIFA may award as compensation in the field of specificity of sport?

The panel in *de Sanctis* noted that since “*the Regulations offer no express guidance as how a judging authority should calculate compensation under this basis*”, reference must be made to article 42 para 2 of the Swiss Code of Obligations, which states that “*if the exact amount of damages cannot be established, the judge shall assess them in his discretion, having regard to the ordinary course of the events and the measures taken by the damaged party to limit the damages.*”<sup>56</sup>

In exercising the aforesaid discretion, the CAS seems to have established a precedent that compensation for specificity of sport shall be calculated based on the player’s 6 months’ salary, as provided either in his new or old contract. See *de Sanctis*<sup>57</sup> and *Matuzalem*.

This position is also reflected in the FIFA commentary, which states that “*there was also the possibility of awarding additional compensation. This additional compensation may, however, not surpass the amount of six monthly salaries*”<sup>58</sup> and also in FIFA DRC decisions.

Indeed, the FIFA DRC in its decision no. 59738 of May 2009 considered the “*aspect relating to specificity of sport also mentioned in art. 17 of the Regulations*”, which it stated ensured that “*decisions taken are not only just and fair legally speaking, but that they also correspond to the interest and specific needs of the football world’s actors. On that basis, the members of the Dispute Resolution Chamber unanimously agreed that an additional amount of compensation should be granted to the Claimant for the damage it had suffered as a result of the termination of the contract without just cause by the First Respondent*”.

It should also be noted that unlike in normal employer-employee relationships where the employee is considered the weaker party, the concept of specificity of sport in football places both footballers (employees) and clubs (employers) on an equal footing.<sup>59</sup> Therefore both parties are required to compensate each other with a similar amount, regardless of the so-called “stronger position” which clubs might be seen to enjoy.

In principle someone can say that FIFA and the CAS share a similar opinion that in light of the unique features of sport, there is a need for disputes to

<sup>55</sup> CAS *Webster* para. 151.

<sup>56</sup> CAS *De Sanctis*, para. 102.

<sup>57</sup> “*Taking into account the specific facts of this matter, determines the additional compensation (...) shall be (...) 6 months remuneration under the New Contract.*” Para. 102.

<sup>58</sup> Commentary on the Regulations for the Status and Transfer of Players, 47, footnote 75. Accessed at [www.fifa.com](http://www.fifa.com).

<sup>59</sup> CAS *Matuzalem*, para. 156.

be specifically decided by applying only special sports regulations, regardless of whether the parties had agreed to the application of another law or laws.



## COMPENSATION IN CASE OF BREACH OF CONTRACT ACCORDING TO SWISS LAW

by *Lucien W. Valloni\** and *Beat Wicki\*\**

SUMMARY: 1. Introduction – 2. Termination of the employment relationship under Swiss Law – 2.1 Fixed-term employment relationship – 2.2 Open-ended employment relationship – 2.2.1 Statutory notice of termination – 2.2.2 Termination with immediate effect in cases of open ended employment relationship – 2.2.2.1 Wrongful termination and termination at an inopportune juncture – 2.2.2.2 Termination with immediate effect – 3. Financial consequences of a termination with immediate effect – 3.1 Notice of termination by employer – 3.2 Notice of termination by employee – 3.3 Article 17 FIFA Regulations – 4. Case law of CAS on Art. 17 FIFA Regulations – 4.1 Webster decision – 4.2 Matuzalem decision – 5. Assessment of the CAS jurisprudence from a Swiss law perspective – 5.1 The positive interest as damages – 5.2 The “specificity of sport” to calculate the compensation – 5.3 Infringement of the principle of parity of termination periods – 6. Conclusion

### 1. Introduction

The following article will give an interpretation of art. 17 of the FIFA Regulations about the status and transfer of players (hereinafter “FIFA Regulations”), from a Swiss law point of view. The focus of the deliberations will be especially on the financial consequences of the termination of a contract as described under this provision. Art. 17 FIFA Regulations and its interpretation must in any event comply with mandatory Swiss law according to Article 63 para 2 of the Swiss Civil Code, because of the fact that FIFA is an association incorporated under Swiss law. Furthermore, non-mandatory Swiss law can also be relevant in relation to art. 17 FIFA Regulations.<sup>1</sup> Hence, Swiss law is relevant for art. 17 FIFA Regulations not

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<sup>1</sup> Cf. LUCIEN W. VALLONI/THILO PACHMANN, *Sports Law in Switzerland*, Alphen aan den Rijn 2011, N 29.

only since the “Webster Decision”.<sup>2</sup> In this ruling the CAS held that the reference in art. 17 para. 1 of the FIFA Regulation, to “the law of the country concerned” (to calculate the compensation in case of a breach of contract), should not be misleading because according to art. 60 para. 2 of the FIFA statutes the interpretation and validity of decisions and regulations of the FIFA may only be assessed under one statute: Swiss law.<sup>3</sup> However this approach and also the one in the “Matuzalem case” cannot be generally accepted. Apart from the applicable mandatory Swiss law, the term “the law of the country concerned” in art. 17 para. 1 of the FIFA Regulation refers to the mandatory law of the country with the closest links to the contractual relationship concerned.

Bearing these considerations in mind, this article will point out the mandatory provisions under Swiss law that a court must respect in any case where fixing an amount of compensation based on art. 17 FIFA Regulations. Further, the authors will shed light on the principles of Swiss law applicable to the calculation of compensation as foreseen in art. 17 FIFA Regulations if a court designates Swiss law as the applicable law.

## 2. *Termination of the employment relationship under Swiss Law*

### 2.1 *Fixed-term employment relationship*

According to art. 334 para. 1 CO fixed-term employment contracts end without notice at the expiry of the contracting period. If an employment relationship after this period is upheld by tacitly extending the contract, it will be deemed to be open-ended.

Fixed-term employment relationships do not exclude employers and employees agreeing on notice periods which allow an early termination of the employment relationship. If the parties have not agreed on such a notice period, only an early termination as defined in art. 337 CO is possible to end the relationship before the expiry of the contractual period. In this case regarding the financial consequences a distinction is to be made between whether the dismissal was for good cause or not (cf. chapter 3). Further it is possible that fixed-term employment relationships may be terminated based on an agreement and mutual consent of the parties to terminate the contract.

### 2.2 *Open-ended employment relationship*

#### 2.2.1 *Statutory notice of termination*

An open-ended employment relationship may be terminated by either party by

<sup>2</sup> *Heart of Midlothian v/ Webster & Wigan Athletic FC* CAS 2007/A/1298, 2007/A/1299, 2007/A/1300 (hereinafter cited as “Webster decision”), cf. also regarding the question of the applicable law the diametric considerations of the CAS in the “Matuzalem decision” under chapter 4.2.

<sup>3</sup> “Webster decision”, recital 16 ss.

respecting the contractually agreed or statutory notice periods. In Swiss labour law it is an important mandatory principle that different notice periods for employees and employers must not apply (so called parity of termination periods, cf. art. 335a CO).

Amongst Swiss scholars it is controversial (but has been affirmed several times by cantonal jurisprudence), whether from art. 335a para 1 CO a substantial parity can be derived in the sense that also beyond the period of notice the other conditions for termination and its consequences may not be aggravated unilaterally for one party (e.g., by way of economic disadvantage).<sup>4</sup> Further, special regulations are to be respected regarding the termination of an employment relationship during the probation period or in case of mass redundancies.

## 2.2.2 *Termination with immediate effect in cases of open ended employment relationship*

### 2.2.2.1 *Wrongful termination and termination at an inopportune juncture*

The Swiss labour law regulates, *inter alia*, in art. 336 ss. CO the issue of dismissal protection. A termination is regarded as wrongful if it infringes the principle of good faith (art. 2, para 2 CC). For example, a notice of termination is unlawful where it is given by one party on account of an attribute pertaining to the person of the other party, because the party exercises a constitutional right and/or prevents claims under the employment relationship from accruing to the other party.

It is important to distinguish between a wrongful termination and a termination at an inopportune juncture. The latter involves a notice of termination during a period blocked by law (cf. art. 336c para. 1 CO and art. 336d para. 1 CO). Any notice of termination during such period (for example during pregnancy or while an employee is absent due to performance of military service, sickness or accident) is void (cf. art. 336c para. 2 CO).

### 2.2.2.2 *Termination with immediate effect*

For good cause, both the employer and the employee may terminate the employment relationship with immediate effect at any time, i.e. despite any contractual or statutory terms of notice (cf. art. 337 para. 1 CO).

A good cause as stated in art. 337 para 1 CO is given in any circumstance which renders the continuation of the employment relationship in good faith unconscionable for the party giving the notice (cf. art. 337 para 2 CO). To decide whether good cause *in casu* is given or not lies within the judge's full discretion (art. 337 para. 3 CO in conjunction with art. 4 of the Civil Code).

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<sup>4</sup> U. STREIFF/A. VON KAENEL, *Arbeitsvertrag*, Praxiskommentar zu Art. 319-362 OR, Zurich/Basel/Geneva 2006, N 2 pursuant art. 335a CO, 611.

If no good cause as defined in art. 337 CO is given, the termination with immediate effect is held as unlawful. Art. 337c s. CO states the consequences of such a termination whereby the legislation additionally distinguishes whether the notice of termination was pronounced by the employer or the employee (cf. chapter 3).

### 3. *Financial consequences of a termination with immediate effect*

#### 3.1 *Notice of termination by employer*

If the employer dismisses the employee with immediate effect but without good cause, the latter has according to article. 337c para. 1 CO a claim for damages in the amount of what he would have earned if the employment relationship had ended after the required notice period or on expiry of its agreed duration. As a result of this provision, the employee should be treated as if no notice of termination with immediate effect had been pronounced. Hence, the so-called positive interest<sup>5</sup> is owed to the employee. This positive interest in case of a termination with immediate effect without just cause consists of the remaining wage(s) and includes other factors like a possible 13th month wage, a severance payment, expenses etc.<sup>6</sup> However, it is to say that such damages are reduced by any amounts that the employee saved as a result of the termination of the employment relationship or that he has earned by performing other work or would have earned had he not intentionally foregone such work (cf. art. 337c para. 2 CO). If the employee wants to claim additional damages, he is entitled to do so according to the general conditions of Swiss tort law.<sup>7</sup> Further it is to be noted that the employee cannot require reemployment. Instead of this, the judge can oblige the employer to pay, in addition to the damages as set out above, compensation at the most of a maximum of six monthly salaries to the employee. The fixing of such compensation lies within the discretion of the judge, who has therefore to consider all circumstances which led to the resolution of the employment relationship. Some scholars qualify this kind of compensation as a penalty,<sup>8</sup> the jurisprudence however calls it a civil law punishment.<sup>9</sup>

#### 3.2 *Notice of termination by employee*

By failure of the employee to take up his post or if he leaves it without notice and

<sup>5</sup> Cf. Decision of the Swiss Federal Supreme Court, BGE 125 III 14, 16.

<sup>6</sup> U. STREIFF/A. VON KAENEL, *Arbeitsvertrag*, Praxiskommentar zu Art. 319-362 OR, Zurich/Basel/Geneva 2006, N 2 pursuant art. 337c CO, 769.

<sup>7</sup> U. STREIFF/A. VON KAENEL, *Arbeitsvertrag*, Praxiskommentar zu Art. 319-362 OR, Zurich/Basel/Geneva 2006, N 4 pursuant art. 337c OR, 772.

<sup>8</sup> Cf. *inter alia*. U. STREIFF/A. VON KAENEL, *Arbeitsvertrag*, Praxiskommentar zu Art. 319-362 OR, Zurich/Basel/Geneva 2006, N 7 pursuant art. 337c CO, 778.

<sup>9</sup> Cf. Decision of the Swiss Federal Supreme Court, BGE 123 III 391; Pra 1999 Nr. 112, 614.

good cause, the employer is entitled to a compensation which corresponds to one quarter of a monthly wage of the employee (art. 337d para. 1 CO). However, if the employee produces evidence that no damages or only lower damages than this quarter of a monthly salary have occurred, the compensation has to be adapted accordingly.<sup>10</sup> Nevertheless the employer has also the possibility to claim greater damages than the quarter of a monthly wage of the employee (cf. art. 337d para. 1 CO *in fine*). Art. 337d CO and the compensation set forth in this provision are intended to lead to a simplification of the calculation of the damages: The employer has no burden of proof regarding damages which lie within the quarter of a monthly wage of the employee. Hence, the claim for a quarter of a monthly wage may have similarities with a contractual penalty, but as a matter of fact, it is only a lump-sum indemnity. Art. 337d CO causes *de facto* a reversal of the burden of proof and, hence, is not to be qualified as a contractual penalty.<sup>2</sup> Nevertheless, the preference of the employer by the reversal of the burden of proof reaches only so far, as it is not a bigger claim at stake than a quarter of a monthly wage of the employee. Otherwise the employer must prove the extent of the damages as well as the causality between the damages claimed and the termination with immediate effect of the employee according to the general principles of tort law. Considering this, art. 44 para. 1 CO will also apply, which states that the injured party, *in casu* the employer, has to take all reasonable steps to mitigate the effects and loss related to its damage. If the respective party fails to do so, the judge may reduce or even completely deny any responsibility for damages. Hence, art 44 para. 1 CO has similar effects on the employer as art. 337c para 2 CO on the employee, which somehow also obliges the latter to reduce to the extent possible his personal damages due to the termination with immediate effect by the employer (cf. chapter 3.1).

Art. 337d CO is an absolute mandatory provision. Therefore, it is not allowed to penalize the early termination of an employee with a contractual penalty.<sup>12</sup> This applies not least because the legislator wanted, due to the fact that an employment relationship is strongly personality-related, to make it possible for the employee to change a job without ruinous consequences.<sup>13</sup>

### 3.3 Article 17 FIFA Regulations

For a better understanding of the FIFA Regulations it is necessary to briefly introduce its history of origin. In the well known ruling on the football player Bosman,<sup>14</sup> the

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<sup>10</sup> Art. 337d para. 2 CO.

<sup>11</sup> U. STREIFF/A. VON KAENEL, *Arbeitsvertrag*, Praxiskommentar zu Art. 319-362 OR, Zurich/Basel/Geneva 2006, N 4 pursuant art. 337d CO, 791.

<sup>12</sup> A. STAHLIN/F. VISCHER, *Zürcher Kommentar zum Obligationenrecht*, Zurich 1996, N 17 pursuant art. 337d CO; M. REHBINDER, *Berner Kommentar zum Obligationenrecht*, Bern 1992, N 6 pursuant art. 337d CO.

<sup>13</sup> T. GEISER, in: *Sport und Recht*, Bern 2007, 108.

<sup>14</sup> *Union Royale Belge des Sociétés de Football Association ASBL et al. v/ Jean-Marc Bosman*, C-415/93.

European Court of Justice held that the duty to pay a transfer fee after the expiry of a player's contract infringes the mainstay of the European economic system. As a result of this ruling, today every football player, after the expiry of his contract, has the freedom to search for a new club. But one consequence of the abolition of the transfer system would have been that the football clubs would have bound their players as early as possible by extremely long-term contracts. Such conduct would have violated European competition law, as such contracts would restrict the players' freedom of movement too much, and their possibilities to offer these services on the market. These problems triggered the procedure IV/36 583-SETCA-FGTB v. FIFA before the European Competition Commission. Under the supervision of this authority, the FIFA developed the FIFA Regulations, which had to prevent the clubs from reintroducing by the back door the former transfer system as before the "Bosman ruling". To sum up, the FIFA Regulations were created with the purpose to strike a balance between the clubs' wish for contractual stability on the one hand and the freedom of movement of the football players on the other hand.<sup>15</sup>

The financial consequences of a termination with immediate effect without just cause are set forth in art. 17 FIFA Regulations, provided that an agreement regarding this question does not already exist between the player and the club. According to this provision the player has to pay a compensation in case of breach of his contract. Such compensation will be calculated by considering the national law (especially mandatory national law), the specificity of sport as well as other objective criteria (salary and other benefits to which the player is entitled according to the present and/or the new contract, the remaining term of the actual contract, the fees and expenses paid by the former club that were amortised over the duration of the contract as well as whether the contract has been terminated during the protected period or not).

#### 4. Case law of CAS on Art. 17 FIFA Regulations

Regarding the calculation of the compensation according to art. 17 FIFA Regulations, primarily the rulings in the cases of "Webster" and "Matuzalem" are of interest. The principles held by the CAS in those two cases were deemed to put in concrete terms the application of art. 17 FIFA Regulations. Unfortunately these maxims turned out to be diametrical to each other and therefore shall be, for the purpose of a later assessment, summarised below. The "de Sanctis case"<sup>16</sup> will not be assessed in detail as it refers in many ways to the findings in the "Matuzalem case". Significant considerations nevertheless will be mentioned in chapter 5 in the course of assessment of the CAS jurisprudence.

<sup>15</sup> Cf. LUCIEN W. VALLONI/THILO PACHMANN, *Sports Law in Switzerland*, Alphen aan den Rijn 2011, N 244.

<sup>16</sup> *Udinese Calcio S.p.A v/ Morgan de Sanctis & Sevilla FC SAD* CAS 2010/A/2145, CAS2010/A/2146, CAS 2010/A/2147 (hereinafter cited as "*de Sanctis decision*").

#### 4.1 Webster decision

As mentioned before, the CAS held in the “Webster decision” *inter alia* that for the fixing of the compensation it is not primarily the national law which would be applicable to the contractual relationship (cf. chapter 1, *in casu* Scottish law) but rather the regulations of the FIFA and Swiss law.<sup>17</sup> Regarding the principle that the compensation must take into consideration the specificity of sport, the CAS correctly held that a balance must be found between the aimed stability of contracts on the one hand and the freedom of movement of the players on the other hand.<sup>18</sup> In view of this, neither the clubs nor the players are to be favoured. This in mind, the unilateral termination of a contract by a player outside the protected period may neither contain punishing elements nor lead to an enrichment of the club concerned.<sup>19</sup> The estimated market value of a player (neither calculated as a loss of profit nor as the replacement value of the player) may not serve as a reference value for the compensation as this would result in an unjustified enrichment of the club respectively in a penalty payment for the player.<sup>20</sup> The CAS even explicitly states that neither economical, moral, nor legal points of view could justify claiming the market value of a player as loss of profit.<sup>21</sup> As a result of this the arbitral tribunal finds that a general entitlement of the club to the claim of the market value of a player would lead again to the initial situation before the “Bosman case”.<sup>22</sup> Finally the tribunal held that under the criteria stated in art. 17 FIFA Regulations, the calculation of the compensation may not be based on the income of the player under his new contract, as this element is not in a direct connection with the breached contract but rather affects the financial future of the player and therefore may have punitive effects.<sup>23</sup>

Ultimately the CAS found in the “Webster decision” that the compensation according to art. 17 FIFA Regulations must be based on the income of the player which he would have earned until the regular expiration of his contract. This is because the player, in case of an early termination of the contract by the club, also would be entitled to this sum as compensation. Further this approach has the advantage that also the calculation of the compensation, at least indirectly, takes the market value of the player into consideration.<sup>24</sup>

#### 4.2 Matuzalem decision

In the “Matuzalem decision”<sup>25</sup> a contractual obligation had to be examined which

<sup>17</sup> “Webster decision”, recital 24 ss.

<sup>18</sup> “Webster decision”, recital 67.

<sup>19</sup> “Webster decision”, recital 73.

<sup>20</sup> “Webster decision”, recital 74.

<sup>21</sup> “Webster decision”, recital 76.

<sup>22</sup> “Webster decision”, recital 81.

<sup>23</sup> “Webster decision”, recital 85.

<sup>24</sup> “Webster decision”, recital 86.

<sup>25</sup> *Shaktar Donetsk v/ Matuzalem Francelino da Silva & Real Zaragoza SAD & FIFA CAS*

forced the club, if receiving a transfer offer of min. EUR 25 mio, to support such transfer. The CAS had to decide whether such clause may be qualified as a contractual agreement between the player and the club that fixes a compensation for the case of an early termination of the contract in the sense of art. 17 FIFA Regulations. The arbitral tribunal denied this approach as the clause did not in any way address the consequences of a unilateral early termination of the contract.<sup>26</sup>

Further the CAS held that amongst the disciplinary measures according to art. 17 para. 3 FIFA Regulations the deterrent effect of this provision lies within the fact that both parties to the contract are aware that in case of a breach of contract without just cause a compensation for the damage resulting from such breach is always due.<sup>27</sup> The damage, according to the CAS, is to be calculated as if the positive interest has to be determined, i.e. that the injured party is to be put in the same position as if the contract would have been completely fulfilled.<sup>28</sup> Further the court held that the ruling authority would have a considerable scope of discretion when establishing such compensation.<sup>29</sup>

Similar to the “Webster decision” the court chose the players’ income as a first factor to calculate the amount of compensation. However, in this case, the amount payable by the club until the regular expiry of the contract was not taken into consideration as the reference value. Instead, the CAS took into consideration the average annual income of the player as paid by the new clubs under the new contracts.<sup>30</sup> Further the court stated that the calculation of the value of the services of a player are reflected, in addition to the salary mentioned above, also by the transfer fees effectively paid, any possible sign on-fee and/or the fee which a third club is willing to pay to the new club to transfer the player.<sup>31</sup> The totally unacceptable conclusions of the CAS out of these considerations are that the damage of the former club consists of the loss of a transfer fee plus the total salary which the new club is paying to the player.

Contrary to the “Webster decision”, the court held that the sum which the former club would have been obliged to pay to fulfil the contract until its regular expiry may not be considered as the damage of the club, as exactly this amount is saved due to the early termination of the contract. In fact this amount has to be deducted from the compensation calculated based on the factors stated under art. 17 FIFA Regulations.<sup>32</sup> On the other hand, the acquisition value of the player which is not amortised in the moment of the termination of the contract may be added to the compensation. In this regard, it is to be assumed that the acquisition value would have been amortised over the complete term of the contract.<sup>33</sup>

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2008/A/1519, CAS 2008/A/1520 (hereinafter cited as “*Matuzalem decision*”).

<sup>26</sup> “*Matuzalem decision*”, recital 69 ss.

<sup>27</sup> “*Matuzalem decision*”, recital 82 s.

<sup>28</sup> “*Matuzalem decision*”, recital 86.

<sup>29</sup> “*Matuzalem decision*”, recital 87.

<sup>30</sup> “*Matuzalem decision*”, recital 91 s.

<sup>31</sup> “*Matuzalem decision*”, recital 104.

<sup>32</sup> “*Matuzalem decision*”, recital 123.

<sup>33</sup> “*Matuzalem decision*”, recital 126 s.

Also contrary to the “Webster decision”, the CAS assumed in the “Matuzalem case” that the wording “law of the country concerned” addresses the law which governs the player contract *in casu*. Often this would be the law of the country in which the club concerned is domiciled. If instead Swiss law would always automatically be applied, the corrective intention behind this regulation would fail.<sup>34</sup>

Ultimately, the CAS held under the heading “specificity of sport” that such factors as the actual remaining term of contract, any infringement of the protected period and/or the status and the conduct of the player have an influence on the amount of the compensation.<sup>35</sup> Concerning this connectivity, the arbitral tribunal refers to the rules set forth in art. 337c para. 3 CO and art. 337d para. 1 CO, which each contribute a “special indemnity” for the party injured by the breach of contract.<sup>36</sup> As a result of this, the court added a corresponding amount to the damages, respectively to the positive interest, calculated according to the principles set out above.

## 5. Assessment of the CAS jurisprudence from a Swiss law perspective

### 5.1 The positive interest as damages

Following the Swiss labour law, damages of the employer due to a termination with immediate effect by an employee usually consist of the additional costs for the engagement of a temporary employee, the costs of overtime work by the other employees or the costs for outsourcing the respective work to a third party. In case of a fixed-term employment contract additionally the problem may arise that an adequate replacement must be found ahead of time. These cost items had been correctly reflected in the “de Sanctis-case” and finally made a considerable share of the compensation.<sup>37</sup> Theoretically also loss of profit could be part of the positive interest. However, this kind of damage is very difficult to prove and therefore rarely admitted in practice.<sup>38</sup> An analogue approach seems to be justified also in the area of football: In general it is to be assumed that the salary of a player (the employee) agreed for the entire term of the contract reflects the performance which the player/employee is able to serve. As a consequence the lapse of the duty to pay a salary will not cause any damages to the club/employer. This should apply at least if the club is not replacing the player and further the club is not able to prove any loss of damage caused by the early termination.

Regarding this preliminary finding some additional in-depth thoughts are to be added: According to the prevailing difference theory in Switzerland, the

<sup>34</sup> “Matuzalem decision”, recital 144 ss.

<sup>35</sup> “Matuzalem decision”, recital 152 ss.

<sup>36</sup> “Matuzalem decision”, recital 156.

<sup>37</sup> “de Sanctis decision”, recital 73.

<sup>38</sup> U. STREIFF/A. VON KAENEL, *Arbeitsvertrag*, Praxiskommentar zu Art. 319-362 OR, Zurich/Basel/Geneva 2006, N 6 pursuant art. 337d CO, 611.

damage consists of the difference between the current financial status and the hypothetical state of the assets without the harmful event. As set out above, the CAS tried in the “Matuzalem case” to calculate the damages by determining the positive interest, i.e. that the injured party is to be put in the same position as if the contract would have been completely fulfilled. In our opinion, such positive interest has to be determined as follows: If the contract between the player and the club is fulfilled correctly, the club may benefit during the entire duration of the contract from the services of the player in exchange for the payment of the agreed salary. If the player’s potential increases exceptionally, the salary under the actual contract might be too low compared with his performance, i.e. that if he could negotiate a new contract, most likely he would earn more than under the old contract. This means that the player’s performance is *de facto* underpaid and therefore the club gains a financial benefit, as he would have to pay more than he does now for another, equivalent, player. In case of an early termination of the contract, the club loses this advantage. Hence, the decisive delta for the positive interest in case of an early termination consists of the difference between the salary of the player under the old contract and the income under the new contract in consideration of the actual term left until the expiry of the contract with the former club. The actual value of the player is reflected in the salary which the new club is willing to pay to the player for his services under the new contract. The difference of this sum to the salary under the old contract reflects the increase of value of the player since the last contract negotiations until the signing of the new contract. This difference is the positive interest which the former club is not able to realize due to the breach of the contract by the player.

Of course the objection can be made that the additional value of a player under a new contract does not only consist of the delta explained above. This in particular is the case if a club is willing to pay a transfer fee for the player. In such a situation, the club does not only declare the additional value that he sees in a player through a higher salary but also by paying in addition a transfer fee to the former club. The value added to the player under the new contract according to this approach consists of the difference between the salary under the new and under the old contract as well as of, according the ruling of the CAS in the “Matuzalem case”, the transfer fee paid by the new club. Under this approach one must keep in mind the following: The additional value of a player reflected in a possible transfer fee may not *per se* be attributed to the former club. Because whether a transfer will be realised or not, and therewith the question of whether the former club may realise a profit by way of the transfer fee, does not lie exclusively in the sphere of influence of the club. Moreover such transfer relies mostly on the willingness of the player to agree on such a transfer. As a consequence, the player may avert such a transfer fee in favour of the club not only by an early termination of the contract, but also with good right, by refusing any attempt of a transfer. Thus, a lost transfer fee may not be qualified as lost profit on behalf of the club and therefore cannot be part of the club’s positive interest. Rather, this

situation is to be seen as a possibility to perhaps one day realize a transfer fee and thus to be qualified as a loss of opportunity (*perte d'une chance*) if such opportunity, on any grounds whatsoever, finally does not materialise. The legal construction of the loss of opportunity in Switzerland is at present not recognized as a factor which could be claimed as damages. A chance itself, *in casu* a lucrative transfer fee, cannot be qualified as an asset, neither an actual one nor a future one. Either such a chance can be realized and becomes a fully fledged asset or it will be "realized in nothing". Thus, a chance itself is never part of the wealth which can be used for the calculation of damages.<sup>39</sup> This conclusion would only be different if the club had already negotiated a transfer in a very concrete way, but the latter would be hindered due to a breach of contract by the player. In such a case, it is to be assumed that the chance of a profit due to a transfer has already become so concrete that a recoverable damage exists.<sup>40</sup> In all other situations the general possibility of a transfer fee may not be used for the calculation of damages in case of an early termination.

If one is consequently pursuing the concept of the positive interest, which means as already mentioned that the injured party is to be put in the same position as if the contract would have been completely fulfilled, the following picture is shown: the player and the club are to be put in the position as if the term of the contract had expired without any incident. Under this assumption, the player would now be free to conclude any new contract he wants to, as he is no longer bound by the old contract. Such negotiations of course could also take place with a new club and the latter would not have to pay any transfer fee at all to the old club under this situation. Therefore, if the correct fulfilment of the contract is assumed, the old club automatically loses its chance to realize any transfer fee. Thus, if the interest in the correct fulfilment of the contract is assumed, a transfer fee can never be part of the claimed damages. These two deliberations dogmatically hinder the idea that a compensation for the "lost" transfer fee can be awarded to a club due to the breach of contract by a player.

However, also the approach in the "Webster case" cannot be fully agreed from a Swiss law perspective. Dogmatically, damages cannot consist in an amount saved due to the "harmful" incident. Nevertheless it is to be borne in mind that, due to the specificity of sport, the value of the services of a player is difficult to estimate by monetary indicators, as the services of a player for a club cannot just be replaced by another equivalent player. The value of a player and therewith the damage through his loss, may most likely be measured against the amount the club was willing to effectively pay for the player's services. From this point of view, the findings in the "Webster case" are to be agreed with, however with the reservation that this way of damage calculation does not recognize any additional value of the player caused by an increase of the player's performance.

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<sup>39</sup> V. PRIBNOW, *Neuere Urteile zum Haftpflicht- und Privatversicherungsrecht*, in: *Personen-Schaden-Forum* 2008, Zurich 2008, 307.

<sup>40</sup> Cf. also U. HAAS, *Die Rechtsprechung des CAS zur Vertragsstabilität im Verhältnis zwischen Fussballspielern und Klubs*, in: *Causa Sport*, 3/2008, Zurich 2008, 249.

In the “Matuzalem case” the CAS added for the calculation of the damages i) the services which the player would have rendered within the next two years (reflected by way of his future income) and ii) the transfer fee which would have to be paid according to his new contract. By this addition, the CAS violated the fundamental principle of tort law which says that no bigger damages are to be granted in compensation than those that were actually incurred. Further the CAS assessed the player’s performance not by considering the contract with the former club, but by taking into account contracts which never had been performed, contracts with a duration until the year 2011 and also based on a salary which the player would only have received, if ever, after the expiry of the contract with his former club. Further, the CAS considered the planned contract with SS Lazio Roma (this contract has never been performed), and therefore again a possible future increase of the player’s value, to calculate the compensation for his former club. By doing this, the CAS diverges from its principle that the damages to be repaired must flow from the breached contract and not from the value that a third party attributes to the services of the player, e.g. by way of a transfer fee.

Such an approach would, as RADOSTOVA/WIESCHEMANN correctly noted, lead under certain circumstances to the situation that clubs would not only be compensated but enriched, as depending on the transfer situation, they would profit from monetary advantages which they themselves would never have achieved.<sup>41</sup>

As a conclusion, according to the “Matuzalem decision” the player is obliged to indemnify his former club for damages which are largely based on fictitious assumptions. Further, from a Swiss law point of view the damages are compensated twice by this calculation. Apart from that, according to the strict wording of art. 17 FIFA Regulations, only compensation is due, and not damages.

## 5.2 The “specificity of sport” to calculate the compensation

Under the criteria “specificity of sport” the CAS in the “Matuzalem case” added the amount of EUR 600’000 to the double indemnity. This meets approximately six monthly wages under the former contract. To justify a possible lump-sum in connection with the breach of an employment contract the CAS reverts to Art. 337c para. 3 CO and art 337d para. 1 CO and finds that six monthly wages are possible as compensation. This interpretation however clearly contradicts the wording of the cited provisions. According to art. 337c para 3 CO the *employer* may be obliged by the court to pay the employee a compensation of up to six monthly wages, if he dismisses the employee without good cause. This clear wording cannot just simply be applied *vice versa* in favour of a football club (the employer) with the argument that a player has a relatively greater power of negotiation as a great number of clubs compete for the player. This because, on the other hand, any club has the possibility to hire football players from all over the globe and the

<sup>41</sup> K. RADOSTOVA/C. WIESCHEMANN, *Entwicklung von Transferregeln der FIFA und der Rechtsprechung zum Schadenersatz wegen Vertragsbruches im Fußball* in: Berufssportrecht, Vienna 2010, 26.

free positions in each team are limited. Therefore the protective regulations of the labour law must also mandatorily apply to football players. In case the employee is cancelling the contract with immediate effect, art. 337d CO protects the employer from an unjustified termination. This provision entitles the employer (as part of the reparation of further damages) to a lump-sum compensation of a quarter of one monthly salary of the employee only. Thus, the maximum sum to which the player in the “Matuzalem case” could have been condemned, according to the cited Swiss law and without the proof of a bigger effective damage, is a quarter of his monthly salary, i.e. about EUR 25’000. Further it is to be noted that this compensation cannot be claimed additionally to the damages due, but only in cases where the employer has suffered a bigger damage, which can be proved. By adding a lump-sum, the CAS has extended the compensation with a punitive element, which is not known under Swiss law. As mentioned above, the lump-sum set forth in art. 337d CO is not a contractual penalty. The CAS mistakes the legal nature of the compensation according to art. 337d CO if it declares it as a “special indemnity”.<sup>42</sup> Further, also a previous decision of the Swiss Federal Supreme Court points out that one cannot simply depart from the clear wording of art. 337c CO.<sup>43</sup> In this case, a football player terminated his contract with immediate effect and with just cause after a dispute with his club. Besides the damages arising out of the loss of salary, the player also claimed an additional compensation according art. 337c para. 3 CO. With regard to this compensation, the Swiss Federal Supreme Court held, and therewith confirmed its previous jurisprudence, that this kind of compensation is only awarded to the employee, if the *employer* has terminated the contract without good cause. An analogue application of this provision if the employee has terminated the agreement with immediate effect and for good cause is, on the other hand, not possible.<sup>44</sup> Finally the CAS did not take notice of the absolute mandatory nature of art. 337d CO. As already set out under chapter 3.2, one cannot deviate from this provision with the result that an early termination of the contract by the employee will be punished with a contractual penalty. But in fact this is what happened in the “Matuzalem case” when the player was condemned under the title “specificity of sport” to pay additional compensation of EUR 600’000.<sup>45</sup>

In a similar way, the CAS also increased the compensation by about EUR 690’789 in the “de Sanctis decision”, which is the equivalent of six monthly wages under the player’s new contract.<sup>46</sup> The CAS referred to the findings in the “Matuzalem case” regarding this compensation. As mentioned above, this motivation

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<sup>42</sup> “Matuzalem decision”, recital 156.

<sup>43</sup> Decision of the Swiss Federal Supreme Court, 4A\_53/2011.

<sup>44</sup> Decision of the Swiss Federal Supreme Court, 4A\_53/2011, recital. 2.1.1. However, it is to mention that the court although awarded by way of satisfaction and based on personal injury an amount of two monthly salaries to the player.

<sup>45</sup> Cf. LUCIEN W. VALLONI/THILO PACHMANN, *Sports Law in Switzerland*, Alphen aan den Rijn 2011, N 250.

<sup>46</sup> “de Sanctis decision”, recital 102 s.

is wrong and without any correct legal basis. In the “de Sanctis case” however, the CAS in addition cites a quote from the FIFA commentary on the FIFA Regulations.<sup>47</sup> In footnote 75 (which is to be found in the section on art. 17 FIFA Regulations and refers to the keyword “specificity of sport”) it is stated and cited also in this way by the CAS that “Moreover there was also the possibility of awarding additional compensation. This additional compensation may, however, not surpass the amount of six monthly salaries (cf. art. 337c para. 3 CO)”. By referring to this reference, the CAS clearly misunderstood that art. 337c para. 3 CO does not apply to the unjustified termination with immediate effect by an employee/player, but to the dismissal by the employer, *in casu* the club. If one takes note of the entire cited footnote, it becomes obvious that the commentary on the FIFA Regulations is absolutely correct and systematically distinguishes between the termination without good cause by the club (in this case the commentary refers to art. 337c CO) and by the player (here the commentary refers to art. 337d CO). Further it is not comprehensible on what basis the CAS considers the new contract of the player for the calculation of the compensation. By doing so, the CAS is distancing itself even more from the actual concept behind art. 337d CO as in the “Matuzalem case”.

Regarding the compensation according art. 337d CO, it is further to be pointed out that the behaviour of the employee that led to the termination of the contract is not to be considered for the respective calculation. Nevertheless, under this title the CAS in the “Matuzalem case” also qualified the termination of the contract within the transfer period after the season’s end as an aggravating factor. Concerning this, the CAS will at some point have to answer the question of whether the termination of a contract during the transfer period really can be held as a termination at an inopportune juncture; especially if the FIFA Regulations allow termination of a contract without disciplinary sanctions only within the transfer period.

### 5.3 *Infringement of the principle of parity of termination periods*

One of the most important principles of Swiss labour law is the principle of parity of termination periods (art. 335a CO, cf. also chapter 2.2.1.). From a substantive law point of view, the principle of parity signifies that the termination of an employment contract may not be aggravated at cost of one party by imposing economical disadvantages that would not apply to the other party. This is especially true in constellations where only one party has to pay a contractual penalty in case of the termination of a contract.<sup>48</sup>

The compensation granted in the “Matuzalem case” is very similar to such a contractual penalty. The CAS in fact imposed on the player a duty to pay his

<sup>47</sup> “de Sanctis decision”, recital 102.

<sup>48</sup> W. PORTMANN, *Basler Kommentar zum Obligationenrecht*, Basel 2007, N 4 pursuant Art. 335a CO.

former club a hypothetical wage increase, a transfer fee agreed with a third party (which has never actually been paid) and a penalty based on the specificity of sport. If the compensation is calculated in this way, a contractual penalty in the amount of a future transfer fee is imposed on the player in case of an early termination of his contract. Thus, by this practice, the contractual balance will be essentially altered at the cost of the employee. This is because a football club in the reverse situation, i.e. if the player would be dismissed before the expiry of his contract e.g. due to insufficiency, would never be forced to pay an amount which exceeds the salary to be paid to the player until the proper expiry of the contract. The way the CAS calculates the compensation leads to an unequal treatment between employer and employee and the CAS thus infringes a fundamental principle of Swiss labour law.

## 6. Conclusion

As a result of the manner in which the CAS in the “Matuzalem case” determined the positive interest, the player has to compensate more than the damages which the former club actually suffered. In fact, the CAS goes even further with their deliberations by stating the following:

*[...] any party should be well advised to respect an existing contract as the financial consequences of a breach or a termination without just cause would be in their size and amount, rather unpredictable.”<sup>49</sup>*

The CAS deliberately chooses for the calculation of the indemnity a method which is unforeseeable for the football player. This approach can no longer be upheld, at the latest since the decision of the European Court of Justice in the “Bernard” matter on March 16, 2010.<sup>50</sup> The European Court of Justice held in this decision that an indemnity for damages<sup>51</sup> can only be calculated based on fixed criteria, i.e. criteria that are known. Further, the court held that it is inadmissible to fix the amount of the indemnity over and above the sum of damages actually suffered.<sup>52</sup> However, the approach of the CAS is contrary to the principle that the damage suffered is to be concretely calculated and that an indemnity may not contain any deterrent or punishing elements. According to the principles of Swiss tort law the reimbursement of damages is limited to the extent it can be expected within the usual course of affairs and the general experience of life that such damages are suitable to cause damages of the kind that actually occurred. Thus the adequacy of the causality between the harming event and the damages

<sup>49</sup> “Matuzalem decision”, recital 89 ss.

<sup>50</sup> *Olympic Lyonnais SASP v/ Olivier Bernard and Newcastle FC*, C 325/08.

<sup>51</sup> *In casu* the sports and training compensation of an “espoir”-player which changed to a new club after the expiry of his traineeship were at stake.

<sup>52</sup> *Olympic Lyonnais SASP v/ Olivier Bernard und Newcastle FC*, C 325/08, recital 46 ss.

determines which infringement of legally protected rights is to be compensated and which not. By this, the duty to compensate damages is limited.<sup>53</sup> In other words, it must be at least abstractly foreseeable for the causer, what damages he will have to compensate. The CAS however wants the compensation, which is deemed as positive interest, to be as unforeseeable as possible, to increase the deterrent effect. Such an unforeseeable compensation has nothing to do with damages that are adequately causal. Therefore, the respective deliberations of the CAS and the consideration of punitive effects associated therewith infringe the principles of Swiss tort law outlined above. A compensation according to art. 17 FIFA regulations is therefore, not only under Community law but also under Swiss law, to be held free of any punishing elements and is to be calculated only based on the contractual value of the player. The approach that this value is to be calculated based on the remaining salary demands under the breached contract<sup>54</sup> goes in the right direction. Nevertheless, from a dogmatic point of view only the effective increase of value of a player, which consists of the difference between the income under the former contract and the salary fixed in the new contract, must be considered as damages to the former club of the player. Thus, it would be desirable, at least from the players' view, if the CAS would go back to the direction taken in the deliberations in the "Webster case". However, transfer fees in connection with the new contract are by no means to be considered for the calculation of damages. The calculation of the compensation is to be based on the difference between the terminated and the new player's contract as well as under consideration of a compensation for acquisition costs of the former club which have not been fully amortized due to the early termination of the contract. This seems to be the one and only adequate solution to achieve the balance between the contractual stability and the freedom of movement for players, which is actually the purpose of the FIFA regulations.

<sup>53</sup> I. SCHWENZER, *Schweizerisches Obligationenrecht Allgemeiner Teil*, Bern 2006, 4. Ed., N 19.05 s.

<sup>54</sup> K. RADOSTOVA/C. WIESCHEMANN, *Entwicklung von Transferregeln der FIFA und der Rechtsprechung zum Schadenersatz wegen Vertragsbruches im Fußball*, in: *Berufssportrecht*, Vienna 2010, 34.

COMPENSATION IN CASE OF BREACH OF CONTRACT  
IN OTHER CIVIL LAW COUNTRIES

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## COMPENSATION IN CASE OF BREACH OF CONTRACT ACCORDING TO BELGIAN LABOUR LAW

by Sarah De Groof\* and Frank Hendrickx\*\*

SUMMARY: 1. Introduction – 2. Fixed-term employment in general – 3. Fixed-term employment of professional football players – 4. Conclusion

### 1. *Introduction*

The following contribution examines the legal situation of a breach of contract situation of a professional football player, with a particular focus on the issue of financial compensation. Seen the intrinsic link with general employment law, this contribution will first outline some general principles of Belgian employment contract law and of breach of contract. Afterwards, the employment contract of the professional football player will be discussed.

However, it is neither possible nor useful to outline in this short contribution the entire Belgian employment contract law or even professional football player employment contract law. Therefore, first, this contribution will only discuss contracts that were concluded for a fixed-term. This limitation is justified because most, if not all, football players are in Belgium employed through an employment contract of fixed-term. Second, this contribution only aims at pointing out particular points of attention and does not envisage being exhaustive due to reasons of limitation.

### 2. *Fixed-term employment in general*

#### a. *General*

Belgium can be described as a country with highly regulated employment

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relationships. In Belgian policy interventions, which are governmental driven as well as left over to social partner initiative in a context of voluntarism and autonomy, protection and security for employees is strongly valued. The law on dismissal can be seen as an exponent of this concern. While it can be seen to be quite liberal in its roots, it is at the same time to be seen as quite strict and above all quite costly in many cases.

Belgian employment contract law knows two kinds of contracts according to length: indefinite period or fixed-term. According to article 7 of the Act of 3 July 1978 Employment Contracts (hereafter *Employment Contracts Act*), an employment contract is concluded either for a fixed-term, for a clearly defined work or for an indefinite period.<sup>1</sup> Belgian employment law considers an employment under a contract for an indefinite period of time the most desirable protection for employees. This is shown by the fact that the conclusion of fixed-term contracts of employment is subject to various formal conditions in order to be considered valid. As is shown in *Eurostat* data, Belgium is a country with a relative high proportion of indefinite period employment contracts.<sup>2</sup> Fixed-term contracts only take account of 8.3% of the total workforce. Belgium stands below the European average with these figures.

Article 2 of the Act of 5 June 2002, providing for equal treatment of fixed-term workers, defines a fixed-term contract as a contract concluded with a worker where the end of the contract is determined by objective conditions such as reaching a precise date or the completion of a clearly defined task.<sup>3</sup> The difference between the two types of contracts primarily relates to the provisions that govern the termination of the contract. When a fixed-term contract comes to an end, no termination indemnities have to be paid and no justification for non-renewal has to be given. On the other hand, fixed-term employment provides, in principle, for contractual job security. A fixed-term contract with a precise date can be concluded by providing a term (e.g. “this contract is concluded for a period of x days/months/year”), or by providing a date of termination (e.g. “this contract will end on [date]”), or by providing for a pre-determined future event that will bring the contract to an end.

Unlike contracts for an indefinite period, fixed-term contracts need to be formally concluded in a written document and need to be agreed upon for every employee individually.<sup>4</sup> The law also provides that the fixed-term contract has to be signed by the parties prior to the employee starting to perform the job.<sup>5</sup> The law uses the words “before the entry into service” of the worker. In case the contract is already being executed, it is, according to the case law of the Belgian Supreme

<sup>1</sup> Article 7 Act of 3 July 1978 on employment contracts, *Off. Gaz.* 22 August 1978

<sup>2</sup> Europe in figures, Eurostat yearbook 2010, [http://epp.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/CH\\_05\\_2010/EN/CH\\_05\\_2010-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/CH_05_2010/EN/CH_05_2010-EN.PDF), 292.

<sup>3</sup> Article 2 Act of 5 June 2002 on the principle of non-discrimination for workers with a fixed-term employment contract, *Off. Gaz.* 26 June 2002.

<sup>4</sup> Article 9 Employment Contracts Act.

<sup>5</sup> Article 9 Employment Contracts Act.

Court- Cour de Cassation, impossible to conclude a fixed-term contract for that work.<sup>6</sup> However, it is not prohibited to conclude a fixed-term employment contract with a worker who is already employed with the contracting employer, although this rule is only limited to good faith circumstances.<sup>7</sup> A fixed term contract of employment furthermore needs to clearly indicate the period of time during which it needs to be executed. In case the contract does not correspond to these requirements, the employment contract remains valid as such, but it is irrefutably presumed by law to be a contract of employment for an indefinite period of time.<sup>8</sup> However, it must be noted that some collective bargaining agreements that have been concluded at sectoral level and have been declared universally applicable, may deviate from the rule that a written contract is needed for fixed-term work.

The Belgian legislator enacted the law of 5 June 2002 regarding the principle of non-discrimination for employees with a fixed-term employment contract,<sup>9</sup> in order to implement the European Directive 1999/70 of 28 June 1999 on fixed-term work.<sup>10</sup> This Act provides that with regard to working conditions, employees with a fixed-term employment contract may not be treated in a less favourable manner than comparable workers who have been permanently employed, unless the difference is justified for objective reasons.<sup>11</sup> As a “comparable worker with permanent employment” is defined, a worker with an employment contract for an indefinite period in the same plant (“*vestiging*”, “*établissement*”), performing the same or a similar job. If there is no such comparable worker in the same plant, then a comparison is made on the basis of a comparable worker in the same enterprise (“*onderneming*”, “*entreprise*”) or, in the absence of such worker in the enterprise, in the same sector (“*bedrijfstak*”, “*secteur*”).<sup>12</sup> It is also provided that, if this would be suitable, the rights of fixed-term workers are set in proportion to their working time.<sup>13</sup> The determination of seniority with regard to certain working conditions is being done according to the same criteria as for permanently employed workers, except if different periods of seniority are justified on the basis of objective grounds.<sup>14</sup> The employer has the obligation to inform the workers employed with

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<sup>6</sup> Supreme Court 7 December 1992, *RW* 1992-93, p. 1375; Supreme Court 20 September 1993, *Soc. Kron.* 1994, p. 30.

<sup>7</sup> No abuse can be made of this, i.e. with a view to avoiding protective legal provisions, Cass. 18 February 1980, *TSR* 1980, 247.

<sup>8</sup> Article 9 Employment Contracts Act.

<sup>9</sup> Act of 5 June 2002 on the principle of non-discrimination for workers with a fixed-term employment contract, *Off. Gaz.* 26 June 2002.

<sup>10</sup> Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, *OJ L* 175, 10 July 1999, p. 43–48.

<sup>11</sup> Article 4 Act of 5 June 2002 on the principle of non-discrimination for workers with a fixed-term employment contract, *Off. Gaz.* 26 June 2002.

<sup>12</sup> Article 2, 3° Act of 5 June 2002 on the principle of non-discrimination for workers with a fixed-term employment contract, *Off. Gaz.* 26 June 2002.

<sup>13</sup> Article 4 Act of 5 June 2002 on the principle of non-discrimination for workers with a fixed-term employment contract, *Off. Gaz.* 26 June 2002.

<sup>14</sup> Article 4 Act of 5 June 2002 on the principle of non-discrimination for workers with a fixed-term employment contract, *Off. Gaz.* 26 June 2002.

a fixed-term contract of the job vacancies in the enterprise or plant, in order to guarantee for them the same opportunities for permanent employment as other workers.<sup>15</sup> This information can be provided by means of a general communication at a suitable place in the enterprise or plant.<sup>16</sup>

*b. Consecutive fixed-term contracts*

The use of fixed-term contracts may give rise to abuses as a repetitive or consecutive use of fixed-term contracts may avoid the application of the normal rules of dismissal law. This concern has also been addressed in article 5 of European Directive 1999/70. The Belgian legislator established a presumption that successive contracts of employment for a fixed period of time are presumed to be a contract of employment for an indefinite period of time, unless it can be demonstrated that the use of a subsequent fixed-term contract is justified on the basis of the nature of the work or by another justified reason.<sup>17</sup> The Supreme Court ruled that the presumption is installed for the benefit of the worker and can be invoked by the worker only. Once invoked by the worker, the employer can rebut the presumption. However, the employer itself cannot make the presumption if the worker has not done so.<sup>18</sup> The (refutable) presumption that a successive fixed-term contract may become a contract for indefinite period, puts employers in a degree of uncertainty and requires them to be cautious. Indeed, it is on a case-by-case approach that labour courts have accepted or rejected the successive use of fixed-term contracts.

This system can be seen as operating in the legislator's original view that the contract for indefinite period is the preferred form of employment relationship. However, in 1994 the rules on successive fixed-term contracts were relaxed by the legislator. It was realised that these kind of contracts could be beneficial to the economy and to the potential inclusion of job seekers in the labour market. A new article 10*bis* was therefore introduced in the Employment Contracts Act. It now allows to conclude successive contracts of employment without them being considered to be a contract of employment for an indefinite period of time, at least if certain conditions are satisfied.

The basis is the 4-3-2-rule: A maximum of 4 successive fixed-term contracts, with a duration of at least 3 months, are allowed over a period of maximum 2 years. If these conditions are cumulatively satisfied no justification has to be given for the conclusion of the successive contracts of employment. There is also a 6-6-3-rule, with regard to a period of 3 years, in which maximum 6 contracts can be concluded of not less than 6 months, with prior permission of the

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<sup>15</sup> Article 5 Act of 5 June 2002 on the principle of non-discrimination for workers with a fixed-term employment contract, *Off. Gaz.* 26 June 2002.

<sup>16</sup> Article 5 Act of 5 June 2002 on the principle of non-discrimination for workers with a fixed-term employment contract, *Off. Gaz.* 26 June 2002.

<sup>17</sup> Article 10 Employment Contracts Act.

<sup>18</sup> Supreme Court 2 December 2002, *Arr. Cass.* 2002, 2649.

labour inspectorate. This latter rule would, however, require a form of justification when asking the permission. The request for permission needs to be done by registered mail or by fax, mentioning the reasons that justify the conclusion of the envisaged successive agreements.<sup>19</sup>

The question arises whether the Belgian system can be held to be in conformity with the European Directive 1999/70, especially as far as the 4-3-2-rule is concerned. The Belgian provisions would appear problematic, in particular, with article 5, paragraph 1 of the Directive, where it is provided:

“To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures

- a) objective reasons justifying the renewal of such contracts or relationships
- b) the maximum total duration of successive fixed-term employment contracts or relationships
- c) the number of renewals of such contracts or relationships”.

In the *Adeneler*-case,<sup>20</sup> the European Court of Justice held that a national provision which merely authorises recourse to successive fixed-term employment contracts in a general and abstract manner by a rule of statute or secondary legislation does not accord with the requirements as stated in the preceding two paragraphs. Indeed, article 5 of Directive 1999/70 requires national measures that are introduced “in a manner which takes account of the needs of specific sectors and/or categories of workers”. The Belgian 4-3-2-solution does not seem to take into account these specific considerations.

### *c. Termination of a fixed-term employment contract*

#### *c.1 General*

Article 32 of the Employment Contracts Act provides that “without prejudice to the general ways in which obligations can end, the engagements resulting from the contracts governed by the present Act come to an end by expiry of the term, by completion of the work for which the contract was concluded, by the will of one of the parties if the contract was concluded for an indefinite period or in case there is a ‘serious cause’ for termination, by the death of the worker or by force majeure.”

To these principles, it can be added that the termination of the employment contract by mutual contract is always possible for every type of employment agreement. This is based on the freedom of contract and on the civil law of

<sup>19</sup> Royal Decree of 17 June 1994, *Off. Gaz.* 25 June 1994.

<sup>20</sup> Case C-212/04 *Adeneler* [2006] ECR I-6057.

obligations. An employment contract can be terminated by mutual consent at any moment. Thus, four main situations may occur with regard to the termination of the fixed-term employment contract:

- The contract is terminated at any time by mutual agreement;
  - The contract terminates automatically upon expiry of the term of the contract;
  - The contract is terminated by either of the parties before the end of the term of the contract;
  - The contract is terminated by either of the parties for ‘serious cause’.
- The three latter situations need more explanation.

### *c.2 Termination upon expiry of the term of the contract*

According to article 32 of the Employment Contracts Act a contract comes to an end upon expiry of the term or upon completion of the work for which the contract was concluded. The expiry of the term automatically terminates the contract. This means that there is no need to give prior notice before the expiry date. Moreover, Belgian law does not know a principle of justification for the non-renewal of the employment contract for a fixed duration. In other words, there is no need to give a reason for not renewing the contract.

The legislator has regulated the situation whereby the parties continue to perform the employment contract, after it has expired. In that case, there is a legal presumption that the employment contract was concluded for an indefinite period. Article 11 of the Employment Contracts Act provides:

“If, after the expiry of the term, the parties continue to execute the contract, this contract will be subject to the same provisions as applicable to contracts concluded for an indefinite period.”

### *c.3 The contract is terminated by either of the parties before the end of the term of the contract*

The Employment Contracts Act does not provide for the possibility of unilateral termination of the contract before the end of the term. This means that, before the end of the term, the employment contract may, in principle, not be terminated unilaterally, but for serious cause.

Nevertheless, in the law of dismissal, a distinction has to be made between the ‘right to dismiss’ and the ‘power to dismiss’. If the law allows a party to unilaterally terminate a contract of employment, then the right to dismiss is exercised. The legislator has regulated this in article 32 of the Employment Contracts Act. Although the law, in principle, restricts the situations in which an employment contract can be terminated, under Belgian labour law either party always has the legal power to terminate the contract unilaterally even when this is in violation with a legal provision. This is based on the principle that no specific performance can be allowed with regard to the duty to work. This rule is based on the freedom

of enterprise and the freedom of labour. An unlawful dismissal, therefore, always leads to the termination of the contract of employment. However, the legislator has provided for sanctions, i.e. the payment of indemnities to the dismissed party. The principle also implies that a fixed-term employment contract can be terminated before its expiry, if the appropriate damages (fixed by the law) are being paid. The damages are calculated in function of what is applicable to employment contracts for an indefinite period.

In principle, the damages to be paid in case of unilateral termination before the expiry of the contract are calculated according to the wages that are normally due until the expiry date of the contract. But there is a maximum. The damages cannot exceed the wages over a period that equals twice the term of notice that would need to be respected if the contract would have been concluded for an indefinite period.<sup>21</sup>

The unilateral termination of the employment contract with notice is expressly provided by the law in case the contract has been concluded for an indefinite period.<sup>22</sup> It would lead us too far to outline how the notice period of a contract concluded for indefinite period should be calculated, but we will indicate some particular points of attention.

The elements for determining the notice period are laid down in the Employment Contracts Act. The notice period is dependent on whether the initiative comes from the employer or the employee and on the seniority of the employee with the same employer. The notice periods for blue collar workers are significantly lower than those of white-collar workers. However, employment of a white-collar worker is mainly based on an 'employment-at-will'. This means that, in principle,<sup>23</sup> the contract of employment of a white-collar worker can be terminated without cause, or even for a cause morally wrong. The protection of white-collar workers is rather afforded via a long term of notice, or high severance pay (payment in lieu of notice). For blue-collar workers, there is a form of substantial protection against dismissal. This is provided in a concept of 'abusive dismissal' ("willekeurig ontslag"/ "licenciement abusif"), which provides an *a posteriori* control over dismissals by the labour court, and on the basis the employer can be condemned to pay a lump sum indemnity pay of 6 months wages.<sup>24</sup>

#### *c.4 The contract is terminated by either of the parties for serious cause*

Every party is entitled to end the contract on the spot without notice or compensation, if there is a serious cause, i.e. any serious fault that makes the continued working relationship between the employer and the employee (a) immediately and (b)

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<sup>21</sup> Article 40 Employment Contracts Act.

<sup>22</sup> Article 37, § 1 and article 32 Employment Contracts Act.

<sup>23</sup> Some specific groups have received specific dismissal protection. Also employment discrimination laws restrict the freedom to fire quite severely.

<sup>24</sup> Article 63 Employment Contracts Act.

definitely impossible.<sup>25</sup>

The party ending the contract appreciates the existence of a serious cause first. When the other party disputes the serious cause, the Courts will evaluate the serious cause considering all factual elements. Factual elements are not only the facts or shortcomings themselves but also the specific circumstances of the case at hand (for instance transparency or position and job level of the employee).

The procedure for dismissal for serious cause is strict. Non-compliance of a procedural rule automatically renders the dismissal for serious cause irregular as a result of which the employee is entitled to compensation instead of notice. The party terminating the contract must observe a double three working days' period: the dismissal must follow within three working days from the moment the facts that consist in a serious cause are sufficiently known by the terminating party and the reasons or grounds for terminations must be notified within three working days from the date of dismissal. This notification must be done by registered mail or by bailiff's writ. If Courts reject the existence of a serious cause or if the dismissal is irregular, a compensation is nevertheless due.

### 3. *Fixed-term employment of professional football players*

#### a. *General*

##### a.1 *Applicable rules*

According to the Act of 24 February 1978 relating to contracts of employment for sports professionals (hereafter *Sports Professionals Act*), every contract concluded between a sports professional and an employer will be deemed to be a contract for white-collar workers, notwithstanding and regardless of the title given to the contract, and will be governed by the provisions of the Sports Professionals Act.<sup>26</sup> By sports professionals is meant those who undertake to prepare themselves for or to take part in a competition or sports spectator event under the authority of another person in return for remuneration exceeding a certain level.<sup>27</sup> This level was set at EUR 8,850 for the period from 1 July 2011 until 30 June 2012.<sup>28</sup> Thus, when the professional football player earns more than EUR 8,850 per year, which we will assume to be the case, his employment will be governed by the Sports Professionals Act.

Next to this general regulation, specific collective bargaining agreements were concluded in the sectorial Joint Labour Committee n° 223 competent for

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<sup>25</sup> Article 35 Employment Contracts Act.

<sup>26</sup> Article 3 Act of 24 February 1978 relating to contracts of employment for sports professionals, *Off. Gaz.* 9 March 1978.

<sup>27</sup> Article 2 Sports Professionals Act.

<sup>28</sup> Royal Decree 19 June 2011, *Off. Gaz.* 1 July 2011.

sports.<sup>29</sup> More in specific, the collective bargaining agreement of 16 June 2009 (hereafter *CBA of 16 June 2009*), concluded for a limited duration until 30 June 2012, will govern the contract of the professional football player.<sup>30</sup>

Finally, specific regulations of the football associations can apply. First of all, the regulations of the Royal Belgian Football Association (hereafter *RBFA Regulations*) intervene because by adhering to the Royal Belgian Football Association, the members agree to respect the regulations of it.<sup>31</sup> Second, the FIFA Regulations intervene because only registered players are eligible to participate in organized football and by the act of registering, a player agrees to abide by the statutes and regulations of FIFA, the confederations and the associations.<sup>32</sup> These regulations, however, will only apply in as far as they are in accordance with the applicable national and international legislation.

#### *a.2 General findings on fixed-term employment of the professional football player*

Contrary to what is common in Belgian employment contract law, fixed-term contracts are the standard and even imposed on professional football players in furtherance of the Belgian football collective bargaining agreement (CBA) of 16 June 2009.

The Sports Professionals Act provides that the fixed-term contract of the sports professional must be concluded in writing in as many copies as there are parties concerned and signed by those parties. One copy shall be handed to the sportsman concerned. Failing a written contract meeting these requirements or if one exists but no copy had been handed to the sportsman, the provisions of contracts concluded for indefinite period shall apply.<sup>33</sup> It would appear from this provision that the Sports Professionals Act imposes less strict obligations to fixed-term contracts as the general Employment Contracts Act since it is not required that the fixed-term contract is signed prior to the entering into service of sports professional. However, one may question whether the Sports Professionals Act can be seen as an exception to the general Employment Contracts Act.

The question of how the two acts are related, comes back in the issue of flexibility with regard to the conclusion of a fixed-term contract. According to the

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<sup>29</sup> This Joint Labour Committee was established by the Royal Decree of 10 August 1978, *Off. Gaz.* 17 October 1978.

<sup>30</sup> The collective bargaining agreement of 16 June 2009 on the employment terms of the professional football player was granted a generally binding effect by the Royal Decree of 15 June 2010, *Off. Gaz.* 27 August 2010.

<sup>31</sup> Article 504.1 Regulations Royal Belgian Football Association, [http://extranet.e-kickoff.com/project/publiek/reglement/reglement\\_nl.pdf](http://extranet.e-kickoff.com/project/publiek/reglement/reglement_nl.pdf), consulted on 19 October 2011.

<sup>32</sup> Article 5 FIFA Regulations on the Status and Transfer of Players, [www.fifa.com/mm/document/affederation/administration/01/27/64/30/regulationsstatusandtransfer2010\\_e.pdf](http://www.fifa.com/mm/document/affederation/administration/01/27/64/30/regulationsstatusandtransfer2010_e.pdf), consulted on 19 October 2011.

<sup>33</sup> Article 4 Sports Professionals Act.

Sports Professionals Act, fixed-term contracts can be concluded for a maximum period of five years and they are renewable, without further limitations according to the Act.<sup>34</sup> As mentioned before, the renewal of fixed-term contracts in general employment law normally entails the assumption that the parties have concluded an employment contract for indefinite term, unless there is a justified reason for the renewal or when strict minimum and maximum rules are respected sometimes requiring a prior permission of the labour inspectorate.<sup>35</sup> It would thus seem that the Sports Professionals Act upholds a more flexible position,<sup>36</sup> but, also at this point it is questionable whether this provision can deviate from the Employment Contracts Act and would be in accordance with the Directive 1999/70.

A third field of application in which the relationship between the Professional Sports Act and the Employment Contract Act is at issue, concerns the fact that the former act seems very much in favour of the fixed-term contract, still leaving the possibility to conclude a contract for indefinite term in professional sports as well. The CBA of 16 June 2009 applicable to professional football players, complicates the matter, as it stipulates that contracts can only be concluded for a maximum duration of 5 years and for a minimum duration which runs until the end of the season (30 June) during which the contract was signed.<sup>37</sup> This CBA was granted generally binding effect.<sup>38</sup> From the CBA's maximum period, it would thus seem impossible to conclude a professional football employment contract for an indefinite duration. But that conclusion seems to be contradicted by general employment case law, in which the Belgian Supreme Court (*Cour de Cassation*) has held that the provision of a maximum period is not irreconcilable with the existence of an employment contract for an indefinite period.<sup>39</sup> But, since the practice in professional football is the signing of a fixed-term contract, this issue may largely be theoretical.

Article 18 of the FIFA Regulations and articles 1103 and 1104 of the RBFA Regulations seem to be in accordance with the provisions stipulated above. Article 1103 of the Belgian Football Association's Regulations, however, adds that a contract should always end on the 30<sup>th</sup> of June.

Thus, to respect all regulations, the contract of a professional football player can be concluded for a fixed-term period, but only for a maximum period of five years. It can be renewed, although the legal consequences of such renewal are somewhat unclear seen the provisions of Directive 1999/70. As to the minimum period, the contract must always end on the 30<sup>th</sup> of June.

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<sup>34</sup> Article 4 Sports Professionals Act.

<sup>35</sup> Articles 10 and 10bis Employment Contracts Act.

<sup>36</sup> Cf. O. VANACHTER, "De vrijheid van contracteren" in F. Hendrickx (ed.), *Fundamentele rechten van de sportbeoefenaar*, Leuven, Peeters, 1996, 36.

<sup>37</sup> Article 11 collective bargaining agreement of 16 June 2009.

<sup>38</sup> Royal Decree 15 June 2010, *Off. Gaz.* 27 August 2010.

<sup>39</sup> Cass. 6 April 1998, *RW* 1998-1999, 846.

*b. Termination of a fixed-term professional football player contract*

*b.2 General*

First of all, it must be pointed out that article 9 of the Sports Professionals Act stipulates that sports professionals and their employers may not undertake in advance to submit disputes arising out of the application of the Sports Professionals Act to arbitrators. This provision also exists in common Belgian employment law. Parties can, however, decide to trust their conflict to arbitrators once the conflict or legal dispute has arisen.

Second, it must also be pointed out that the parties cannot sign a settlement agreement on the due compensation when the professional football player is still at the service of the club. This is because the employee/professional football player cannot waive his rights when he is still in an inferior position vis-à-vis the employer/club.<sup>40</sup>

The Sports Professionals Act provides that if a contract has been concluded for a specified period, its termination before the date of expiry of the contract without serious grounds shall give the injured party the right to compensation equal to the amount of remuneration due up to the end of the contract, with the proviso that the compensation shall not exceed twice the amount of compensation that would have been due when a contract for indefinite period was concluded.<sup>41</sup> Thus, when the contract is ended because of the expiry of the contract, no compensation is due according to the Sports Professionals Act or the other rules mentioned above. As is the case in common Belgian employment law, the expiry of the term automatically terminates the contract which means that there is no need to give prior notice before the expiry date. Moreover, there is no need to give a reason for not renewing the contract. When the contract is ended before the expiry of the contract, the situation in which no justifying grounds were at hand must be differed from the situation in which the contract is ended for justifying grounds.

*b.2 Termination with no justifying grounds*

According to article 4 of the Sports Professionals Act, compensation equal to the amount of remuneration due up to the end of the contract is due when the fixed-term contract is ended before its date of expiry. However, the compensation is limited to twice the amount of compensation that would have been due when a contract for indefinite period was concluded, which is determined by Royal Decree of 13 July 2004.<sup>42</sup> This Royal Decree fixes the compensation at a certain number

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<sup>40</sup> Labour Court of Appeal Antwerp 7 September 1994, *Sportrechtspraak*, 6.2 nr. 21, MAESCHALCK, J. e.a.

<sup>41</sup> Article 4 Sports Professionals Act.

<sup>42</sup> Article 4 Sports Professionals Act.

of months' remuneration depending on the yearly remuneration of the professional football player and on the moment on which the contract was terminated.<sup>43</sup> The maximum number of months' remuneration is equal to 18 months. Thus, a maximum amount equal to 36 months' remuneration can be due for fixed-term contracts according to the Sports Professionals Act. The amounts are fixed at a high level, which normally makes it impossible for the football player to end the fixed-term contract prior to its expiry date.<sup>44</sup>

Month remuneration when a contract concluded for indefinite term is terminated under the Sports Professionals Act:

<b>Yearly remuneration (amounts applicable as from 1 May 2011)</b>	<b>Termination during the first 2 years of the contract</b>	<b>Termination after the first 2 years of the contract</b>
< EUR 17,699.70	4.5 months	3 months
EUR 17,699.70 – EUR 28,860.75	6 months	3 months
EUR 28,860.75 – EUR 38,481.01	6 months	6 months
EUR 38,481.01 – EUR 115,443.03	12 months	12 months
> EUR 115,443.03	18 months	18 months

The RBFA Regulations do not add anything to these provisions.<sup>45</sup>

The FIFA Regulations, on the contrary, determine that the compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria including, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of 5 years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period.<sup>46</sup> In so far as these objective criteria add something to the provisions as determined in the Sports Professionals Act and the Royal Decree of 13 July 2004, they are null and void since they are contrary to Belgian legislation.

The same goes for article 16 of the FIFA Regulations which states that

<sup>43</sup> Article 1 Royal Decree of 13 July 2004 on the fixation of the amount of the compensation aimed in article 5, 2<sup>nd</sup> paragraph of the Act of 24 February 1978 relating to contracts of employment for sports professionals, *Off. Gaz.* 3 August 2004.

<sup>44</sup> R. BLANPAIN, *Het statuut van de sportbeoefenaar naar international, Europees, Belgisch en Gemeenschapsrecht*, Brussel, De Boeck en Larcier, 2002, 110.

<sup>45</sup> Article 1104 Regulations Royal Belgian Football Association, [http://extranet.e-kickoff.com/project/publiek/reglement/reglement\\_nl.pdf](http://extranet.e-kickoff.com/project/publiek/reglement/reglement_nl.pdf), consulted on 19 October 2011.

<sup>46</sup> Article 17 FIFA Regulations on the Status and Transfer of Players, [www.fifa.com/mm/document/affederation/administration/01/27/64/30/regulationsstatusandtransfer2010\\_e.pdf](http://www.fifa.com/mm/document/affederation/administration/01/27/64/30/regulationsstatusandtransfer2010_e.pdf), consulted on 19 October 2011.

a contract cannot be unilaterally terminated during the course of a season. Since Belgium knows the difference between the right to dismiss and the power to dismiss and since the latter cannot be restricted, this clause is contrary to Belgian legislation and thus will remain null and void.

### *b.3 Termination with justifying grounds*

In general, an employment contract can in Belgium only be ended by either party without notice period or compensation for serious fault when strict procedural rules are respected. As mentioned, a serious fault is a fault that makes the continued working relationship between the employer and the employee (a) immediately and (b) definitely impossible.<sup>47</sup> Since no specific rules exist in the Sports Professionals Act, termination for serious fault respecting the rules set out in article 35 of the Employment Contracts Act is also the only possibility to end the contract of the professional football player on the spot without compensation. However, different provisions refer to certain justifying grounds for the termination of the fixed-term contract prior the expiry date.

First, article 12, § 2 of the CBA of 16 June 2009 states that the parties agree not to end the employment contract prior to the expiry date unless in case of “serious reasons according to the judge of the competent bodies among which the reconciliation commission...” (“gegronde redenen te beoordelen door de rechter of de bevoegde instanties waaronder de verzoeningscommissie...” / “des raisons reconnues comme fondées par le juge ou les instances compétentes, parmi lesquelles figure la commission de conciliation...”). However, this article can only impose a supplementary obligation to the club wishing to end the employment contract. Indeed, it could be argued that this article restricts the freedom of the professional football player to end the fixed-term employment agreement by paying compensation as is provided in article 4 of the Sports Professionals Act, which is prohibited by article 7 of this Act.

Second, articles 14 and 15 of the FIFA Regulations provide certain rules on the termination of the contract with just cause or with sporting just cause. The first cause allows either party to terminate the contract without compensation, the second cause only allows the football player to terminate the contract and compensation could still be payable. In so far as these causes are interpreted in a broader sense than the “serious fault” of article 35 of the Employment Contracts Act, these provisions are contrary to Belgian employment law and thus null and void.

## *4. Conclusion*

While examining the legal situation of a breach of contract situation of a professional football player, different tensions have become clear.

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<sup>47</sup> Article 35 Employment Contracts Act.

First, the employment contract, including its termination, of the professional football player is governed by general Belgian employment law which considers an employment contract for an indefinite period of time the most desirable protection for employees. In professional team sports, however, the fixed-term contract is usually preferred. To regulate the specific situation of the sports professionals, the Sports Professionals Act was enacted. However, it remains uncertain how certain provisions of this Sports Professionals Act relate to the Employment Contracts Act, especially regarding the possibility to conclude or renew fixed-term contracts. This tension between both acts becomes more problematic in light of the Sports Professionals Act's difficult relationship with Directive 1999/70. This Directive imposes strict obligations on the renewal of fixed-term contracts, with no specific exceptions for sports professionals.

Second, it is typical for Belgian law that representatives of both clubs and players have concluded a CBA, namely the CBA of 16 June 2009 on the employment conditions of the professional football player, which was granted generally binding effect by Royal Decree. Although this instrument is, at least in theory, very beneficial to regulate the specific situation of the professional football player, it can also cause tensions with other regulations. For example, the CBA determines a maximum period for which employment contracts can be concluded while the Sports Professional Acts provides the possibility to conclude an agreement of indefinite term.

In general, it could be wondered whether the tensions which we have examined are due to the fact that general national and European provisions do not take the specific situation of the professional football player into account. If this is so, the Belgian CBA of 16 June 2009 for professional football players might serve as an example for the European governance of professional football. It is perhaps an option to conclude a European professional football players CBA, in light of the existence of a European Directive (1999/70) on fixed-term work. That may also generate a debate about the European regulation of employment contract law in light of the specificity of sport, which we would consider a topic for further research.

## COMPENSATION IN CASE OF BREACH OF CONTRACT IN FRANCE

by *Jacopo Figus Diaz\** and *Valerio Forti\*\**

SUMMARY: Introduction – 1. Fixed term contracts under the French Labor Code – 2. Regulation by national sports associations and unions – 3. The parties' freedom of contract – 4. Compensation for breach of contract – Conclusion

### *Introduction*

In France, employment relationships between athletes and sports teams are ordinarily governed by fixed-term employment contracts. The essence of a fixed-term contract is the guarantee of contractual stability throughout its duration. To achieve the required stability, fixed-term contracts cannot be unilaterally discharged before their term unless one of three circumstances occurs. According to Article L. 122-3-8 of the French Labor Code, parties can discharge a fixed-term contract exclusively in case of: (i) substantial breach by the counter-party (so called “*faute grave*”); (ii) force majeure; and, (iii) conclusion, by the athlete-employee, of a permanent employment contract.

If one party voluntarily discharges an employment contract outside one of the three afore-mentioned possibilities, the discharge will trigger damages in favor of the terminated party. In other words, French employment law does not recognize a party's unconditional right to unilaterally put an end to a fixed-term contract before its natural term. Moreover, the already limited freedom of interrupting an employment relationship is further delimited by case-law. French judges are very cautious in finding one of the three causes justifying a unilateral discharge of the employment contract without payment of damages.<sup>1</sup>

These constraints upon the early termination of fixed-term contracts patently conflict with the athletes' growing necessity of mobility. Nowadays, players

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<sup>1</sup> H. BLAISE, *De la difficulté de rompre avant son terme le contrat de travail à durée déterminée*, in *Dr. Soc.*, 1993, 41 ss.

often change several teams throughout their career, also during a same season. Modern economics of sports call for a flexible market. Consequently, the contractual stability arising from labor law has an important downside: while protecting employees, it is likely to undermine the mobility from club to club, which is pivotal to athletes.

The fight against this diminished flexibility is twofold. First, various national sports associations have enacted regulations permitting the parties to discharge a contract before its term for reasons falling outside the scope of Article L. 122-3-8 of the French Labor Code. Accordingly, certain fixed-term contracts can be terminated when a specific event occurs, other than the force majeure or the failure of a condition. A frequent example is the relegation of the team in an inferior division; if the contractual conditions are met, the relegation permits the athlete or the team to terminate the contract before its natural end. Second, also the parties' agreement can regulate the exercise of the right of termination. In some instances, parties agree that they can exercise the right at every moment; in other instances, they make themselves bound to exercise it on or after a specified time, generally the end of the season. Yet, the lawfulness of both collective and individual contract rights of early termination is not absolute.<sup>2</sup>

The complex interrelationship between labor law, regulations enacted or collective agreement entered by national associations, and the parties' contractual freedom calls for a separate analysis of each of these tools.<sup>3</sup> Hence, Part 1 summarizes the labor rules governing fixed-term contracts under the French Labor Code, as well as the application of those provisions by the judiciary. Part 2 and 3 illustrate, respectively, how national associations and the parties to employment contracts have tried to fight against the undesired contractual stability imposed by law. Part 4 examines the structure and the nature of the compensation for breach of contract, focusing on the scenario where the contract is terminated before its natural end.

### 1. Fixed term contracts under the French Labor Code

According to Article L. 122-3-8 of the French Labor Code, parties can discharge a fixed term contract in case of: substantial breach by the counter-party (so called "*faute grave*"); force majeure; and, conclusion by the athlete-employee of a permanent employment contract.

The *faute grave* is a substantial breach that makes the continuation of the employment relationship impossible, thereby justifying its immediate interruption.<sup>4</sup> Faced to a party's substantial breach, the counterparty can lawfully

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<sup>2</sup> See *infra*, Part 2 and Part 3.

<sup>3</sup> See J.P. KARAQUILLO, *L'application des dispositions du Code du travail au contrat de travail du sportif professionnel. Une contribution à l'interprétation des textes relatifs au contrat de travail à durée déterminée*, in *Revue Du Droit Du Travail*, 2010, 14.

<sup>4</sup> M.-P. DESCAMPS, *La faute grave à la lumière de la jurisprudence récente*, *Semaine Soc. Lamy*, 1993, n. 656, 2.

put an end to the contract, without being condemned to the payment of damages for the premature termination. The rationale beyond the right of termination is patent. A substantial breach may seriously undermine the duty of loyalty which employment contracts are based on. The breach may give rise to a conflicting relationship between the employer and the employee, which is likely to affect the future performance of the contract and the cooperation among parties.

Yet, only certain substantial breaches qualify as *faute grave*. Typically, the breach must entail an important or significant violation of the duty of loyalty under Article L. 1222-1 of the French Labor Code. The courts have clarified what breaches constitute a *faute grave*. For instance, the use of doping substance by a professional athlete – where ascertained by the competent sport authority – qualifies as a substantial breach: it is likely to undermine both the duty of loyalty encompassed in the employment contract and the sport ethics.<sup>5</sup> Similarly, courts have concluded that a footballer's persistent violation of the team's internal regulations justifies the interruption of the contract by the team.<sup>6</sup> On the other hand, the mere professional or physis inaptitude, the incapacity for the athlete to integrate into the team and the incompetence or lack of results of a team's coach does not justify the termination of the contract.<sup>7</sup> Likewise, sporadic behaviors, though conflicting with the appropriate lifestyle of an athletes, *e.g.*, the abuse of alcoholic substances, do not attain the status of substantial breach.<sup>8</sup>

Force majeure is a well-known concept: it is an unforeseeable, insurmountable and irresistible event, not depending upon the parties' behavior, which excuses the performance of the contract. French courts have adopted a very restrictive interpretation of force majeure; an attitude that penalizes both the athletes and the teams. For example, the physical inaptitude of a professional athlete caused by a work accident does not qualify as force majeure. It merely empowers the team to interrupt the contract under Article L. 122-32-9 of the French Labor Code, which governs the circumstance where the employer is not able to offer an alternative suitable employment position to the injured employee.<sup>9</sup>

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<sup>5</sup> CA Limoges, 4 mai 1998, Assoc. Creuse sport promotion c/Durand: J. MOULY *L'exercice du pouvoir disciplinaire de l'employeur à l'encontre d'un sportif salarié convaincu de dopage*, in *Dr. Soc.*, 1998, 1003.

<sup>6</sup> CA Grenoble, 19 oct. 1993, Lacuesta c/Assoc. olympique lyonnaise: *Rec. Dalloz*, 1995, somm. 60, obs. J.-P. KARAQUILLO.

<sup>7</sup> J. MOULY, *La résolution judiciaire du contrat de travail à durée déterminée d'un jour professionnel de football*, in *Rec. Dalloz*, 1991, 278. Yet, Article 12 of the *Charte du football professionnel* provides that a contract can be discharged in case of physical inaptitude of the athletes, so long as the inaptitude is proven by the competent medical authority. See J. MOULY, *Le sort du contrat de travail à durée déterminée d'un footballeur professionnel en cas d'inaptitude physique liée aux fonctions*, *Rec. Dalloz*, 1994, 439.

<sup>8</sup> See, *e.g.*, T. VASSINE, *Attention, l'abus d'alcool d'un joueur est dangereux pour la santé financière de son club*, in *Cahiers Dr. Sport*, 2010, n. 22, 58.

<sup>9</sup> Cass. soc. 23 mars 1999, Olympique de Lyon et du Rhône c/Bare: *Rec. Dalloz*, 1999, 470, note F. LAGARDE. Force majeure would empower the employer to terminate the contact without payment of damages while, under Article L.122-32-9, the employer can be condemned to pay damages or an indemnity to the injured employee.

Similarly, courts have constantly affirmed that the economic impossibility to perform a contract does not justify its breach, unless the club enters into bankruptcy.<sup>10</sup>

Finally, parties can discharge a fixed term contract if the athlete-employee concludes a permanent employment contract. Labor law tends to protect the employee and creation of permanent contract. A fixed-term employee must not be prevented from concluding a permanent employment contract simply because she is already bound by her current fixed-term position. Nonetheless, as it will be illustrated in Part 2, below, certain agreements concluded between sport associations and unions significantly limit this right of discharge recognized in favor of the employee.

## 2. Regulation by national sport associations and unions

Various national sports associations have adopted regulations aimed at standardizing specific aspects of the employment relationship between clubs and athletes in a given sport. Usually, these regulations have the legal status of collective employment agreements, entered into by the sport association on the one side, and the unions of athletes or coaches of a given sport on the other side. Because of their collective nature, these agreements trump individual contracts. The most notable example is the *Charte du football professionnel*, whose status as a collective agreement was expressly recognized by the French Supreme Court.<sup>11</sup> Comparable agreements govern other sports, such as rugby, basketball and hand-ball.<sup>12</sup> International associations may also contribute to shape the regime of national employment contracts by the adoption of harmonization provisions, which usually address the most significant differences among the several national systems.

Regulations governing football, basket-ball, volley-ball, hand-ball and rugby require the homologation of the individual employment contract. Depending on the sport concerned, the lack of homologation may cause either the substitution of the contractual clauses governing the performance of the contract or the nullity of the contract itself.<sup>13</sup>

With regard to the breach of fixed-term contracts, the collective agreements governing basket-ball and rugby are worth noting. They significantly limit the rights under Article L. 122-3-8 of the French Labor Code, which entitles an employee to terminate her fixed term contract in case of conclusion of a subsequent permanent employment contract. According to both the agreements, if an athlete or a coach

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<sup>10</sup> Cass. soc. 6 mai 1998, Parsy et a. c/Villa et a.: in *Rec. Dalloz*, 1998, 611, note F. LAGARDE, *Dr. Soc.*, 1998, 835, obs. J.-P. KARAQUILLO.

<sup>11</sup> G. COUTURIER, *Nature et validité de la Charte*, in *Les contrats des sportifs. L'exemple du football professionnel*, G. Simon (eds.), PUF, 2003, 61.

<sup>12</sup> J.P. KARAQUILLO, *L'application des dispositions du Code du travail au contrat de travail du sportif professionnel. Une contribution à l'interprétation des textes relatifs au contrat de travail à durée déterminée*, in *Rev. Dr. Travail*, 2010, 14.

<sup>13</sup> *Ibidem*.

unilaterally terminates her fixed term contract because of the conclusion of a permanent contract with a different club, the latter agreement is refused homologation. The likely rationale consists in the prevention of frauds, though these collective agreements significantly weaken the legislative approach in favor of permanent employment contract.<sup>14</sup>

The *ordre public* (public policy) represents the main limit to the collective freedom of sports associations. Associations and unions can reduce the stability of fixed-term contracts, but they can neither undermine nor nullify the protection provided by law to employees. Consequently, the French Supreme Court has declared several dispositions of the *Charte du Football Professionnel* null and void, because they provided employees with a protection lower than that provided by Article L. 122-3-8 of the French Labor Code.<sup>15</sup> In a similar fashion, courts are more inclined to declare a clause of a collective agreement unlawful if it favors the employer more than the employee.<sup>16</sup>

### 3. *The parties' freedom of contract*

The parties' freedom of contract is an alternative way to regulate the compensation in case of breach of contract. In particular, parties can broaden (or, more rarely, limit) the cases in which a fixed-term contract can be terminated before its term without payment of damages. Individual employment contracts can encompass a clause (called "*clause résolutoire*" or "*libératoire*") which confers upon both or either party a right of unilateral termination, were a specific condition to occur. Clauses providing for the early termination of the contract in case the team is relegated into an inferior division are typical examples of such contractual provisions.<sup>17</sup>

Yet, the lawfulness of these clauses is highly disputed and has been extensively discussed.<sup>18</sup> The French Labor Code seems to exhaustively enumerate the causes for which a fixed-term contract can be terminated before its end. The existence of a *numerus clausus* – established by law – reasonably advocates for

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<sup>14</sup> *Ibidem*.

<sup>15</sup> Cass. soc. 20 mars 1990: *Rec. Dalloz*, 1991, 143, note J. MOULY.

<sup>16</sup> Soc. 1<sup>er</sup>, 2009, in *RJES*, 2009, n. 92 obs. F. LAGARDE. See also J.P. KARAQUILLO, *L'application des dispositions du Code du travail au contrat de travail du sportif professionnel. Une contribution à l'interprétation des textes relatifs au contrat de travail à durée déterminée*, in *Rev. Dr. Travail*, 2010, 14.

<sup>17</sup> The right of termination of the contract in case of relegation of the club to an inferior division is normally established by the collective agreement and merely restated in the individual contracts. For instance, Article 9.2. of the *Convention collective nationale du rugby professionnel* expressly provides for clauses allowing the players to terminate the contract before its term because of: (i) the ranking achieved by the team at the end of the season; (ii) the non-qualification of the team for the current season; or, (iii) the adoption of decisions concerning the relegation of the team or its non-admission.

<sup>18</sup> See J.-P. KARAQUILLO, *Validité d'une clause résolutoire au profit d'un sportif professionnel lié par un contrat à durée déterminée*, in *Rec. Dalloz*, 2009, 2664.

the unlawfulness of any cause of termination not expressly provided by the law.

The case-law, by its part, has adopted a draconian approach in favor of employees. Resolution clauses based upon the team's relegation but agreed in favor of the employer are absolutely unlawful. An employee cannot, according to courts, confer the employer a right of unilateral termination for reasons which do not fall within the scope of Article L. 122-3-8 of the French Labor Code.<sup>19</sup> In other words, courts have clearly upheld a complete ban of any employer's right of unilateral termination of a fixed-term employment contract.

Specifically, courts tend to re-qualify such a challenged contract into a permanent employment contract or to declare the clauses null and void. Were one to speculate on the reasons of such solution, the most educated guess would be the absence of the parties' intent to enter into a permanent employment relationship. In a similar fashion, it would be hard to consider the team's relegation as a cause of economic impossibility or economic force majeure. French courts are traditionally not prone to uphold economic excuses to the non-performance of a contract.<sup>20</sup>

Liquidated damages clauses represent a second important tool of freedom of contract. By agreeing on such a clause, the parties mutually set, at the time the contract is concluded, the amount of damages to be paid in case of breach. Specifically, parties can "personalize" these clauses, and they can set different amounts of damages depending upon the cause of the breach or upon what party unilaterally terminates the contract. As it will be clarified in Part 3 below, liquidated damages clauses are likely to violate Article L. 122-3-8 of the French Labor Code, which expressly states the amount of damages payable for the termination of fixed-term contracts without justifications, but the case-law is not consistent on the point.<sup>21</sup>

The indemnities paid for the transfer of a player are a sort of liquidated damages clause. Under French law they do not have any autonomous legal foundation. For this reason, they are usually qualified as liquidated damages, although they could be considered the price of the option to breach the contract. Practically, however, they are the outcome of an interested enforcement of labor rules governing fixed-term contracts. Through a transfer clause the "selling club" can obtain from the ex-player and employee (or rather from the "acquiring club") a compensation for the damage suffered because of the early departure of the player.<sup>22</sup>

This system for the transfer of players raises some important issues. First and foremost, the rupture of the contract does not always originate in the athlete,

<sup>19</sup> Cass. soc., 16 déc. 1998, Assoc. Cercle Saint-Pierre c/Ghewy: *Rec. Dalloz*, 2000, 30, note P. ALAPHILIPPE; Cass. soc., 5 juill. 1995, Football club gueugnonnais c/Chay: *Rec. Dalloz*, 1996, 280, note J. MOULY.

<sup>20</sup> Soc. 28 avr. 1986: *Rec. Dalloz*, 1987, 474 note J-P KARAQUILLO; 20 fevr. 1996: *Rec. Dalloz*, 1996, 633 note C. PUIGELIER; *RDSS*, 1997, 614, obs. E. ALFANDARI and S. HENNION-MOREAU; 16 oct. 2002: *RJS*, 2003, n. 16.

<sup>21</sup> See J-P. KARAQUILLO, *Illicéité (ou licéité) d'une clause libératoire au profit d'un club sportif employeur dans un CDD*, in *Rec. Dalloz*, 2009, 2261.

<sup>22</sup> C. civ., art. 1152.

but in the team. In these cases, the team should not be recognized any right to compensation. Corollary, the compensation is never paid directly by the athlete, but it is paid by the “acquiring club”. Finally, the amount of the compensation often exceeds the damages actually incurred by the “selling club”.

#### 4. Compensation for breach of contract

The early termination of a fixed-term employment contract may generate two different scenarios: (i) if the contract is terminated because of one of the three causes explicitly provided for by Article L. 122-3-8 of the French Labor Code, or by the parties’ mutual agreement, no damages arise in favor of the non-breaching party; (ii) on the contrary, if the cause of the termination falls outside the scope of Article L. 122-3-8, or absent the parties’ agreement on the termination, damages must be paid by the breaching party.

The amount of damages differs depending on what party breaches the contract. If the contract is breached by the employee, the employer is entitled to damages equal to the actual harm suffered. By contrast, if the employer decides to terminate the employment relationship, the employee is entitled to an amount at least equal to the salaries that would have been paid until the natural end of the contract.<sup>23</sup> For the employer, the advantage is clear: because the amount of damages to be paid is reasonably foreseeable, the employer can easily calculate whether the breach will be efficient or not. A breach is efficient when the benefits arising from the non-performance of the contract more than offset the benefits of its performance. Nonetheless, an important caveat exists: in some instances, courts can condemn the employer to damages that not only cover the salaries still to be paid, but also compensate the employee for some other harm, for instance emotional distress. The possibility of additional compensation undoubtedly makes any calculation made by the employer *ex ante* less reliable.

Moreover – as illustrated in Part 3 above – the parties can mutually agree on the reasonably foreseeable damages, and stipulate a liquidated damages clause. Yet, the amount of damages agreed upon can be judicially modified. Under Article 1152 of the French Civil Code, not only can the judge decrease the amount fixed by the clause if she is to consider it excessive, *i.e.*, if the clause was in fact a penalty clause; the judge can also increase the amount of damages, in case she concludes it is excessively low.

Also, parties can contractually avoid damages. If the contract contains a *clause résolutoire*, the entitled party can exercise the right of termination provided by the clause without payment of damages, if the clause allows so. In this scenario, the early termination does not cause a breach whose “harm” is compensated by damages. The entitled party “buys” the right of termination, the costs of which is normally reflected either in the price of the contract or in the indemnity to pay at

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<sup>23</sup> C. trav., art. L. 122-3-8.

the time the clause is exercised. However, disputes may arise on whether the party is terminating the contract under the *clause résolutoire* or is terminating the contract by breaching it.<sup>24</sup> The terminating party will obviously argue that her termination conforms to the clause, in order not to pay damages. The terminated party, on the contrary, will argue that the termination does not fall within the clause, but rather represents a breach of the contract likely to generate damages in her favor.

In each scenario, the amount of damages for breach can be significant, notably if contracts concluded with famous sport players are breached. For instance, the Paris-Saint-Germain F.C., one of the most notorious French football teams, was condemned in first instance to the payment of Euro 850,000 of damages in favor of its coach Mr. Halihodzic, for the breach of his fixed term contract.<sup>25</sup> However, for the most part litigations concern amateur players, whose remuneration is substantially lower than the one of football stars. The amount and type of payments received by athletes are determinative in litigation, as they can disqualify the existence of an employment contract. Only if the payment truly qualifies as “remuneration”, the parties have entered into an employment relationship and, consequently, labor law is applicable. By contrast, if the payments are mere refunds of expenses, or are irregular in nature or time, the relationship is less likely to qualify as employment contract.<sup>26</sup>

It is worth noting that the damages accorded to the employee are subject to taxation as well as social security contributions, regardless of whether they reflect the salaries still to be paid or any additional harm caused by the breach.<sup>27</sup> The entire amount of damages is subject to taxation. Yet, for non-fiscal purposes the damages are subject to the legal regime governing indemnification, not remuneration. For example, the damages’ limitation period is 30 years; the five-year period which is typical of wages does not apply.<sup>28</sup>

The quantification of the amount of damages to be paid depends (or rather should depend) on the time that is needed to actually terminate the contract. The problem is apparent when the parties cannot reach an agreement on the termination,

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<sup>24</sup> See, e.g., D. JACOTOT, *Rupture du contrat de travail et cause libératoire*, in *Cahiers Dr. Sport*, 2008, 45.

<sup>25</sup> On appeal the judgment was reversed. Mr. Halihodzic was condemned to pay Euro 80,000 in damages to the Paris-Saint-Germain. See, J.-P. KARAQUILLO, *La prise d’acte par un salarié de la rupture d’un CDD: une initiative à risque*, in *Rec. Dalloz*, 2008, 2047.

<sup>26</sup> See, generally, D. JACOTOT, *Confusions autour du régime de la rupture du CDD*, in *Cahiers Dr. Sport*, 2006, 57.

<sup>27</sup> D. JACOTOT, *Le régime sociale des indemnités de rupture du contrat de travail à durée déterminée*, in *Cahiers Dr. Sport*, 2006, 33; J. SAUREL, *Le régime fiscal des indemnités de rupture du contrat de travail à durée déterminée*, in *Cahiers Dr. Sport*, 2007, 16. Prior to 1999, the share of damages aimed at compensating the employee for the loss of wages was subject to taxation, while the part of damages granted to indemnify any other harms, such as emotional distress, was not subject to taxation.

<sup>28</sup> D. JACOTOT, *Le régime social des indemnités de rupture du contrat de travail à durée déterminée*, in *Cahiers Dr. Sport*, 2006, 33.

and the non-breaching party is obliged to bring an action for the termination. A significant time may intervene between the filing of the action and the entering of a judgment. Supposing that this lapse of time causes additional damages, *e.g.*, that it affects the market value of the player who, because of the conflicting relationship with the team, is not allowed to play while the litigation is pending, should this additional damage be compensated as a part of the breach?

Finally, it is worth considering that other kinds of breach can occur, the economic nature of which is less patent. For instance, labor law – and sometimes collective agreements – provides for procedural due process in case one of the parties (normally the employer) exercises the right of termination of the employment contract.<sup>29</sup> What happens if the procedural guarantees in favor of the employee are violated? Undoubtedly, in a similar breach the identification of the most appropriate compensation seems significantly more complex than in a normal case of breach of contract for non-performance.

### *Conclusion*

The rigidity of the labor rules concerning the termination of fixed-term contracts is not appropriate to address the needs of the sports market.<sup>30</sup> Although its main purpose it is to protect employees and their stability, labor law may weaken the position of athletes. In particular, its typical lack of flexibility is likely to undermine the equilibrium between the economic fragility of the club-employer, on the one side, and the ambition and careers of the athletes-employees, on the other.<sup>31</sup> Moreover, the rigidity in the termination of fixed-term contracts seriously affects the overall regime of the compensation in case of breach of contract, as most of the sports employment contracts are fixed-term contracts.

Collective agreements between associations and unions are often considered the most appropriate response to the needs of sports. First and foremost because they take into account the specificity of sport.<sup>32</sup> While Article L. 122-3-8 of the French Labor Code set general rules, and addresses the termination of fixed-term contracts in any economic sector, well beyond the sport activity, collective agreements are sector-specific.

Accordingly, it would not be unreasonable for the legislator to structure the employment contracts' regime in a way so as to confer more importance to the solutions adopted by sports associations and unions.<sup>33</sup> A double layer regime

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<sup>29</sup> See D. JACOTOT, *Absence de spécificité de la rupture du contrat de travail d'un footballeur professionnel*, in *JCP S*, 2007, n. 19, 1345.

<sup>30</sup> J.P. KARAQUILLO, *Validité d'une clause résolutoire au profit d'un sportif professionnel lié par un contrat à durée déterminée*, in *Rec. Dalloz*, 2009, 2664.

<sup>31</sup> *Ibidem*.

<sup>32</sup> In this sense, J.P. KARAQUILLO, *L'application des dispositions du Code du travail au contrat de travail du sportif professionnel. Une contribution à l'interprétation des textes relatifs au contrat de travail à durée déterminée*, in *Revue Du Droit Du Travail*, 2010, 14.

<sup>33</sup> *Ibidem*.

will probably address the tension between stability, on the one side, and flexibility, on the other. General labor rules will guarantee the stability. A more central recognition of the role of collective agreements will improve flexibility.

## COMPENSATION IN CASE OF BREACH OF CONTRACT IN CIVIL LAW COUNTRIES: GREECE

by *Konstantinos Dion Zemberis\**

SUMMARY: 1. Termination of employment contracts – 1.1 Termination of open-ended employment relationships – 1.2 Termination of fixed term employment relationships – 2. Maintenance of contractual stability in football – 2.1 Termination of employment contracts by players or clubs – 2.2 Compensation in case of breach of contract by a player or a club

*Abstract:* This article studies the consequences of breach of contract by a professional player or a club, with main focus on the compensation that the party in breach needs to pay for the termination of the contract without just cause. In order for the special status of the players as employees to be better elucidated, a brief reference to the termination of employment relationship in general, will be made in the beginning of the said article. Finally, the present article will demonstrate the special and unique way of calculating the compensation to be paid in case of breach of contract without just cause, provided by the Regulations on the Status and Transfer of Players of the Hellenic Football Federation (HFF), which actually permit the accurate calculation of the payable compensation by any of the parties.

### *1. Termination of employment contracts*

#### *1.1 Termination of open-ended employment relationships*

As a general principle, termination of employment in Greece is permitted without the employer having to justify his decision or invoke any reason.

The termination of open-ended employment contracts and in general of every open ended employment “relationship”, that is, employment relationship which for some reason does not formally constitute a valid labour agreement, is governed by article 74 para. 2 and 3 of Law 3863/2010, in combination with Law 2112/1920

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and Law 3198/55, as amended and currently in force.

As a rule, an open-ended employment contract is terminated by means of a written statement of termination by the employer and payment of the appropriate compensation, as determined by law (or by the contract, in case the compensation provided therein is higher than the one provided by law for the specific circumstances).

The employer has to give notice in writing to the employee regarding the termination of the employment relationship, such notice being determined by the law, depending on the duration of service of the employee with the employer's business.

The notice of termination and the relevant compensation that needs to be paid to the dismissed employee, are regulated today as follows:

1. The employment by means of an open-ended employment contract is considered to be a trial employment period for the first 12 months from the commencement date and can be terminated without any notice and without compensation for the dismissal, unless it has been agreed otherwise by the parties (amendment made by means of art. 17 para 5a of Law 3899/2010).
2. After the first 12 months of employment, an open-ended employment relationship can be terminated following written notice by the employer, as follows:
  - a) For employees that have been providing their services from 12 months up to 2 years, notice period of one month before the dismissal is required.
  - b) For employees that have been working for a period of 2 full years up to 5 years, a two months advance notice is required.
  - c) For employment of duration between 5 full years and 10 years, a three months advance notice is required.
  - d) For employment of duration between 10 full years and 15 years, a four months advance notice is required
  - e) For employment of duration between 15 full years and 20 years, a five months advance notice is required.
  - f) For employment of duration between 20 full years and up, a six months advance notice is required.

If the employer does not give notice of termination to the dismissed employee according to the above mentioned, he is obliged to pay the said employee the compensation provided by means of the Law 2112/20 and 3198/55, that is, for employment:

- a) between 2 months and 1 year, the salary of 30 days
- b) between 1 year and 4 years, the salary of 60 days
- c) between 4 years and 6 years, the salary of 3 months
- d) between 6 years and 8 years, the salary of 4 months
- e) between 8 years and 10 years, the salary of 5 months
- f) over 10 completed years, the salary of 6 months

- g) and thereafter, for every additional year of employment the salary of 1 month is added.

If the employer complies with the above mentioned obligation for notice of termination, he is required to pay to the dismissed employee the compensation that is provided by the two aforementioned laws for the respective employment years, in case of termination following appropriate notice, that is, for service:

- a) of 12 months up to 2 years, the salary of one month
- b) of 2 years up to 5 years, the salary of two months
- c) of 5 years up to 10 years, the salary of 3 months
- d) of 10 years up to 15 years, the salary of 4 months
- e) of 15 completed years up to 20 years, the salary of 5 months
- f) of 20 completed years and up, the salary of 6 months

The calculation of the compensation is made on the basis of the regular salary of the last month under full employment status (the applicable Christmas and Easter bonuses and the holiday allowance are also taken in consideration pro rata). However, the monthly salary that is used as basis for the calculation of the compensation cannot be higher than 8 times the day wage of an unskilled worker, multiplied by the number 30 (unless there is opposite contractual provision).

In any case, the termination is invalid and does not produce effect, if it is not made in writing and if the employer has not proceeded with the payment of the appropriate compensation due.

When the compensation due for the dismissal is higher than the salary of two months, the employer can pay at the moment of the dismissal the part that corresponds to the salary of two months and the rest can be paid in bimonthly instalments, each one of which cannot be lower than the salary of two months, unless the remaining amount is lower. The first of the remaining instalments needs to be paid on the next day following two months from the dismissal.

With respect to workers, technicians and servants (the criterion is whether the physical element is prevailing in their work instead of the intellectual, since if the intellectual element is prevailing, they are considered employees), there is also the same obligation for written termination of the employment relationship, like in the case of employees, and the requirement for notice of termination is determined as follows:

- a) for service of 2 months up to 12 months, notice before 5 days is required
- b) for service of 12 months up to 24 months, notice before 8 days is required
- c) for service of 24 months up to 5 years, notice before 15 days is required
- d) for service of 5 years up to 10 years, notice before 30 days is required
- e) for service of 10 years and up, notice before 60 days is required

The compensation due in such cases is not influenced by the employer's notice of termination towards the worker, technician or servant, it is payable in full and is determined as follows:

- | Service with the employer                | Compensation |
|--|--------------|
| a) from 2 completed months up to 1 year, | 5 day wages  |

- |  |               |
|--|---------------|
| a) from 1 completed/full year up to 2 years, | 7 day wages   |
| b) from 2 completed years up to 5 years,     | 15 day wages  |
| c) from 5 completed years up to 10 years,    | 30 day wages  |
| d) from 10 completed years up to 15 years,   | 60 day wages  |
| e) from 15 completed years up to 20 years,   | 95 day wages  |
| f) from 20 completed years up to 25 years,   | 15 day wages  |
| g) from 25 completed years up to 30 years,   | 135 day wages |
| h) from 30 completed years and up,           | 150 day wages |

Last but not least, it is important to mention that if the employee is dismissed for commitment of criminal act during the provision of his services, then there is no obligation of observance of the notice period nor of payment of compensation. If however the employee is cleared of the accusations, then he becomes entitled to receive the otherwise appropriate due compensation.

Finally, it has to be pointed out that not only the employer, but also the employee who intends to terminate his employment relationship has typically the obligation to give notice of termination to the employer. The notice period in this case is the half of the notice period that would apply in the same case for the employer, but it cannot be more than three months before the desired day of termination.

## 1.2 *Termination of fixed term employment relationships*

Fixed term employment contracts can be prematurely terminated by either party only for significant reasons (just cause).

Indeed, pursuant to article 672 of the Greek Civil Code, any of the parties of an employment contract can terminate the said contract at any time, with immediate effect, without any notice of termination, in case of existence of a just cause. Such right cannot be waived by means of an agreement.

Moreover, article 673 of the Greek Civil Code stipulates that if the breach of contract by one of the parties constitutes the just cause for the termination of the employment contract, then the party in breach is liable to pay compensation.

In case a compensation is payable, such compensation would in principle be the remaining salaries until the end of the agreed term of the employment contract, plus any other damage that will be proven, minus any amount that the party receiving the compensation has earned, following the termination and until the end of the original term of the contract, or any amount that the said party intentionally has failed to earn, since there is an obligation of the party receiving the compensation to mitigate his damage.

## 2. *Maintenance of contractual stability in football*

### 2.1 *Termination of employment contracts by players or clubs*

Football players in Greece are considered employees but they enjoy a special

status and their employment is regulated by means of the pertinent regulations of the Hellenic Football Federation (HFF) and the regulations of UEFA and FIFA.

The employment contracts of professional football players are fixed term employment contracts with maximum duration of five years and in case of minors three years.

The current Greek system is pretty harmonised with the FIFA Regulations on the Status and Transfer of Players and article 17 of the said regulations, with a very particular way however to calculate the compensation payable in case of breach of contract without just cause.

In fact, the Regulations on the Status and Transfer of Players of the HFF currently in force, regulate the termination of an employment contract under articles 13-17 of section IV which refers to contractual stability (titled “Maintenance of Contractual Stability Between Professionals and Clubs”).

Article 14 (“Termination of Contract With Just Cause”) of the Greek Regulations reads as follows:

*“Article 14 Termination of Contract With Just Cause*

1. *A contract may be terminated by any of the parties, without any kind of consequences for the innocent party, for just cause*
2. *The existence of just cause, with the exemption of the indicatively mentioned cases in the present regulations, is determined according to the facts of each particular case.*
3. *In case of termination of contract:*
  - a) *sanctions are imposed on the party in default, if the breach occurred during the protected period,*
  - b) *payment of compensation is due to the innocent party.*
4. *Just cause for the termination of the contract constitutes:*
  - a) *the non-payment of the regular wages of the player for a total period of two (2) months,*
  - b) *the non-payment of extra payments (bonuses) for a period of two (2) consecutive months,*
  - c) *the non-payment of an instalment of the ones mentioned in the contract for a period of more than thirty (30) days,*
  - d) *the non-payment on behalf of the club of the amounts due for the social insurance of the player for a period of more than 45 days,*
  - e) *the non execution of a private insurance contract by the club or the relevant professional union, for a period of more than 45 days following the commencement of the relevant championship,*
  - f) *the sanction of the player for receipt of substances or use of forbidden methods (doping),*
  - g) *the sanction of the Club for inducement of the player for receipt of substances or use of forbidden methods (doping),*
  - h) *the sanction of the player for disciplinary offence with restriction on playing for more than 8 matches or 2 calendar months for one year contract, for more than six months for three years of contract,*

- for more than eight months for five years of contract,*  
 i) *the just cause as determined by the Greek labour law”.*

It is thus clear that just cause for the termination of an employment contract by a player would usually be the violation by the club of its financial obligations.

For a club, just cause of termination would usually refer to behavioural issues of the player and possible severe sanctions of the player or doping.

Furthermore, article 13 of the HFF Regulations provides for the possibility of an established professional to terminate a contract with sporting just cause, in case he has participated during a season in less than 10% of the official matches of the team. The termination can only occur after the end of the season in line with FIFA Regulations. In case of termination for sporting just cause, there is no disciplinary sanction for the player. However, the player might be liable to pay compensation to the club.

## 2.2 *Compensation in case of breach of contract by a player or a club*

The issue of the compensation payable by the party that breached the contract without just cause to the other party and the pertinent calculation of such compensation, are governed by article 17 of the Greek Regulations on the Status and Transfer of Players, which constitute a combination between article 17 of the FIFA Regulations on the Status and Transfer of Players and the old Greek provisions for the compensation that was payable in case of breach of contract by a club without just cause.

The said article 17 of the HFF Regulations on the Status and Transfer of Players which is titled “Consequences of Termination of Contract Without Just Cause” reads as follows:

*“Article 17 Consequences of Termination of Contract Without Just Cause  
 The following provisions apply for compensation and sporting sanctions in case of termination without just cause:*

1. *In any case, the party in breach of contract is obliged to pay compensation. The amount due to the other party as compensation for breach of contract, either within the protected period, or out of the protected period, may be stipulated in the contract.*
2. *If the amount of the compensation is not stipulated in the contract, or if a lower amount, in comparison to the following amounts, is stipulated, the following apply:*
  - a) *In case the club is responsible for terminating the contract out of the protected period, then it must pay to the player:*
    - i) *all regular monthly wages for the time remaining until the end of the next transfer period (after the termination), as well as the applicable pro rata Christmas and Easter bonuses and holiday allowance, and*
    - ii) *an amount equal to the sum of the remaining instalments of*

*the contract until the expiry date agreed by the parties, divided by the number of the remaining transfer periods.*

*b) In case the club is responsible for terminating the contract within the protected period, it must pay to the player:*

*The double of the above mentioned amounts i) and ii).*

2. *In case the player is responsible for terminating the contract, compensation is due exclusively and only for the following reasons:*

*a) For misleading the club with false data regarding the required documents for the signature of the contract and the issuance of the player's status certificate.*

*b) For breach of the existing contract in any way, in order to sign a new contract with another team.*

*For the above mentioned cases, the compensation is calculated according to the provisions of paragraph 2 a i) ii).*

*If the breach of contract (par.3b) is committed within the protected period, the amounts of paragraph 2 a i) ii) must be paid in double.*

3. *Entitlement to compensation cannot be assigned to a third party. If a professional is liable to pay compensation, the professional and his new club will be jointly and severally liable for the payment of the compensation.*

4. *In addition to the obligation to pay compensation, sporting sanctions shall also be imposed on the party violating the contractual terms within the protected period, as follows:*

*a) The player liable will be restricted from participating in official matches for four months. In case of aggravating circumstances, the restriction may be extended to six months. This sporting sanction shall take effect from the start of the following season of the new club.*

*b) The liable club will be banned from registering in any way, any new native or foreign players for two registration periods.*

5. *Any unilateral breach without just cause or sporting just cause, committed after the protected period, will not result in sporting sanctions*

6. *Any club or person subject to the Statutes and Regulations of the Hellenic Football Federation, UEFA and FIFA (club officials, players' agents, players, etc.), who acts in a manner aiming to induce a breach of contract between a professional and a club in order to facilitate the transfer of a player, shall be sanctioned according to the present Regulations or other relevant regulations."*

7. *Any club or person subject to the Statutes and Regulations of the Hellenic Football Federation, UEFA and FIFA (club officials, players' agents, players, etc.), who acts in a manner aiming to induce a breach of contract between a professional and a club in order to facilitate*

*the transfer of a player, shall be sanctioned according to the present Regulations or other relevant regulations.”*

Therefore, according to Greek law, a player or a club that has breached the contract without just cause is in all cases liable to pay compensation to the other party.

Pursuant to the aforementioned article 17, such compensation can be established in advance by the parties by means of the contract (agreed compensation for breach of contract). In that case, the payable compensation by the party in breach is the one contractually agreed, provided though that the said agreed compensation is not lower than the one provided by the Greek Regulations and more specifically by article 17.

Indeed, the standard contract of the HFF gives the possibility to the parties to establish the amount of the agreed compensation in case of breach of contract by the club in or out of the protected period (the protected period is of course the same of the FIFA Regulations) and by the player in or out of the protected period.

It is thus obvious that the parties can establish different levels of compensation depending on which party is committing the breach and whether the said breach occurs within or out of the protected period.

However, it is advisable that the agreed compensation shall be proportionate to the value of the contract and the same, independent of whether the breach occurs by the club or the player. In the opposite case, the agreed compensation could be deducted, if for example it is disproportionate or if the respective compensation in case of breach by the other party is much lower, since the parties, as general principle, shall be put in equal footing.

If though, no compensation has been agreed by means of the employment contract or if the amount of the agreed compensation is lower than the compensation that would be payable by means of article 17 in the case in question, then article 17 applies with respect to the compensation payable.

With respect to the breach of contract committed by the player, it should be noted that compensation is due by the player to the club, only in case the player had breached his contract with the aim to sign a contract with a new club.

Regarding the amount of compensation and its calculation, article 17 provides that the compensation that a player will have to pay to the club in case he breaches his contract in order to sign with a new club, is exactly the same with the one payable in case of breach by the club.

Moreover, in compliance with the FIFA Regulations, if a player has to pay compensation for breach of contract, the new club of the player is jointly and severally liable to pay such compensation.

Disciplinary sanctions apply only when the breach of the contract by the club or the player occurs within the protected period.

Thus, in case of breach by a player, the player is sanctioned with 4 months restriction on playing in official matches, which can raise up to 6 months in aggravating circumstances and, in case of breach by a club, the club is banned from acquiring and registering any new players for two registration periods.

The amount of compensation provided by article 17, is also depending on whether the termination of contract occurred in or out of the protected period.

If the breach occurred out of the protected period, the compensation payable by the party in breach is basically the equivalent of the remaining instalments of the contract, divided by the number of transfer windows until the end of the contract, plus an amount equal to the regular monthly wages of the contract (one should bear in mind that it is mandatory for the standard employment contracts of the HFF to include, in addition to the instalments of the contract which are usually the main remuneration of the player, an amount as monthly wages) until the end of the next transfer period following the breach (plus the respective pro rata amount of Christmas and Easter bonuses and holiday allowance).

If the termination occurred within the protected period, then the above mentioned amounts are paid in double.

For example, a player has signed a contract on 1<sup>st</sup> July 2008 for four years, that is, until 30 June 2012 and it was agreed that he would receive 400,000 euros net in sixteen instalments of 25,000 euros net each, payable on 1<sup>st</sup> August 2008, 1<sup>st</sup> of December 2008, 1<sup>st</sup> of February 2009, 1<sup>st</sup> of May 2009, 1<sup>st</sup> of August 2009, 1<sup>st</sup> of December 2009, 1<sup>st</sup> of February 2010, 1<sup>st</sup> of May 2010, 1<sup>st</sup> August 2010, 1<sup>st</sup> of December 2010, 1<sup>st</sup> of February 2011, 1<sup>st</sup> of May 2011, 1<sup>st</sup> of August 2011, 1<sup>st</sup> of December 2011, 1<sup>st</sup> of February 2012 and 1<sup>st</sup> of May 2012, plus 1,000 euros net as monthly wages (12 months per year, plus Easter Bonus equal to half of the monthly wages, Christmas Bonus equal to one monthly wages and holiday allowance equal to half of the monthly wages).

If the club breaches the contract without just cause on 15 November 2011, then the club would have to pay the player as compensation for the unlawful breach the amount that equals the total amount of the remaining instalments of the contract, divided by the number of transfer windows until the date of the normal expiry of the contract plus the monthly wages until the end of the transfer window that follows the date of the breach.

Thus, in our example, the club would be liable to pay compensation amounting to: a) 75,000 euros net (instalments of December 2011, February 2012 and May 2012), since there is only one transfer window from November 2011 until June 2012 (the winter transfer window of January 2012) and therefore the residual amount of the instalments of the contract (75,000 euros) is divided by one, meaning that the whole amount is actually due as compensation for the breach of contract and b) an additional amount of 4,000 euros net, such amount corresponding to the monthly wages until the end of the next transfer window, that is from November 2011 until the end of January 2012, plus the Christmas Bonus of 2011 (3,000 euros monthly wages plus 1,000 euros Christmas bonus).

However, if the breach had occurred within the protected period, then the above mentioned amounts of compensation would have been double according to article 17 para. 2b.

On the other hand, if the breach had occurred on 15 June 2011, instead of 15 November 2011, the payable compensation would be lower, since pursuant to

article 17, the amount of compensation would be: a) 50,000 euros net, since there would be two transfer windows from 15 June 2011 until June 2012 (the summer window of 2011 and the winter transfer window of January 2012) and therefore the amount corresponding to the remaining instalments of the contract (instalments of August 2011, December 2011, February 2012 and May 2012), that is, the amount of 100,000 euros net, would be divided by two and b) an additional amount of 4,000 euros net corresponding to the monthly wages until the end of the next transfer window, that is from June 2011 until the end of August 2011, plus the holiday allowance and a small amount pro rata for the Christmas Bonus of 2011 [3,000 euros monthly wages plus 500 euros holiday allowance and 500 euros pro rata (4/8) for the Christmas bonus].

Therefore, in the previous example, the club would actually pay lower compensation if the termination had occurred in June 2011 instead of November 2011 (both terminations out of the protected period), since in the first case the club would have to pay the player compensation for breach of contract amounting to 54,000 euros net, while in the second case the club would have to pay compensation for breach of contract amounting to 79,000 euros net.

However, the decision of the legislator to link the calculation and the level of the payable compensation with the number of transfer windows that fall within the period from the date of termination until the end of the original term of the contract, together with the mere fact that, under article 17, the amount of the payable compensation for breach of contract is fixed and constitutes the upper limit and thus there is no space for higher compensation than the one stipulated therein, provide the party in breach with the possibility to accurately calculate in advance the payable compensation and even to plan a termination at a certain time, in order to pay lower compensation for the said breach.

The above described reality is clearly contrary to the system provided by article 17 of the FIFA Regulations on the Status and Transfer of Players, which does not provide for a fixed and easy to calculate compensation, but rather leaves the said calculation of the appropriate compensation to the competent bodies that are obliged to decide on a case by case basis.

In fact, it is really interesting to see the difference between the system of compensation provided by article 17 of the HFF Regulations in cases of breach of contract without just cause and the respective system of article 17 of the FIFA Regulations.

As aforementioned, while the calculation of the compensation pursuant to article 17 of the FIFA Regulations is based on objective criteria and cannot be easily calculated and predicted in advance, the compensation provided by article 17 of the Greek Regulations for breach of contract without just cause is a fixed compensation and cannot be lowered or increased because of any aggravating or mitigating factors, apart from the aggravating circumstances of the breach committed within the protected period provided by para. 2b of article 17 of the Greek Regulations.

Nevertheless and despite the clear wording of article 17 of the Greek Regulations, it has been argued that the compensation provided by the said article can actually be lowered in case there are mitigating circumstances.

However, the said opinion, which sounds logical and is in line with both the jurisprudence of the Greek civil courts referring to compensation for breach of a fixed term employment contract (out of football world) and with general principles of law, does not seem to be the prevailing one and does not seem to be supported by either the actual text of article 17 or by the jurisprudence of the Greek competent sport bodies.

Indeed, while there is no rich jurisprudence on the said matter (only a couple of cases), mainly because the termination needs to be confirmed by the competent bodies over long procedures and therefore, players are reluctant to terminate the employment contract based on the said article, however, in the few cases where the issue of such compensation was dealt with, it was upheld that the compensation provided by article 17 is a fixed compensation which cannot be lowered or increased.



## SPORT AND CONTRACTUAL STABILITY: THE ITALIAN CASE

by *Michele Colucci\**

SUMMARY: 1. Law No. 91 of 1981 on Professionalism in Sport – 2. The status of Italian Athletes – 3. A special employment relationship – 4. The employment relationship in football – 5. Rights and obligations – 6. Termination of the contract – Conclusions

### *1. Law No. 91 of 1981 on Professionalism in Sport*

In Italy the legal basis for labour relations in sport are laid down by Law No. 91 of 23 March 1981, which substantially amended the previous legal framework and provided a special set of regulations suited to the specificity of sport.<sup>1</sup>

Pursuant to Article 1 of Law No. 91/81 ‘the practice of a sporting activity, whether individually or as part of a group, as a professional or an amateur, is free’.

Despite such a general provision, a sports activity can be considered as being completely free only when carried out as a formative or recreational activity and thus for leisure.

In fact, at professional level this freedom could be substantially restricted by the de facto monopoly of the sports federations and their rules.<sup>2</sup>

Article 1 reiterates principles enshrined in the Italian constitution, in particular Articles 2, 3, 4, and 32 concerning personal freedom to carry out sporting activities, which may not be limited by state legislation except for ‘justified’ reasons.

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<sup>1</sup> L. CANTAMESSA, ‘*Il contratto di lavoro sportivo professionistico*’, in L. Cantamessa, Giovanni Maria Riccio, Giovanni Sciancalepore, ‘*Lineamenti di diritto sportivo*’, Giuffrè, Milan, 2010, 171; M. COLUCCI, ‘*Il rapporto di lavoro nel mondo dello sport*’, in M. Colucci, ‘*Lo sport e il diritto*’, Jovene, Napoli, 2004, 17; G. VIDIRI, ‘*Profili societari ed ordinamentali delle recenti modifiche alla legge 23 marzo 1981, No. 91*’, *Riv. dir. sport.*, 1997, 3; F. BIANCHI D’URSO & G. VIDIRI, ‘*La nuova disciplina del lavoro sportivo*’, *Riv. dir. sport.*, 1982, 3.

<sup>2</sup> M. SIGNORINI, ‘*Le organizzazioni sportive*’, in M. Colucci, ‘*Lo sport e il diritto*’, cit., 10; A. QUARANTA, ‘*Sulla natura giuridica delle federazioni sportive nazionali*’, *Riv. dir. sport.*, 1986, 172; G. PETRUCCI, ‘*Rapporto di lavoro con federazioni sportive: natura pubblica o privata?*’, *Dir. e pratica del lav.*, 1997, 812; C. NOYA, ‘*La nuova disciplina delle società sportive professionistiche*’, *Riv. dir. sport.*, 1997, 629.

The practice of a sporting activity cannot be subject to the registration to the Italian National Olympic Committee (CONI) nor to a sporting federation. However, membership of a sporting organization implies acceptance of its rules, including those establishing the requirements and criteria that distinguish the two categories of athletes (professionals and amateurs).<sup>3</sup>

Pursuant to Article 2 of Law 91/81 professionals<sup>4</sup> are the ‘athletes, trainers, technical and sports managers, and coaches who carry out a remunerated sporting activity on a continuous basis’.

In order to work professionals need to obtain an authorization from the relevant national sports federation, in accordance with the rules laid down by them and provided for by CONI.<sup>5</sup>

Law No. 91/81 deals with technical staff alongside athletes as was previously the case with the law which places artistic and technical staff under a single legal statute; however, it is possible to distinguish the technical and sports managers (the person who is responsible for setting the rules for the sporting activity in a given sector) from the managers/coaches and trainers (who are usually assistant coaches). Only the latter have the recognized competence to prepare and train the athletes from both a technical and physical point of view.

Article 2 finally set a rigid legal framework which had the negative consequence of siphoning off all the cases of ‘de facto professionalism’ from Law No. 91/81.

In fact, the categories of sports professionals are listed in such a manner as to exclude any possibility of extending its interpretation or application to other categories. It is, however, true that the *ratio* of the provision was to create a far-reaching regulation,<sup>6</sup> aiming at giving large autonomy to the sports system and consequently to the organizational structure headed by CONI.

On the basis of the above considerations, the categories listed in Article 2 cannot be considered exhaustive and therefore the only two requirements necessary to qualify as a professional are the following: (a) authorization by the national sports federation; and (b) remuneration.

The same provision does not cover amateur sporting activity since this has different characteristics and objectives: Amateur sport is practiced for free

<sup>3</sup> P. AMATO, ‘Il vincolo sportivo e le indennità di formazione e di addestramento nel settore calcistico alla luce della sentenza Bernard: il fine che non sempre giustifica i mezzi’, in M. Colucci & M. J. Vaccaro, *Vincolo sportivo e indennità di formazione. I regolamenti federali alla luce della sentenza Bernard*, SLPC, Bracciano, 2010, 51.

<sup>4</sup> L. CANTAMESSA, ‘Il contratto di lavoro sportivo professionistico’, in L. Cantamessa, Giovanni Maria Riccio, Giovanni Sciancalepore, ‘Lineamenti di diritto sportivo’, cit., 150; G. GIUGNI, ‘La qualificazione di atleta professionista’, *Riv. dir. sport.*, 1986, 166.

<sup>5</sup> G. MARTINELLI, ‘Lavoro autonomo e subordinato nell’attività dilettantistica’, *Riv. dir. sport.* (1993): 13; A. D’HARMANT FRANÇOIS, ‘Il rapporto di lavoro sportivo tra autonomia e subordinazione’, *Dir. lav.* 1 (1988): 265; F. REALMONTE, ‘L’atleta professionista e l’atleta dilettante’, *Riv. dir. sport.* (1997): 371.

<sup>6</sup> G. AMBROSIO & A. MARANI TORO, ‘L’iter Parlamentare della Legge 23 marzo 1981, No. 91, sui rapporti tra società e sportivi professionisti’, *Riv. dir. sport.* (1981), 492.

even though amateur sportsmen are allowed to receive a series of gratuities in the form of reimbursements which, however, cannot be considered *strictu sensu* as a salary.

## 2. *The status of Italian Athletes*

In general terms, the status of an athlete – professional or amateur- is defined by each single federation taking into account that amateur sport is carried out for free even though amateur athletes are allowed to receive a series of gratuities in the form of reimbursement which, however, cannot be considered as a salary.

As far as the type of employment relationship is concerned article 3 of Law No. 91/81 states that the sporting activity carried out by the athlete is considered as work under an employment contract, and therefore it is subordinate in its nature, except in those cases where at least one of the following requirements is met:

- (a) the activity takes place in a single sporting event or a series of sporting events linked over a short period of time;
- (b) the athlete is not bound by contract to attend training or preparation sessions;
- (c) though the services provided by the sportsmen are on a continuous basis, they do not exceed eight hours per week or five days per month or thirty days per year.

According to some authors<sup>7</sup> the hypothesis under (a) clearly refers to a fixed-term contract while the one under (c) to a vertical part-time contract. On the contrary, the hypothesis under (b) certainly does appear to be a contract of self-employment<sup>8</sup> because the elements of subordinate status are absent.<sup>9</sup>

The concept of ‘subordinate status’, historically linked to the characteristics of work done within an enterprise, progressively proved inadequate to cover the various forms of work under an employment contract.

Hence the efforts of legal scholars and the courts to supplement and refine it, either linking it with socio-economic criteria (such as the economic weakness of employees or the fact that the means of production and the results of their work do not belong to employees),<sup>10</sup> or referring to some elements from which the presumption of such a relationship may be inferred (such as the employee being tied to the organization of the enterprise, the payment system, the existence of fixed working hours, the incidence of risk).

<sup>7</sup> M. PERSIANI, ‘*Commento all’art. 3 della Legge 91/1981*’, *Nuove Leggi civ. comm.* (1982): 567.

<sup>8</sup> According to Art. 2222 of the Italian civil code, this is a contract, under which one party undertakes, for a fee, to perform a task or service without the ties of subordinate status and using predominantly his or her own labour. Self-employment is governed not by the protective norms and principles of labour law but by those covering ordinary contracts of exchange (such as sale, hire, etc.), which presupposes the parity, not the inequality, of the contracting parties.

<sup>9</sup> V. FRATTAROLO, *L’ordinamento sportivo nella giurisprudenza* (Milano, 1995), *passim*.

<sup>10</sup> T. TREU, *Labour Law in Italy*, The Hague, Kluwer Law International, 1997.

In any case, all these criteria need to be considered within an overall assessment of the employment relationship taking account of the particular features of the activity performed. Absolute criteria to define subordinate status do not exist and has maintained that qualification of the relationship must be decided not by a judgment of identity but by a judgment of approximation, on a case-by-case basis.

Following Law 91/81, a sporting activity is considered a subordinate form of employment and in some cases as self-employment.<sup>11</sup> Employment in sport is extremely varied, compared to the typical characteristics of employment provided for by Article 2094 of the Civil Code, which defines an employee as someone who works in a position of subordination and under the direction of another person, under a contract of employment. Besides, the services provided by professional athletes have a nature and characteristics of their own.

### 3. *A special employment relationship*

A special legal regime applies to sports professionals because of their status and the peculiarities of the field where they play.

In this perspective, the employment relationship in Sport is considered as a “special employment relationship” in the sense that some labour law provisions which apply to all workers with regard to some of their fundamental rights (Law 300/1970, so called “workers statute” and Law 604/ 66 on dismissals and the relevant legislation on fixed term contracts (Legislative Decree 2001/368) do not apply to professional athletes (art. 4 of Law 91/81).

In practice some limitations and restrictions foreseen in order to protect the workers do not apply to Sports Professionals because of the specificities related to their activities. The ban on monitoring with cameras the workers activities, the prohibition of checking the health and medical conditions of the worker in case of illness and injury at workplace, the prohibition to hire workers directly and the right to be re-hired in case of dismissal without just cause do not apply to Sport.

The same is true with regard to fixed term contract whereas the Italian legislation (Decree 2001/368) sets a series of restrictive conditions in order to hire a worker and expressly states that the contract for a fixed term period can be legitimately renewed only once for the same duration and activity.

It is clear that all these conditions do not match with the needs of both players and clubs who need more mobility taking into account with the peculiarities of sports competitions and the very short length of the career of sports professionals.

As a way of derogation from principles of contract law, a written contract establishing an employment relationship is required in the sports sector; otherwise

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<sup>11</sup> L. CANTAMESSA, ‘Il contratto di lavoro sportivo professionistico’, in *Lineamenti di diritto sportivo*, eds L. Cantamessa, G.M. Riccio & G. Sciancalepore (Milano, Giuffrè, 2008), 147; DURANTI, ‘L’attività sportiva come prestazione di lavoro’, *Riv. it. dir. lav.* 1 (1983), 699.

the contract is null and void.<sup>12</sup> Such a form is necessary in order to prove the existence of the contract itself and to afford a minimum level of protection to the players.<sup>13</sup>

Article 2126 of the Italian Civil Code provides for the ratification of an invalid employment contract (when for example the condition that it should be in writing has not been respected) for the period it was implemented: a professional football player who performs without a written contract certainly has the right to everything to which he is due by contract.

On the basis of the provisions of Article 4, paragraph 1, every athlete's contract must be drawn up 'in accordance with the standard contract drafted by the relevant national sports federation and the representatives of the interested categories'. Every club has the obligation to file the contract with the relevant sports federation for its approval.

This provision is of great significance because it gives the federations or the leagues important powers: they decide on the standard contract in the collective bargaining process and subsequently they should check every single contract.<sup>14</sup>

In that regard for some federations/leagues the standard contract is just a framework to be fleshed out with content in the negotiating stage of each individual relationship while for others it must contain the full text of the collective bargaining agreement.

Pursuant to Article 4, paragraph 12, Law No. 91, the athletes shall play for the club, respecting technical instructions and other requirements given to that end. This provision is in conformity with the general rule of Article 1176 of the Italian civil code which obliges the employee to perform his/her services using the care, skill, and prudence demanded by the nature of the job performed.<sup>15</sup>

Instructions concerning players' behaviour outside sport *tout court* are legitimate and binding only if they are justified by requirements related to his professional activity. In any case, they cannot be of prejudice to human dignity.

Although Article 8 of Law 300/1970 (the so-called 'workers' statute') prohibits any investigations into workers' private opinions and private lives unless it is necessary in relation to the work they carry out; such investigations are allowed in the sports sector to the point that athletes must accept in writing the insertion of a clause in the contract obliging them to observe the technical instructions and training indications given by the club.

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<sup>12</sup> V. FRATTAROLO, *Il rapporto di lavoro sportivo*, Giuffrè, Milan, 2004, 38-61; G. VIDIRI, 'Sulla forma scritta del contratto di lavoro', *Giust. civ.*, I, 1993, 2839.

<sup>13</sup> M. SANINO & F. VERDE, *Il diritto sportivo*, CEDAM, Padova, 2008, 191.

<sup>14</sup> L. CANTAMESSA, 'Il contratto di lavoro sportivo professionistico', cit., 157; M. COLUCCI, 'Il rapporto di lavoro nel mondo dello sport', cit., 25; M. DE CRISTOFARO, 'Commento all'art. 4, L. 23 marzo 1981, No. 91', *Nuove leggi civ. comm.*, 1982, 574.

<sup>15</sup> M. ROCCELLA, 'Manuale di diritto del lavoro', Giappichelli, Torino, 2010, 279; A. BRECCIA FRATADOCCHI, 'Profili evolutivi e istituzionali del lavoro sportivo', *Dir. lav.*, I, 1989, 71.

#### 4. *The employment relationship in football*

The employment relationship in football between players and clubs is regulated by reference to Law 81/91 as well as by the collective bargaining agreement (hereafter “CBA” recently concluded by Assocalciatori (the Italian trade union association), the Italian League of Serie A, and the Italian Federation on 5 of September 2011.<sup>16</sup>

#### 5. *Rights and obligations*

The Collective Bargaining agreement governs the economic and regulatory treatment of the relationships between professional footballers and Clubs. In this context it provides clubs and players with rights and obligations.

Pursuant to art. 10 of the CBA the player shall provide his sports services to the Club and observe the technical instructions as well as disciplinary rule.

He shall be loyal to the club and therefore avoid any behaviour that could be detrimental to the Club’s image.

This means that even rules relating to the footballer’s lifestyle are legitimate and binding, provided, however, that human dignity is respected at all times.

Particularly important is also the provision according to which the player shall have no right to interfere in the Club’s technical, managerial and business decisions.

The violation of one of the above rules could lead to the breach of contract and therefore to its termination with all (sporting and economic consequences).

Depending on the seriousness of the breach a player could be sanctioned with a written warning; fine; reduction of pay; temporary exclusion from training sessions and pre-championship preparation with the first team; termination of the Contract.

Of course, before applying any kind of disciplinary sanction all necessary procedural steps should be undertaken, as for instance the communication in writing of the alleged violation.

Peculiar is the provision concerning the fine. This shall consist of a contractual penalty the amount of which shall not exceed 30% (thirty percent) of one twelfth of the fixed part only of their gross annual remuneration. In the case of the accumulation of several infractions committed during the same month, the fine shall not exceed 60% (sixty percent) of one twelfth of their gross annual remuneration (fixed part).

The amount of the remuneration can be reduced and shall not exceed 50% (fifty percent) of the part of gross annual compensation relating to the period for which the reduction itself is requested.

In case the player has been sanctioned by a national or international Sports Justice body, the Club can propose a reduction of the effective gross remuneration

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<sup>16</sup> The collective bargaining agreement is available on [www.assocalciatori.it/LinkClick.aspx?fileticket=PwXxRnZrcIQ%3d&tabid=58&language=en-US](http://www.assocalciatori.it/LinkClick.aspx?fileticket=PwXxRnZrcIQ%3d&tabid=58&language=en-US) (19 September 2011).

for the period corresponding to the duration of the disqualification, and for an amount not exceeding 50% (fifty percent) of the remuneration due for the period.

Due account shall be given to: a) the fixed part of the compensation only, a) the nature of the anti-regulatory conduct occurring and punished and of the subjective element that has given rise to the disqualification, c) and the extent of the detriment caused to the Club.

Pursuant to art. 11 para. 10 of the Collective bargaining agreement the player's temporary exclusion from training sessions or from pre-championship training with the first team, may also be ordered provisionally by the Club provided that the latter duly notifies the player with the appropriate sanction.

The club could ask and obtain the termination of the contract in those cases where the player has been condemned in last degrees.

The player, on his side, can oppose the disciplinary sanction and ask either for the reinstatement and/or for the termination of the contract. Before the national arbitration body the player can ask damages and/or the termination of the employment agreement when the Club has violated contractual obligations it is required to fulfil towards him.

In particular, in case the player is not allowed even to train with the first squad or does not have access to the training facilities, after having duly notified the club, can refer the matter to the arbitration body asking the reinstatement or the termination of the employment agreement. In both cases, the footballer also has the right to payment of the damages in the measure of not less than 20% (twenty percent) of the fixed part of his gross annual compensation.<sup>17</sup>

Pursuant to art. 13 of the collective bargaining agreement the player has just cause to terminate a contract when the club delays 20 days the payment of the monthly salary to its players. By far this is a provision very much in favour of the players working in Italy since the FIFA Dispute Resolution Chamber, for instance, in the international cases it judges on, recognises the right to ask termination for just cause only when there are 3 salaries due (in some circumstances two).

If the footballer is signed by the Club following temporary transfer of the contract as specified in Act no. 91 of 23 March 1981 and further amendments, the notice referred to in article 13 must also be sent, with the same modalities and terms, to the Club which temporarily transferred the contract. Similar notice must be given to the Club that holds participation rights in the event of a definitive transfer.

## 6. *Termination of the contract*

A contract between a player and a club can be terminated: a) because the parties

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<sup>17</sup> Pursuant to art. 12 para. 4 of the collective agreement, if, after the decision taken by the arbitration body for the reinstatement of the player, the Club does not comply within 5 (five) days of receipt of the decision, the footballer will be entitled to obtain the termination of the Contract as well as compensation for damages which is calculated as the amount of the contractual compensation due up until the end of the sports season.

do not fulfil their contractual obligations as examined above, b) upon its expiration, or c) or by mutual agreement.

Of course, it can also be terminated for *just cause* which occurs when a fact or situation arises such that the employment relationship cannot be continued even temporarily.

The just cause does not necessarily presuppose non-fulfilment of contractual obligations, since it can refer to facts or situations which are external or private although still incompatible with the possibility of continuing the employment relationship; in reality, however, such facts must be regarded as relevant in so far as they affect the probability of proper fulfilment of contractual obligations in the future. Non-fulfilment of the duties inherent in the employment contract must be of exceptional gravity, such that it does not fall within the less serious category of subjectively justifiable reason or disciplinary sanction as opposed to dismissal. If the violation is among those laid down by collective bargaining as cause for disciplinary dismissal, the guarantees covering disciplinary sanctions apply to it.

Except in the event of a *just cause*, resignation carries an obligation to give notice to the employer. Unlike dismissal, resignation does not require any justification or reason.

The definition of just cause and whether just cause exists shall be established in accordance with the merits of each particular case and taking into account the relevant provisions of the CBA.

In fact, behaviour that is in violation of the terms of an employment contract still cannot justify the termination of a contract for just cause. However, should the violation persist for a long time or should many violations be cumulated over a certain period of time, then it is most probable that the breach of contract has reached such a level that the party suffering the breach is entitled to terminate the contract unilaterally.

In the event of just cause being established by the competent body, the party terminating the contract with a valid reason is not liable to pay compensation or to suffer the imposition of sporting sanctions.

On the other hand, the other party to the contract, who is responsible for and at the origin of the termination of the contract, is liable to pay compensation for damages suffered as a consequence of the early termination of the contract.

In particular, in case it is the club to terminate the contract without just cause, the club will pay a compensation equal to the remaining value of the contract.

On the contrary, in case it is the player to terminate the contract he/she will compensate the damages caused to the Club which are nevertheless very difficult to prove.

Even if art. 15 of FIFA regulations foresee the termination of the employment relationship for the so called “sporting just cause” and such a principle is binding on national sports federations, the Italian one has not implemented such a rule.

The Regulations reflect the fact that an established player may have valid

sporting reasons (so-called 'sporting just cause') to prematurely terminate a long-term contract unilaterally if he has appeared in less than 10% of the official matches of his club during a season.

With regard to termination by law, it is questionable whether the three grounds for such termination provided for in the civil code (non-performance, frustration and excessive burden) can be applied to the employment relationship in football, given its special nature and the exhaustive special provisions governing dismissals and resignations.

With regard to unilateral termination of the employment relationship, Article 18 of the workers' statute and Law No. 604/66 on individual dismissal (which put limits on the power of the employer to terminate the contract)<sup>18</sup> does not apply to the sports sector.

In other words, Law No. 91/81 establishes the principle of dismissal *at will* in case of a long term contract and derogates from Articles 2118 and 2119 of the civil code, unless these regulations are modified by federation rules, contract types or collective agreement.<sup>19</sup>

Pursuant to art 2118 cc, either party may terminate a contract of unspecified duration by giving the required notice as specified by existing regulations or customs and practice or according to the principles of equity (see however the reference to the need for a "justified reason" above). Either party failing to give the required notice becomes liable for a payment equal to the remuneration which would have been paid during the period of notice. The employer must also make such a payment in lieu of notice in cases where the employee dies in service. The length of periods of notice is governed largely by collective agreements at the national industry level and varies according to the sector, category of employee and length of service. The notice period runs from the first day of the month following that in which the notice is received by the employee.

Article 2119 provides that each party can terminate a fixed term-contract before the expiration of the term or a long-term contract without notice for just cause, i.e., due to a fact that prevents the continuation, even temporarily (for the period of notice or until the expiration of the employment relationship).

The inapplicability of Article 7 of Law 604/66 on individual dismissal to the disciplinary measures taken by sporting federations should be underlined. If applied, this would increase the time needed to deliver judgment in sports justice, and thereby jeopardize the organization and carrying out of sports events.<sup>20</sup>

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<sup>18</sup> The employer must communicate the dismissal in writing, setting out the reasons of the dismissal; and secondly, he must have a justifiable reason or just cause. If these formalities are not fulfilled, or in the event of evidence of discriminatory purpose, the dismissal is null and void; in the absence of substantial grounds, it can be contested by the employee, within sixty days of receiving the communication, in order to obtain its annulment, and the employer is then bound by law either to reinstate the employee or to pay specified compensation for damages.

<sup>19</sup> M. DI FRANCESCO, 'Risoluzione ante tempus del contratto di lavoro sportivo', in *Riv. Dir. Ec. Sport*, 3, 2007, 48.

<sup>20</sup> The basis of the employer's managerial authority is to be found in Art. 2106 of the Civil Code,

However, Article 7 applies to all matters which are not technical or sports-related.

As a consequence, an individual fixed-term contract may be terminated when the contract expires or when the tasks for which the contract was drawn up are completed. A long-term contract may also be terminated if the company ceases doing business completely (not where the employer merely changes activity), by mutual consent, because of *force majeure* or the total incapacity of the employee, the withdrawal of one party without the consent of the other, or one party failing to fulfil the contract.

If withdrawal from the contract is due to the employee's resignation, then there are no legal restrictions, although most collective agreements stipulate periods of notice and that notice must be given in writing.

However, any employee may resign with immediate effect in the circumstances specified in art. 2110 cc (such as non-payment of wages or social security contributions, closure of the enterprise, failure to be included within the category or grade corresponding to the work effectively being undertaken, refusal to grant holidays, the unilateral changing of the employee's duties with a corresponding reduction in wages, offences by the employer against the duty to safeguard the physical and psychological well-being of the employee under sec. 2087 cc).

The CBA for football players contains specific provisions related to the case of termination of a contract for injury and illness. In particular art. 18 foresees that for the period of unfitness in the event of illness or, the footballer will be paid the compensation laid down in the Contract until the expiry of the same. If the footballer's inability because of illness or injury lasts for more than 6 (six) months, the Club may refer the matter to the relevant national arbitration body and ask the termination of the Employment Agreement or for the reduction to one half of the compensation due until the end of the period of inability. If the injury or illness is so serious the Club can immediately ask the termination of the employment agreement.

For the period of unfitness in the event of illness or, the footballer will be

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which provision was subsequently incorporated into the workers' statute, but hedged about with many guarantees for employees. For instance, Art. 7 of the statute stipulates, among other things, that the disciplinary code (*codice disciplinare*) relating to sanctions, to the offences for which each of these sanctions may be applied and to the procedures for appealing against them must be made known to employees by being posted up in a place accessible to all; that the employer may not apply any disciplinary measure without first communicating the grounds for it to the employees in question and hearing what they may have to say in their defence; and that the employees may be assisted in this by a representative of the union to which they belong or which they nominate for the purpose. The Constitutional Court has ruled that these procedural restrictions laid down by the statute are applicable not only to what are known as 'conservative' sanctions (i.e., disciplinary action short of dismissal), but also to individual dismissal on disciplinary grounds. See E.F. CARABBA, '*Illecito sportivo e illecito penale*', *Riv. dir. sport.* (1981), 186; G. DE SILVESTRI, '*Illecito penale e illecito sportivo*', *Riv. dir. sport.* (1981), 431; P. DINI, '*Il diritto sportivo nel codice penale e nel codice civile*' (1985), 16; I. MARANI TORO, '*La responsabilita degli atleti*', *Riv. dir. sport.* (1985), 389.

paid the compensation laid down in the Contract until the expiry of the same. If the footballer's inability because of illness or injury lasts for more than 6 (six) months, the Club may refer the matter to the relevant national arbitration body and ask the termination of the Employment Agreement or for the reduction to one half of the compensation due until the end of the period of inability.

If the injury or illness is so serious the Club can immediately ask the termination of the employment agreement.

Finally breaches of contract are dealt with by sports clubs, while sports-related offences are within the competence of the federations. In practice, sports clubs<sup>21</sup> no longer have any disciplinary power beyond verbal proof, while all other measures are decided on by each federation.

### *Conclusions*

*Pacta sunt servanda* is a fundamental principle of the Italian legal system.

Nevertheless its application to the Sports world is characterised by a series of derogations with regard to fundamental rights, dismissals, and fixed term contracts. Such derogations make the employment relationship in sport quite special.

Athletes and Clubs have specific needs with regard to the activities they carry out, in particular they claim more contractual freedom which nevertheless should be ideally counterbalanced by specific guarantees that they can negotiate and set up in collective bargaining agreements.

Contractual stability is granted but in a way that parties are anyway free to start, develop, and terminate their employment relationship under the specific provisions foreseen by the law and the relevant CBA.

For sure athletes and clubs in Italy have a high degree of contractual freedom and when they decide to end their employment relationship they are aware of the legal and economic consequences they will face especially in terms of compensation.

This is because contractual stability should always be linked to the concept of legal certainty rather than to (or only to) the abused concept of specificity of Sport.

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<sup>21</sup> M. MACRI, 'Associazioni e società sportive. Diritto commerciale', *Enc. giur.*, 111, 1988, 1; G. GRASSELLI, 'Il "vincolo" sportivo dei calciatori professionisti', *Dir. lav.*, 1, 1974, 399; G. FERRARO, 'La natura giuridica del vincolo sportivo', *Riv. dir. sport.* 1987, 3.



## CONTRACTUAL STABILITY IN FOOTBALL AND COMPENSATION IN CASE OF BREACH OF CONTRACTS IN PORTUGAL

by *José Manuel Meirim\**

SUMMARY: 1. The relevant national law – 2. Termination of the Sporting Labour Contract – 3. Compensation in case of breach of contract – 4. The relevant FIFA and portuguese sport rules – 5. A curious (or delicate?) question

### *1. The relevant national law*

Portugal is one of the few countries that have a special law aimed at governing the labour relations between professional players and clubs.

In fact, Law No. 28/98, of 26 June 1998,<sup>1</sup> lays down a new legal framework to be applied to the labour contract for the players and to the sporting training contract.

The principle *pacta sunt servant* applies to all contracts – therefore also to the one in the sports sector – pursuant to article 406, paragraph 1, of the in Civil Code.<sup>2</sup>

First of all, an insight into the core issue of the legal framework of the labour contract for professional players is needed, particularly focused on the aspects deemed relevant for the purpose to analyse the contractual Stability in Football.

Article 8 of Law 28/98 states that the length of the sporting labour contract shall not be less than one sporting season and not over eight seasons. Moreover a sporting labour contract may be concluded for less than one sporting season where (a) it has been concluded immediately after the beginning of a sporting season, to be effective up to the end of that season; (b) its objective is the hiring of a player, who is to participate in a competition or a given number of

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<sup>1</sup> Modified by Law No. 114/99, of 3 August 1999.

<sup>2</sup> “The contract must be strictly complied with. It may only be modified or terminated upon mutual consent of the parties involved therein or in the terms provided for by the law”.

events composing an identifiable unit within the corresponding sporting modality.

Any contract lacking reference to its expiry date shall be deemed entered into for one sporting season or for the season during which it concluded.

The lapse of time during which the sporting activities are running shall be construed as a sporting season, though never exceeding a 12-month period. The length of each sporting activity shall be fixed by the respective federation with sporting public utility”.

Special attention should be given to article 18 on “Freedom of work” according to which are deemed null and void any clauses inserted in the labour contract which aim at restraining or limiting the player’s freedom to work after expiry of the contractual relation.

The mandatory payment of a fair compensation in the form of the player’s promotion or self improvement may be set forth in a collective bargaining agreement. The said compensation shall be due to the former player’s employer by the new employer that concludes a sporting labour contract with the concerned player upon expiry of the former contract.

The collective bargaining agreement mentioned is applicable only to the transfers of players involving Portuguese clubs with registered offices on national territory.

The freedom to hire a player cannot be actually affected, in an unbalanced way, by the compensation value referred to in paragraph 2 here above.

Neither the validity nor the effectiveness of the new contract are dependent on payment of the compensation due under the provisions of paragraph 2 here above.

The above mentioned compensation can be paid by the player himself.

## 2. *Termination of the Sporting Labour Contract*

Chapter V of Law 28/98 contains rules concerning the Termination of the sporting labour contract.

According to the provisions of article 26, paragraph 1, the contract may be terminated due to: “(a) Expiry; (b) Revocation upon mutual agreement; (c) Dismissal with just cause decided by the sporting employer; (d) Termination with just cause upon the sporting player’s initiative; (e) Termination by any one of the parties during the experimental period; (f) Collective redundancies; (g) Drop-out of working sessions. The rules provided for in article 40 of the legal regimen on individual labour contract termination, as approved by Order in Council No. 64/89, of 27 February 1989, apply to the termination of contract due to drop-out of working sessions”.

## 3. *Compensation in case of breach of contract*

Article 27 of Law 28/98 deals with the duties and obligations of both players and clubs upon termination of the contract:

The party that breached the contract shall be liable to pay a compensation which cannot exceed the value of the considerations that might be due should the labour contract be terminated upon its expiry.

Where the termination has been caused by the employer, the provisions of the preceding paragraph shall not be detrimental to the employee's right to reintegration in the club in case of illicit dismissal.

Where, in case of dismissal promoted by the employer, the player is entitled to compensation under paragraph 1 here above, any remuneration paid to the player by another sporting employer for the same activity during the period corresponding to the term set out by contract shall be deducted from the said compensation.<sup>3</sup>

There are four situations that generate compensation according to article 27, paragraph 1:<sup>4</sup>

- Dismissal with just cause promoted by the sporting employer;
- Termination with just cause upon the initiative of the sporting player;
- Undue dismissal (without just cause);
- Undue for termination upon the initiative of the player (without just cause).

In these situations the party that caused or unduly promoted termination shall be deemed civilly liable by virtue of the damage deriving breach of contract. Compensation may not exceed the value of the considerations that might be due should the labour contract be terminated upon its expiry.<sup>5</sup>

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<sup>3</sup> Other relevant legal provisions on this issue are: articles 28, 29 and 30, that, correspondently, establish as follows:

*“Article 28 – Termination by the employee*

The compensation provided for in article 18 shall not take place in case the sporting labour contract is terminated with just cause by the employee”.

*“Article 29 – Communication of contract termination*

1 – The effectiveness of a sporting labour contract termination depends upon the communication to the entities that perform the compulsory registration of the concerned contract under article 6.

2 – The communication must be made by the party that promoted termination, and it shall refer the contract termination option that has been adopted. “.

*“Article 30 – Arbitration agreement*

1 – For purposes of settlement of any labour disputes arising from the sporting labour contract, the recourse to arbitration may be decided by the associations representative of the employers and the sporting players pursuant to Law No. 31/86, of 29 August 1986, by way of granting exclusive or prior powers to officially recognised joint arbitration committees, under Order in Council No. 425/86, of 27 December 1986.

2 – The agreement establishing recourse to arbitration as provided for in the preceding paragraph shall provide the powers of the joint arbitration committee and its composition.

3 – Is deemed competent under paragraph 1 of this article any arbitration committee or tribunal already existing on the entry into force of this Law, provided its powers derive from the agreement that determined its setting up”.

<sup>4</sup> Which refers to subparagraphs (c) and (d) of article 26.

<sup>5</sup> According to the Constitutional Court (*Decree No. 199/2009, of 28 April 2009*, published in the official journal *Diário da República*, 2.<sup>a</sup> série, n.º 105, of 1 June 2009, pages 21 914 – 21 918) the provisions laid down in article 27, paragraph 1, of Law No. 28/98, of 26 June 1998, are unconstitutional to the extent that they violate the principle of equality enshrined in article 13 of the Constitution by stipulating that, in case of termination with just cause upon the initiative of

Just for purposes of analysis let us concentrate on the fourth possible occurrence: the undue of termination of contract upon the initiative of the player.

As shown, a limit has been fixed for compensation even in this case: compensation may not exceed the value of the considerations that might be due to the player should the labour contract be terminated upon its expiry.<sup>6</sup>

We will see further ahead the possible impact of this rule when confronted with article 17, paragraph 1, of FIFA Regulations on the Status and Transfer of Players.

#### 4. *The relevant FIFA and portuguese sport rules*

FIFA Regulations on the Status and Transfer of Players were transposed, in totu, into the regulations of Federação Portuguesa de Futebol (FPF)<sup>7</sup> and into the regulations of Liga Portuguesa de Futebol Profissional (LPFP).<sup>8</sup>

In the case of FPF, we are dealing with a non official Portuguese version.<sup>9</sup>

The competitions organised by LPFP are, even when considering the Portuguese law, a kind of FPF competitions and, therefore, they remain subject to the above referred sports rules.

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the player, the compensation due «may not exceed the value of the considerations that might be due to the player should the labour contract be terminated upon its expiry»

<sup>6</sup> Some questions may arise when we consider the terms of the Collective Labour Contract entered into the Professional Football League and the Professional Football Players Union.

In fact, subparagraph (e) of article 39 stipulates that cancellation upon the player's initiative without just cause gives rise to termination of contract, where duly provided for in the contract. In this case, article 46 states as follows:

- 1 The player's right to terminate the contract in force unilaterally and without just cause may be provided for in the sporting labour contract by way of payment of a settled compensation to the club.
- 2 The compensation value may be defined or liable of definition on the basis of criteria duly laid down for that purpose..
- 3 The effectiveness of the termination depends upon the actual payment of the compensation or payment agreement.
- 4 The deposit of the compensatory amount with the LPFP shall have a release effect.

<sup>7</sup> Portuguese Football Federation.

<sup>8</sup> Portuguese Professional Football League.

<sup>9</sup> FIFA Regulations on the Status and Transfer of Players, disclosed in the *Comunicado Oficial da FPF* (Official Release of the *FPF*), n.º 93, dated 6 September 2010.

The Release read as follows:

“We call the attention of the Ordinary Associates, Clubs, SADs and other concerned persons to the fact that the enclosed text is a non official translation of FIFA's Regulations on the Status and Transfer of Players, which shall enter into force on the 1<sup>st</sup> of October of this year. The reading of this document does not exempt from visiting the FIFA website (www.fifa.com). The English version shall prevail in case of dispute.

These Regulations are fully recognised by the *FPF*, and the compliance therewith is compulsory”.

## 5. A curious (or delicate?) question

Article 13 of FIFA Regulations on the Status and Transfer of Players<sup>10</sup> confers special dignity on the respect of contract. In these terms, this regulation reaffirms a fundamental principle of Portuguese civil law on the contracts, as already referred to.

Chapter IV of the FIFA regulations comprises the rules concerning maintenance of contractual stability between professionals and clubs. In particular, article 17 deals with the consequences of terminating a contract without just cause.

Let's emphasize paragraph 1 thereof:

1. In all cases, the party in breach shall pay compensation. Subject to the provisions of article 20 and Annexe 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period.

These provisions lay down an obligation to compensate and – really relevant to our approach – the criteria for the calculation of such compensation.

Clearly, one of the criteria is the domestic law (shall be calculated with due consideration for the law of the country concerned).

On this particular criterion – the consideration for the law of the country concerned –, Portugal offers a good case study.

As already said, compensation may not exceed the value of the considerations that might be due to the player should the labour contract be terminated upon its expiry.

Portuguese courts have already experienced the opportunity to interpret that compensation limit, established in article 27, paragraph 1, of Law No. 28/98.

It was in the so-called “Case «Zé Tó»”.<sup>11</sup> The Supreme Court declared that some rules were null and void – article 50, paragraphs 1 and 2, and article 52, paragraph 1, of the Collective Labour Agreement concluded between the Portuguese Professional Football League and the Professional Football Players Union.

Article 50 of the Collective Labour Agreement provides as follows:

«The football player's liability in case of termination of contract without just cause

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<sup>10</sup> “Respect of contract

A contract between a professional and a club may only be terminated upon expiry of the term of the contract or by mutual agreement”. Another sign of the relevance of this core principle can be found in article 1, paragraph 3(b).

<sup>11</sup> Acórdão do Supremo Tribunal de Justiça, de 7 de Março 2007.

1 – Where the just cause adduced under article 43 is declared unfounded on grounds of lack or inadequacy of the alleged facts, the player is obliged to compensate the club or the sporting society in an amount not less than the value of the considerations that might be due to him should the contract be terminated upon its expiry .

2 – Where, by virtue of termination of the contract, the employer endures damages exceeding the value of the compensation fixed in the preceding paragraph, he shall be entitled to lodge the competent lawsuit for compensation, without prejudice of the termination effects.»

The Supreme Court supports its decision by saying:

“As stated by the magistrate, paragraph 1 of article 50 provides for a minimum limit of the compensatory quantum due to the employer by the player having terminated the contract without just cause; furthermore, the same paragraph establishes that quantum regardless of the damages endured by the employer as a consequence of breach of contract on the player’s part. Indeed, according to paragraph 1 of article 50, the player always has the obligation to pay to the employer a compensation, the value of which may never be less than the value of the due considerations. This represents a less favourable regime to the player than the one laid down in article 27, paragraph 1, of Law No. 28/98, not only because the latter does not provide for a minimum limit of compensation to be paid to the employer, but also because it subjects the right to compensation to the actual existence of damages.

Furthermore, its illegality is even starker when considering the provisions laid down in article 50, paragraph 2, which allows the possibility for the compensation quantum due to the employer to be higher than the due consideration value, i.e. the maximum limit fixed in paragraph 1 of article 27. In fact, it allows that entity to demand a compensation higher than the due considerations in case it has endured damages of a higher value than that of the said considerations. The compensatory regime set out in article 50 becomes thus less favourable to the employee than the one provided for in paragraph 1 of article 27, which brings out the said illegality and causes admissibility of the appeal in this particular part.

Article 52 refers to the “requirements for the player’s sporting untying in case of termination on his/her initiative”. Paragraph 1 of the said article reads as follows: “1 – Without prejudice to the dissolution of a binding contract in the scope of the labour legal relationships, the player’s participation in official competitions under a third club during the season in which the sporting contract was terminated upon the player’s initiative shall depend upon the recognition of just cause for termination or upon the club agreement thereto.”

The Supreme Court has decided that this rule is contrary to article 47, paragraph 1 (Freedom to choose a profession and of access to the public service)<sup>12</sup>

<sup>12</sup> Which reads as follow: Everyone has the right to choose a profession or type of work freely, subject to the legal restrictions that are imposed in the collective interest or the restrictions that are inherent in a person’s own capabilities.

and article 58, paragraph 1 (Right to work), of the “Constituição da República Portuguesa – CRP” (Portuguese Constitution).

In what concerns the first aspect, the Supreme Court decreed that “it is indisputably clear that the instruments governing the collective contracts may not set out restrictions to the right of freedom to choose a profession in its two-folded nature of freedom of choice and freedom of pursuing a profession”.

In what concerns the other constitutional rule<sup>13</sup>, the Supreme Court further affirms:

“No doubt is raised as regards the fact that article 52, paragraph 1, of the Collective Labour Contract, as concluded between the Portuguese Professional Football League and the Professional Football Players Union, imposes a restriction to the freedom of pursuing a profession by making the player’s participation in official competitions on behalf of a third club during the season in which he/she terminated the sporting labour contract on his/her initiative subject to recognition of just cause for termination or to the club agreement thereto, although the labour binding has ceased to exist”.

This important case-law was analysed by João Leal Amado, Sports Labour Law professor in Faculdade de Direito da Universidade de Coimbra.<sup>14</sup>

According to this author “Anyway, pursuant to the decree of the Supreme Court of Justice, the current legal framework on this matter is clear and unambiguous: the football player who has terminated his/her contract ante tempus, without just cause, shall only be liable for up to the limit corresponding to the due considerations,, ex vi art. 27 of Law No. 28/98.

In summary, the price to be paid by the player in order to become free from the contract tying may not exceed the value corresponding to the due considerations. “This is the unsurpassed maximum limit for the compensation liability which the outgoing player may be liable for”.

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<sup>13</sup> Article 58, paragraph 1: Everyone has the right to work.

<sup>14</sup> *Desporto&Direito.Revista Jurídica do Desporto*, Ano IV, Maio/Agosto 2007, nº 12, 501-517.



**CONTRACTUAL STABILITY IN FOOTBALL  
COMPENSATION IN CASE OF BREACH OF CONTRACT IN  
ROMANIAN CIVIL LAW**

by *Geanina Tatu\**

**SUMMARY:** Introduction – 1. Individual labour contract. Civil convention – 1.1 Definitions. Regulations – 1.2 Term of the contracts concluded between the football clubs and professional football players – 1.3 The contents of the individual labour contract and of the civil convention – 1.4 Conclusion of the individual labour contract and of the civil convention – 1.5 Modification of the individual labour contract and of the civil convention – 2. Termination of the individual labour contract and of the civil conventions – 2.1 General methods – 2.1.1 The player – 2.1.2 The club – 2.2 Special methods for the termination of contractual relations – 3. Analysis of the way compensation is calculated – 4. Termination of professional relations at national level in relation to those established by FIFA in its regulations

*Introduction*

The athletic activity in Romania is regulated by Law no. 69/2000<sup>1</sup> on physical education and sports. This law acknowledges, among other things, the importance of professional sports and aims to create the foundation of the organisational system for the development of the activities associated with it.

From the definition given to the professional athlete<sup>2</sup> in article 14 para. 2 of the law, we identify the categories of contracts, which may regulate his relations with a sports structure, namely: the individual labour contract and the civil contract

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<sup>1</sup> Published in Official Gazette no. 200 from 9 mai 2000; modified by OUG no 240/2000, OUG no 56/2001, O.G. no 7/2001, Law no 610/2001, Law no 345/2002, Law no 414/2002, Law no 221/2003, OUG no 64/2003, Law no 194/2004, Law no 472/2004, OUG no 119/2005, Law no 293/2005, OUG no 205/2005, Law no 241/2007, Law no 34/2009, OUG no 77/2009, Law no 77/2010, OUG no 15/2010.

<sup>2</sup> Are to be considered as professional athletes thoughts who, for practicing a certain sport, conclude, according to law, with the club were they are licensed, an individual labor contract on a determinend period obtaining the professional sportsmen licence.

(convention). We notice that the lawmaker gives the parties involved in the sports activity an option right regarding the choice to express the manifestation of their will, which can take the shape/embody a certain type of contract.

Although the choice might seem purely formal at first, however, under the applicable legal regime, the option to conclude one contract or the other generates differences in the development of the contractual relations between the professional athlete and the sports structure. The applicable legal regime differences, at least regarding social insurances and protection of professional athletes, have also been noticed by the lawmaker, which, by Law no. 124 of 6 May 2006, modified Law no. 69/2000, added para. 3 of art. 14, according to which, "the professional athlete, who concluded a civil convention with a sports structure, is also ensured, on request, the participation in the payment of the contribution to a public or private pensions system, pursuant to the law."

Major differences can also be noticed in the theoretical interpretation of such contracts. Therefore, if the civil convention generally falls under the provisions of the Civil Code, and especially under the specific regulations of the sports branch in which the parties activate, the individual labour contract is subjected to the regulations corresponding to the Labour Code, to the Collective Labour Contract concluded at national level, to the collective labour contracts at the level of sports branch or unit (if any) and to the special regulations issued by the National Federations and Professional Leagues in the branch in question. Moreover, the reports between the contracting parties also present significant differences.

Therefore, in case of concluding a civil convention,<sup>3</sup> the parties are contractually equal, the athlete standing as self-employed, with all consequences arising from this status. However, the subordination specific for certain work relations is ensured by the sports regulations, considering the nature and purpose of the sport activity.<sup>4</sup>

In case of work relations' existence, by conclusion of an individual labour contract, the employee's (athlete's) subordination towards the employer (sports entity) is based primarily on the concluded contract itself, and secondly on the sports regulations. In such a circumstance, the contractual relations are much more rigorously regulated, and the provisions of the sports regulations on the conclusion, execution, amendment, termination of the contract are completed by the provisions of the labour law, the latter also having fiscal and social security implications.<sup>5</sup>

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<sup>3</sup> The jurisprudence and the fiscal authorities consider that this kind of contract is possible only for an occasional, unique activity and not for regular activities performed on undetermined term or longer than that activity requires.

<sup>4</sup> The Fiscal National Authority expressed clearly its decision, during 2010, by sanctioning the football clubs for hiring professional athletes, accountants, drivers, electricians etc. on civil conventions. According to ANAF, "the professional athletes shall not be hired on civil conventions, which might be concluded only for occasional activities, and not for laterals ones".

<sup>5</sup> The contributors who obtain incomes from civil conventions could choose between an taxation for independent activities or taxation of incomes obtained from other sources.

Concerning the object of this study, I appreciate that the contractual stability in the field of the contracts concluded between the professional football players and the sports clubs can be regarded as a particular application of the general principle regarding the security of the legal circuit. Therefore, in case of such contractual relations, it can also be distinguished between the static security of such legal relations (involving the stability of the relations arising from such contracts which is ensured by certain means of publicity, as well as by specific sanctions of civil or sports nature) and the dynamic security (regarding the facility of conclusion of such contracts and manifested by encouraging the establishment of such legal relations based on regulations on the assurance of the equity and stability of the contractual relations).

Considering such circumstances, the clarification and definition of the individual labour contract (ILC) according to the Labour Code and of the civil convention pursuant to the provisions of the Civil Code is required, as foundation of this analysis. The following step for the clarification of contractual stability in this field is represented by the specific aspects of the termination of work relations in football, with the particularity that such conventions are subjected to the law, in this case to the Labour Code and to the Civil Code, so that multiple aspects will be analysed in the first subchapter.

The method for compensations calculation, will also be analysed, as a consequence of the termination of the contractual relations between the players and the clubs, exemplified with several cases settled by the Romanian Football Federation (FRF), as well as by the Romanian Professional Football League (LPF).

The final section consists of a conclusion regarding the termination of professional relations at national level in relation to those established by FIFA in its regulations.

### *1. Individual labour contract. Civil convention*

Regarding the assurance of the contract's stability in the analysed field, the investigation of such conventional instruments is important at least from the following aspects:

- the definition and regulation thereof – with direct implications on the applicable legal regime;<sup>6</sup>
- the characteristics determining the specificity of the legal reports arose therefrom;
- the contents thereof given by the nature of the provided activity;
- the requirements which must be met at the conclusion thereof;
- the modification of such contracts.

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<sup>6</sup> The direct consequences of civil conventions exclusion from the application of the labor law regulations and also of the fiscal legislation applicable to the labour relations determined a important number of employers to take into account and even to choose this alternative in relation with the employees.

### 1.1 Definitions. Regulations

The organisation of football, as a sports branch recognised at national level, is performed, primarily, within the general framework set forth by Law no. 69/2000 on physical education and sports, and secondarily by the specific regulations adopted by the bodies having competences in the football field. To this end, we consider the statutes and regulations adopted by the Romanian Football Federation (FRF) as sole football authority acknowledged by the international bodies and established pursuant to the sports law, and by the Romanian Professional Football League established pursuant to Law no. 69/2000 with responsibilities in the organisation and development of the Romanian First League (Liga I) national football championship.

The provisions regarding the individual labour contracts or the civil conventions concluded between the football clubs and the professional football players are found in the “Regulation on the status and transfer of football players” (RSTJF) adopted by the Executive Committee of FRF, and applicable for all football divisions.

Assuming the general regulation of Law no. 69/2000, RSTJF specifies the parties’ possibility to opt either for the conclusion of an individual labour contract, or for the conclusion of a civil convention. Thus, in the definition of the terms with which the regulation is operated, point 18 specifies that the term “contract” signifies either the individual labour contract, or the civil convention. However, considering the specificity of each contract, their regulation is performed separately – art.11 refers to the individual labour contract and art.12 to the civil convention. If the regulation fails to specify the type of the contract, the provision in question shall apply to both.

The provisions of RSTJF regarding the individual labour contract shall be completed by the labour legislation in force, and the employee’s (professional football player’s) rights provided therein cannot be inferior to those provided in the collective labour contract concluded at national level.<sup>7</sup>

The individual labour contract enjoys a regulatory definition outlined in art.11 of RSTJF: “The individual labour contract is the contract based on which the player undertakes to participate in the training process and in official games within a sports structure in exchange for being awarded certain financial and material rights. The club undertakes to ensure to the player the necessary conditions for the development of his activity, to pay his salary and other financial rights, in relation with the quality and results of the provided work, pursuant to the contractual clauses, and to pay all other contributions, pursuant to the law.”

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<sup>7</sup> The professional leagues negotiate and conclude collective labor contracts accordingly to the law (Law no 130/1996 regarding the collective labor contract). According to the law regarding the collective labor contracts, the last one is the convention concluded between the patron or the employers organization and the employees represented by the trade-unions or another way determined by law regarding the agreed clauses on the labor conditions, the remuneration and also other rights and obligations deriving from the labor relations.

It is noted that this definition is objectionable, in theory, under two aspects. On one hand, it is too broad, as it refers to “financial rights” (which include, apart from the salary, game bonuses, various objective or performance allowances), given that only the salary payment is essential for an individual labour contract, and on the other hand it refers to the possibility of granting certain “material rights”, a phrase which contradicts the theory according to which the salary is expressed exclusively in money.

The specificity of sports law, as well as the ascertained practice of remuneration of professional players (irrespective of the chosen contractual form) requests the need to broaden the classic definition of the individual labour contract in the football field and to adapt it to specific requirements.

Regarding the civil convention,<sup>8</sup> art. 12 of RSTJF defines it as being “the written will-agreement between a football player and a club affiliated to FRF/AJF concerning either mutual rights and obligations arising from football practice in trainings and competitions. The rights and obligations are similar to those arising from the individual labour contract, with the difference that they do not create work relations.”

The civil convention in the sports area is also excluded from the field of classic work relations by the provisions of art. 12 para. 2 RSTJF: “The civil convention does not have as effect the acquiring of the quality of employee, and the players concluding such a contract with a club do not benefit of social security rights, or of the rights provided by the legislation on the protection of the unemployed. The provisions of this regulation on labour contracts, except for those against its nature, are applied, by analogy, for the conclusion and execution of the civil convention.”

### *1.2 Term of the contracts concluded between the football clubs and professional football players*

The Labour Code<sup>9</sup> establishes, as principle, the fact that a labour contract is usually concluded for a non-determined period, and the exception will be expressly provided by the law. To this end, art. 81 of the Labour Code lists the cases when the determined term of the contract is allowed.

Based on the hypothesis specified under letter e) („in other cases expressly provided by special laws”), RSTJF sets as a rule the conclusion of the labour

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<sup>8</sup> The Law no 577/2003 abrogated the articles regulating the civil convention for the services providers from the Law no 130/1999 regarding some protections measures for the working people. As consequence, the only legal bases of the civil convention is the common law: the Civil Code – the only requirements imposed by the law are: a certain enterprise and a determent period of time. It does not exist requirements on the written form, meaning that these conventions might be concluded also in oral (like simple contracts solo consensus).

<sup>9</sup> The Labor Code has the character of a special law related to the Civil Code as regarding the labor - *specialia generalibus derogant*. So, the regulations governing the labor relations are established by labor law and in cases where there are no provisions, the civil law shall apply (according to the art. 295 Labor law).

contract for a determined period by regulating the minimum and maximum term thereof, any exceptions from this disposition being strictly prohibited.

Therefore, an individual labour contract in this field can have as minimum term the period between its conclusion and the termination of the competition year in question, and as maximum term, a period of five years. If the individual labour contract does not expire within one of the transfer periods set forth by FRF, the players in question are entitled to unilaterally terminate the contract during the final transfer period prior to contract termination, this being considered a just cause for admitting requests. A player undergoing such a situation, who did not practice the right to unilaterally terminate the contract, shall be entitled to register with another club only in the following transfer period.

RSTJF also establishes the determined terms of certain individual labour contracts, considering the specific characteristics thereof or the situation of the contracting parties. Therefore:

- in case of temporary transfers, the minimum term of the contracts can be from their entering into force and until the end of the first and second half of the championship.
- players under 18 years can conclude contracts for a maximum of 3 years, but which cannot exceed the junior period, otherwise the contract shall be rightfully terminated. A player can have the statute of junior between the ages of 11 and 19. Therefore, a contract concluded by a player between the ages of 16 and 18 can be concluded for a maximum period of 3 years, and when the player turns 19, the contract is rightfully terminated, being possible to conclude a new contract with the same club or with a different club in the general conditions.

The derogation from the regulations of common law in the field of labour relations, regarding the term of the contract, is required by the specificity of sport, the shorter activity period of professional football players in comparison to other categories of employees, the accentuated mobility of the labour market in the sports field, as well as the need to protect the career of professional football players by the possibility of successive transfers regarded as foundation of their professional affirmation.

These provisions are also applicable to the civil convention concluded in the sports field.

### 1.3 *The contents of the individual labour contract and of the civil convention*<sup>10</sup>

The individual labour contract of professional football players must include general elements, provided under art. 17 of the Labour Code, as well as certain special

<sup>10</sup> "Having stated the aforementioned, the Chamber wished to highlight that in order for an employment contract to be considered as valid and binding, apart from the signature of both the employer and the employee, it should contain the *essentialia negotii* of an employment contract,

elements specified in the sports legislation.

Apart from the general requirements, applied to an individual labour contract, RSTJF also provides certain special requirements, which it must meet (requirements which must also be met in case of concluding a civil convention):

- a) to be concluded in standard form, agreed by FRF;
- b) to be concluded for a determined period;<sup>11</sup>
- c) not to exceed, as the case can be, the junior or temporary transfer period;
- d) to include financial clauses (salaries, indemnifications, fees, awards, etc)
- e) to be drafted on computers, typed or handwritten;
- f) to be registered with the club and to bear the conclusion date;
- g) to be signed by the parties and to bear the club's stamp. The player's signature must be affixed on each page;
- h) to be submitted (*with the competent bodies*) in at least two original counterparts, of which one remains in the records of the competent body.

*Type of work*<sup>12</sup> – it is an essential element of the individual labour contract, and in sports law it is particularly important in the qualification thereof. Generally, this element can only be modified by agreement of the parties or in the cases provided by the law. In my opinion, in the football field, this contract's essential element cannot be modified by agreement of the parties, its modification triggering the termination of the convention.

This fact arises from the specific characteristics of the activities provided by the professional player, as well as from the configuration of the conditions for the contract's conclusion and registration. Therefore, the professional football player's activity is strictly delimited by participating in the training process and in official games within a sports structure. The changing of the type of work wouldn't offer efficiency to the contract concluded in this manner, also considering the fact that it is developed between the parties having a certain quality (sports structure and professional football player), being registered with the authorised bodies and producing effects precisely because of the type of work. The changing of the type of work automatically modifies the regime of such contract, and it can no longer be considered a specific labour contract between the football club and the professional football player.

*Place of work* – this essential element of the individual labour contract is also subordinated to the specific characteristic of the football activity. By the

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such as the parties to the contract and their role, the duration of the employment relationship, the remuneration". (Decision of *The Dispute Resolution Chamber of FIFA* passed in Zurich, Switzerland, on 22 July 2010).

<sup>11</sup> The civil convention had been regulated in details by the Law no. 130/1999 regarding some protections measures for the working people. This law clearly stated that civil conventions could be concluded only for activities not exceeding 3 hours per day on a month. But these stipulations were abrogated by the Law no 577/2003.

<sup>12</sup> Regarding the labor provided by the employee, art. 15 from Labor Code stipulates "it is prohibited, under absolute nullity, to conclude an individual labor contract having as object an illegal or immoral activity.

specification of the obligation of the professional football player to participate in official games, a mobility clause is deemed as inserted, considering that these games can take place in various places in the country or abroad. Generally, the training process takes place in the club training centre (thus, at the employer's office), but in certain situations the training is performed in other places (friendly matches played away, training camps, etc). The mobility clause, even if not expressly provided, is understood considering the specific characteristics of the provided activity, and taken into account in view of establishing a satisfactory salary.

#### 1.4 Conclusion of the individual labour contract and of the civil convention

We can divide the requirements for the conclusion of such contracts in the football field in two categories:

- A) General requirements, which are common for any conventions – capacity, consent, object, cause.
- B) Special requirements specific for the contracts in the field: quality of the parties, prior notification.

A) Regarding general requirements, as they are common for any contract, they do not need any additional explanations. However, regarding the capacity to conclude a labour contract, RSTJF provides that “a player can directly conclude a contract if he turned 16 years of age” and “under penalty of absolute nullity, the clubs are not entitled to conclude contracts with minors under the age of 16 or with the persons under interdiction as a consequence of alienation or mental incompetence” (art. 10, para. 5 and para. 6). These provisions are applicable in case of professional players. In conclusion, the full working capacity in case of professional football players is acquired when turning 16 years of age.

- B) Regarding specific requirements, the following mentions are needed:
- *quality of the parties* – the legal working relation in the football field is a qualified legal relation, in the sense that, in order to conclude a valid labour contract, the parties must have a certain quality;
  - *prior notification* – RSTJF enforces on football clubs a series of obligations prior to concluding an individual labour contract with a certain player. Therefore, a club, which wishes to conclude a contract with a professional player, must previously notify, in writing, the player's current club, prior to starting the negotiations with the player.

In case of concluding a new individual labour contract with a player, RSTJF also establishes a “self-information” obligation of the club, consisting of the “obligation to perform all required researches, studies, tests and/or medical examination or to perform any action it deems necessary, prior to signing the contract, otherwise being responsible for paying the obligations undertaken by means of the contract”. Therefore, the validity of a transfer contract or agreement cannot be conditioned by the result of a medical examination and/or by the procurement of the work permit.

### 1.5 *Modification of the individual labour contract and of the civil convention*<sup>13</sup>

As shown above, I believe that the modification of the individual labour contract regarding the type of work cannot intercede. As a specific institution of the sports law, with applicability in the studied field, the institution of the transfer is provided in RSTJF.

The transfer of football players consists of their transition from the club they are licensed at to another club, with the approval of the players and of the two clubs. The players' transfer can be temporary or final.

### 2. *Termination of the individual labour contract*<sup>14</sup> *and of the civil conventions*

The methods of termination of the contractual relations in football provided in the "Regulation on the status and transfer of football players" could be classified as general or specific.

#### 2.1 *General methods*

Pursuant to art. 18 point 1, irrespective of the fact if they are founded on an individual labour contract or on a civil convention, "*the termination of the contractual relations takes place in the following ways:*

1. *at the termination of the term for which they were concluded;*
2. *by agreement of the parties specified in the contract or expressed subsequent to the conclusion of the contract;*
3. *at the initiative of either party, in compliance with the regulation;*
4. *in other manners concluded by the law"*

In case of the rightful termination of the work relations, the parties can agree on the extension of such relations by concluding a new contract.

This case of contract termination is a consequence of the "expiration" of the term for which it was concluded, as a consequence of the pre-existing agreement of the parties, performed at the moment of the conclusion thereof. The "expiration" of the term produces as effect the automatic termination of the contractual relations

<sup>13</sup> Because the labor contract bases on the parties will, its clauses have to be respected, entailing a labor stability. Any change of the contract's clauses, according to the principle of legal simetry, shall be done also on this way, respectively by the will of the same parties, and the contract termination shall take place only according to the established cases and in respect of the legal conditions and proceedings.

<sup>14</sup> Art. 55 of the Labor Code stipulates the way in which the termination of the contractual relations takes place:

- at the termination of the term for which they were concluded;
- by agreement of the parties at the established term;
- specified in the contract or expressed subsequent to the conclusion of the contract;
- at the initiative of either party, in compliance with the clauses and the legal regulation.

between the club and the player, not being necessary the issuing of a decision by the employer, the only regulation's requirement is the notification of the organising body (FRF/LPF) by any of the parties.

Pursuant to the provisions of the regulation, the term must expire within one of the transfer periods established by FRF. The failure to observe this regulation and the expiration of the term outside the transfer periods entitles the players to unilaterally terminate the contract during the final transfer period prior to contract termination, which represents a just cause.

In case of terminations of work relations during the validity term of the contract by *agreement of the parties*, "this can be performed in writing, in an explicit and unequivocal manner" and shall be ascertained by a decision of the competent commission. Furthermore, the parties must specify the agreed manner for the liquidation of mutual obligations.<sup>15</sup>

As the contract concluded between the parties is a consensual contract, it is validly concluded by performance of this will-agreement. Considering the principle of legal symmetry, the relevant legislation and the "Regulation on the status and transfer of football players" also specify the possibility of terminating contractual relations by means of this agreement of the parties, irrespective of the term it was concluded for.

The performance of this will-agreement can interfere during the execution of the contract and from the initiative of either party. In this sense, any clause inserted in the individual labour contract or in the civil convention by which the club reserves the right to terminate the labour contract at any time shall be considered inefficient.<sup>16</sup>

As the individual labour contract or the civil convention between a player and a club is generally concluded for a determined period, it cannot be terminated by the *unilateral will of one party* before the term for which it was concluded, except for the cases and with observance of the requirements set forth in the "Regulation on the status and transfer of football players" - article 18, point 10.

### 2.1.1 The player

The player can terminate the labour contract from his own initiative, for solid reasons excluding his fault, otherwise he shall have to pay damages to the club for the unexpected termination of the contract.

In the first case, the player's right to request the termination of the contractual relations with just cause can be performed if he proved that he was

<sup>15</sup> The termination of the labor contract according to the common law see A. TICLEA, *Labor Law*, Bucarest, Legal Universe, 2010; A. TICLEANU, *Labor law jurisprudence*, Bucarest, Legal Universe, 2010.

<sup>16</sup> A clause like this is similar to the abusiv clause from the contract concluded between consumers and merchandisers, prohibited in the contractual relations by Law no 193/2000 regarding the abusive clauses from the contracts concluded between the merchandisers and consumers, modified by the Law no 161/2010 and republished in the Official Gazette no 305 from 18 April 2008.

not actually used in at least 10% of the club's total official matches throughout a competition year.

As no definition of the term "actual use" exists, questions arise such as, does "actual use" mean the actual presence of the player on the playing field or does it also include the player's presence on the bench or which would be the playing duration per game so that the actual use of the player is considered?<sup>17</sup>

Therefore, the calculation of the percentage of 10% shall be assessed by the competent commission invested with the settlement of the player's request regarding the litigation, calculation which excludes the games he was suspended from or was not able to participate in for medical reasons.

Under penalty of the termination of such right, the player must submit the request within a maximum of 15 days as of the date of the last official game of the competition year in question.

The second reason provided by the regulation for the unilateral termination by the player for just cause consists of the club's violation of the obligation to pay to the player his contractual rights for a period exceeding 60 days.

The legal grounds provided under this paragraph is represented by the failure to perform for a period exceeding 60 days of the obligation undertaken by the club towards the player by the conclusion of simultaneous obligational relations.

The regulation uses the term "contractual rights", which include all financial rights due to the player, namely salaries, indemnifications, fees, awards, etc.

In relation to the activity developed by the player, the contractual rights (salary) are an essential element of the concluded contract, a component of the obligations undertaken by the club and of the legal cause of the player's obligation and represent the entirety of the money rights due for the provided activity.

The club's main obligation is to pay the contractual rights of the player in question for the payment of the salary rights, in consideration for the activity performed by the player. The club cannot avoid its obligation by invoking the lack of funds, due to the primary character of the payment of salaries to players, as, pursuant to the legal regulations in force, salaries must be paid before any monetary obligations, therefore the invocation of such administrative or financial aspects, or the dysfunctions thereof (especially the lack of monetary funds necessary for the payment of the salaries) cannot affect the existence or amount of the salaries guaranteed by the Constitution.

To protect the player's contractual rights, but also to ensure contractual stability, the performance by the player of this manner of unilateral termination of the contract is affected by a legal term exceeding 60 days, within which the club did not perform the payment obligation, but also by a requirement, namely the

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<sup>17</sup> We consider that the expression "effectively used" should be seen from the perspective of the player's obligations according to the labor contract signed or to the civil convention. So, as long as the contractual obligations refer not only to the player's performance in the official matches, but to a more big area, which involves the training participation, the friendly matches, cantonments, the effectively involve of the player implies also these aspects, and that rule shall not be applied only to the case when the player is not used a certain period of time in the official matches.

performance of the contractual obligations undertaken by the club.

Unlike the first case of unilateral termination provided in favour of the player, which can only be performed at the end of the competition year, in this case the player can exercise his right after more than 60 days as of the date when the club's obligation becomes due.

The club's obligation to pay all contractual rights and the player's right of unilateral termination under such conditions is also valid in case of "acceptance without reserves of a part of the salary rights or the signing of the payment documents in such circumstances does not signify the waiver by the employee to the salary rights due to him in their entirety, pursuant to the legal or contractual provisions"(art. 170 Labour Code).

This interdiction to waive such rights, in whole or in part, are measures for the players' protection, meant to ensure the unconfined practise of his legitimate rights and interests within the contractual relations concluded with the football clubs, in order to shelter them from the consequences of any abuses or threats from the employers. Such a measure for the players' protection must not be regarded as a privilege, as long as it is justified in the consideration of the situation of a certain social class denouncing such a protection.

Paragraph 2 of art. 18 point 10 could be interpreted in the same way; it states "*within 60 days from the due date, if the presented evidence show that the player collected at least 75% of the due contractual rights, associated to the competition year in question, the commission shall pronounce a decision by which to obligate the club to pay the due amounts within 5 days from decision communication*".

Therefore, this termination case is subjected to the following conditions:

- the player's due contractual rights have been paid at least in proportion of 75%,
- the unilateral termination is performed at the end of the competition year,
- the player performs the termination 60 days after the due date of the club's obligation.

The club's obligation for the integral payment of the contractual rights towards the player is also valid if the player collected during the competition year a part of his contractual rights, namely a percentage of at least 75%. In view of guaranteeing the player's rights, the regulation allows the unilateral termination by the player within 60 days from the due date of the club's payment obligation.

In this case, the contractual relations are terminated as of the date of the decision acknowledging the failure to perform by the club of the payment obligation of the outstanding amounts within 5 days from the date of the previous decision establishing the existence of this debt, which falls upon the club.

Both situations provided under art. 18 point 10 and analysed above – namely the failure to pay by the club of the salary, game premiums, indemnifications or other financial rights, as well as if the club fails to provide the player with other requirements, as provided in the contract, the player is entitled, after the due date,

to notify the competent commission within the FRF, LPF or AJF, as appropriate. In such circumstances, the player can request the payment of the outstanding financial rights and the termination or continuation of the contractual reports.

Finally, the reason for which a player can unilaterally terminate the contract for just cause is the termination of the period for which the contractual relations with the club were concluded, but this term expires outside the transfer period set forth by FRF. In order to allow the players to start negotiations and conclude a new contract with another club, the player in such circumstance is entitled to unilaterally terminate the contract, after which the parties shall decide on the manner of extinguishing the outstanding contractual obligations.

### *2.1.2 The club*

The contract concluded between a player and a club is mandatory for both parties pursuant to the general common law rules “the legally executed conventions stand as the law between the contracting parties”

The performance of the contract, from conclusion until termination, is characterised by the exchange of mutual provisions between the contracting parties: the interdependence between the player’s obligation to perform the undertaken obligation and the club’s obligation to remunerate it.

The prerogatives awarded by the law are natural, considering that the material means for the development of the activity and the financial means belongs to the club, which undertakes the risk of its athletic and economic activity. Considering that the player and the club are related by subordination, the club’s power cannot be unlimited and must be exercised with observance of the players’ rights and dignity, without discriminative actions.

Apart from the provisions aiming to secure the player against the failure to perform the contractual obligations by the club, the regulation establishes protective measures for the club in relation with the player, which may lead to the unilateral termination by the club.

In the first case, regarding the reasons, which the club can use for unilateral termination, the unilateral termination is conditioned by the player’s absence without leave from trainings and official matches for a period exceeding 30 days.

The absence without leave is considered to be any absence, which is not grounded on medical reasons or on certain player’s personal reasons and which have not been communicated to the club. If this absence is ascertained for a period exceeding 30 days, the club is entitled to terminate the contract. If, during this interval, the player comes back for a short period, taking part in trainings and official games, which leads to the interruption of the calculation of the 30 days period, but is followed by another absence for a period approaching the 30 days period, without exceeding it, the club is entitled to apply disciplinary sanctions without being able to exercise the right of unilateral termination.

By the absence without leave for a period exceeding 30 days, the player

fails to perform the main obligation undertaken by the contract concluded with the club, namely the performance of the activity, which entitles the club to claim compensations for the caused damage, accompanied by the termination of the contract.

Regarding the second termination reason acknowledged in favour of the club, it is similar to that provided for players and analysed above. Procedurally, we believe that this right acknowledged in favour of the club should be drafted in a much clearer manner in a subsequent edition of the regulation in view of preventing any abusive behaviour of the clubs, which would injure the employees' legitimate rights and interests. But a future drafting of the regulation should provide an equitable balance between the clubs' and the players' interests.

In the current regulation, a termination from objective reasons for which the player participated in under 10% of the club's total number of official games is difficult.

The current drafting does not allow the analysis of the proportion in which the player's absence in the rest of the games is a consequence of the club's decision of not putting the player in the game and the proportion in which the absence is a direct consequence of the player's choice and behaviour.

The lack of the decisions of competent commissions regarding this matter makes it difficult to answer to the vagueness of the current regulation regarding this matter, so that it is the choice of the deciding bodies from the Romanian football whether to admit a unilateral termination from the club for these reasons.

## 2.2 *Special methods for the termination of contractual relations*

A particular case of termination of the contractual relations is provided in the Regulation under art. 13 point 5:

*“The contracts concluded by players with clubs whose teams pulled back or were excluded from the competition after the beginning of the championship are terminated as of the registration date of new contracts concluded by the players in question with other clubs. Such players can get registered with another club at any time, except for the last six stages of the championship in which the team of the new club takes part. Amateur players registered with clubs whose teams pulled back or were excluded from the competition after the beginning of the championship can request to be registered with another club, similarly to professionals.”*

This case is actual in the Romanian football, considering the sanctioning and relegation of three football teams from League 1, decisions, which were also ascertained and maintained by TAS.

A second particular case of termination of the contract concluded by the parties takes place in case of the club's failure to perform the obligation to record the individual labour contract of the civil convention with the organising body (FRF or LPF) within 45 days from contract signing, pursuant to art.15 point 1.

Exceeding this term leads to the invalidity of the contract concluded between the parties, as well as of the addenda, as shown by art. 15 point 2:

*“If, within no more than 45 days from conclusion, the clubs fail to record with the competent body, pursuant to art. 15.5.1. and respectively art. 19.11, the contracts concluded with the players, the appendixes and addenda thereto or the transfer agreements, such documents lose their validity regarding the registration or transfer of the players, but produce effects regarding the financial obligations provided therein.”*

Unlike the procedural conditions in which the termination of the contractual reports analysed above can intervene, this case is subjected to the condition of failing to record the contract with the competent body by the club within no more than 45 days. The failure to perform the obligation to record the contract leads to the invalidity thereof, without exempting the club of the fulfilment of the financial obligations undertaken towards the player.

### 3. *Analysis of the way compensation is calculated*

According to the common law rules, which also apply in the contractual relations concluded between players and clubs, in case of failure to perform or inappropriate performance of the undertaken obligations, the failed party (debtor) falls under the obligation to pay damages to the creditor.

Compensations are owed under the initial obligations, which form the secondary object, as penalty, of the performance of the obligation in question.

Pursuant to the “Regulations on the status and transfer of players”, the legal grounds entitling the entitled party (creditor) to compensations are the provisions specified under art. 18 point 9.1 and 9.2, such grounds differing depending on whether the unilateral termination without just cause takes place within the protected period or outside the protected period.

The sole condition required for the application of these legal grounds is “without just cause”. When establishing whether just cause exists or not, the competent commissions analyse each case in compliance with the regulations of FIFA/UEFA.<sup>18</sup> To this effect, without analysing the international regulations defining this institution, we will limit our analysis to the compensations set forth as a consequence of ascertaining the unilateral termination without just cause.

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<sup>18</sup> “The Chamber focused its attention on the calculation of the amount of compensation for breach of contract in the case at stake. In doing so, the members of the Chamber firstly recapitulated that, in accordance with art. 17 par. 1 of the Regulations, the amount of compensation shall be calculated, in particular and unless otherwise provided for in the contract at the basis of the dispute, with due consideration for the law of the country concerned, the specificity of sport and further objective criteria, including, in particular, the remuneration and other benefits due to the Claimant under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, and depending on whether the contractual breach falls within the protected period”. (Decision of The *Dispute Resolution Chamber of FIFA* passed in Zurich, Switzerland, on 21 May 2010).

Art. 18 point 9.1:

*“If the unilateral termination without just cause occurs within the protected period, unless otherwise provided in the contract, the party proved to be at fault shall be sanctioned as follows:*

- a) The club ... shall have to pay to the player a compensation representing the total value of the financial rights due to the player until the expiration of the contract, except for game and objective premiums.*
- b) The player ... shall have to pay a compensation to his former club, the value of which is established by the competent commission, which shall consider the following elements:*
  - the amount of the transfer compensation, or, as appropriate, of the training, promotion and/or solidarity compensation paid by the club at the registration/transfer of the player in question;*
  - 50% of the rights actually paid to the player up to the moment of unilateral termination, without just cause, of the contract. The player’s new club shall be responsible for the full and timely payment of the compensation established by the competent body by a final decision;”*

A first remark is that, both for the club and for the player, apart from the sporting sanctions (suspension, prohibition of transfers), compensations shall be applied according to the calculation method, which can be determined by the parties by means of the contract concluded between them.

The parties’ convention regarding the establishment of the owed compensations must take place before the unilateral termination for the creditor; this convention can aggravate, eliminate or limit the debtor’s responsibility.

The parties can set the penalty amount per day of delay in the failure to perform the contractual relations, and can include in the calculation of compensations and game premiums indemnifications and other financial rights.

When no contractual assessment (agreed by the parties) of the compensations exists, the competent commission shall assess the compensations.

If the club is responsible for the termination of the contract, the calculation grounds are represented by the total amount of the financial rights due to the player until the expiration of the contract term, except for game and objective premiums, thus the payment of the uncollected future earnings.

The calculation grounds in case of the player’s responsibility is much broader and includes the transfer compensation or the training, promotion and/or solidarity compensation paid by the club at the registration/transfer of the player in question plus 50% of the contractual rights actually paid to the player up to the moment of contract termination.

The compared analysis of the two calculation grounds shows that it is much more aggravating and burdening in case of the player, as an expression of the football bodies’ effort to ensure contractual stability and to protect clubs against the “migration” of players to other clubs.

Art. 18 point 9.2 *“If the unilateral termination without just cause occurs outside the protected period, and unless otherwise provided in the contract, the competent commission shall obligate:*

- a) *The club: to pay to the player a compensation representing the total value of the financial rights due to the player up to the expiration of the contract, except for the game and objective premiums;*
- b) *The player: to pay to the club a compensation consisting of 25% of the contractual rights actually paid to the player up to the moment of termination without just cause of the contract, as well as the value of the transfer compensation, respectively, the training/promotion/solidarity compensation paid by the club at the player’s registration. The new club shall be jointly responsible with the player for paying the compensation.”*

The termination without just cause outside the protected period leads to the sole obligation to pay the compensations, without sporting sanctions.

On the one hand, similar to the previous case, the calculation grounds for establishing the compensations owed by the club are the total amount of the financial rights due to the player up to the expiration of the contract, except for game and objective premiums.

On the other hand, the compensations due by the player are represented by the percentage of 25% of the contractual rights actually paid up to the moment of termination, plus the value of the transfer indemnification, of the training/promotion/solidarity compensation paid by the club.

A compared analysis between the presented provisions of the Regulation and the practice of the commissions with jurisdictional attributions in the field is limited because of the low number of accessible decisions, and the contents thereof do not detail the “algorithm”, the calculation grounds considered by the competent commissions when establishing the compensations.

Most decisions include a presentation of the case elements without the decision being argued yet, as is the case of most decisions given by LPF in cases including the calculation of compensations required as a consequence of the unilateral termination of the contract without the sporting just cause.

Theoretically, the analysed jurisprudence shows that, in case of invocation by the player of the unilateral termination without just cause for failure to pay the contractual rights, the considered calculation grounds are represented by the financial rights – salary, bonuses (for winning the Championship, qualification in the Champions’ League, etc).

For the observance of and compliance with the impartiality principle, it is necessary that, in the future, the commissions with competence in the settlement of litigations involving the establishment of compensations to proceed to a detailed analysis of the reasoning considered in the establishment of compensations, taking into account their role as “legal bodies in football” and thus meeting the requirements and practice followed by FIFA.

4. *Termination of professional relations at national level in relation to those established by FIFA in its regulations*

The Regulation on the status and transfer of the football player adopted by FIFA and implemented and the National regulations of the various National federations contain provisions, which directly tend to strengthen the contractual stability in the field of legal relations between professional players and football clubs. Thus, apart from the general provisions regarding the irrevocability of the contract<sup>19</sup> and the interdiction of the unilateral termination thereof during the competition season,<sup>20</sup> the Regulation also contains provisions regarding the just cause, as a requirement for the unilateral termination of a contract concluded between a professional football player and a football club, as well as the consequences of the unilateral termination of a contract without just cause.

Thus, art. 14 of the Regulation states: “A contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause.”, and art. 15 “An established professional who has, in the course of the season, appeared in fewer than ten per cent of the official matches in which his club has been involved may terminate his contract prematurely on the ground of sporting just cause. Due consideration shall be given to the player’s circumstances in the appraisal of such cases. The existence of sporting just cause shall be established on a case-by-case basis. In such a case, sporting sanctions shall not be imposed, though compensation may be payable. A professional may only terminate his contract on this basis in the 15 days following the last official match of the season of the club with which he is registered.”

As it can be observed, the Romanian regulation of the RSTJF transfer the provisions of FIFA at national level, the interpretation of the national regulation also being performed in compliance with the jurisprudence of the international body.

Regarding the unilateral termination of the contract without just cause and the protected period, the jurisprudence of the Court of Arbitration for Sport states that “As there is “no just cause” for unilateral breach by the player contract nor any “exceptional circumstances” justifying such breach, a four month suspension on the athlete eligibility to participate in any official football matches is mandatory pursuant to article 23 (a) of the FIFA’s Regulations on the status and transfer of players. Art.23 (a) of the Regulations states as follows: “if the breach occurs at the end of the first or second year of contract, the sanction shall be a restriction of four months on its eligibility in any official football matches as from

<sup>19</sup> Art. 13 FIFA Regulations on the Status and Transfer of Players – Respect of the contract – “A contract between a professional and a club may only be terminated upon expiry of the term of the contract or by mutual agreement.”

<sup>20</sup> Art. 16 FIFA Regulations on the Status and Transfer of Players “A contract cannot be unilaterally terminated during the course of a season.”

the beginning of the new season or the new club's national championship". The phrase "at the end of" embraces the period up to and including the end, so the fact that the relevant breach occurred during the first year does not disable FIFA from imposing suspension. The article makes suspension mandatory where there is "no just cause" for unilateral breach by the player of the contract save "in exceptionally circumstances".

Considering the analysed problems, we can say that the stability of the contractual relations generated by sporting legal relations is performed, apart from the guarantees offered by common law, by two methods specific for the sports field:

- the preventive method – which involves certain measures of publicity and prior verification of the contracts (the registration thereof with the competent body and the requirements regarding the form thereof), as well as the provision of specific inhibiting sanctions applicable to the parties which would, by their actions, try to break the contractual balance (payment of substantial compensations, suspension from the athletic activity, interdiction for transfers, downgrading, relegation, disaffiliation, etc.)
- the coercive method – involves the application of sports law sanctions when the contractual balance is broken, and the relations between the parties are irremediably damaged.

Several clarifications are necessary regarding the second method. If common law is mainly focused on saving the convention and obligating the parties to fulfil their commitments undertaken upon the expression of the will-agreement, sanctions being subsidiary and consisting in the full reparation of the damage, in what regards the sporting contractual relations the situation is different. Although saving the contract is a priority, however, considering the specific characteristics of the activity, as well as the severe consequences which the behaviour of the *mala fide* parties brings upon the sports activity, the sanctions have a dual nature. Thus, on the one hand, they refer to the reparation of the damage incurred to one of the parties (the compensations provided by RSTJF) which have the nature of a true legal criminal clause, and on the other hand, another type of sanctions "borrow" the character of certain public law penalties (suspensions, interdictions, downgrading, relegations, disaffiliation). The latter also contribute to the strengthening of the contractual discipline in the sports field, by isolating such parties which prove *mala fide* in the performance of their contractual obligations and disturb the organisational and operational framework of a sports competition.

It is notable that such sanctions are only specific for sports law, constituting derogation from the norms regulating the work reports generated by the conclusion of a labour contract, as well as from the norms regulating the civil convention.

In order for the regulation of these sporting contractual relations to obtain the desired finality, FIFA Regulations on the Status and Transfer of Players, as well as RSTJF specify the possibility of unilateral termination of the contract grounded on the "sporting just cause". This institution, showing similarities with

the “force majeure”, seen as a cause for exemption from contractual responsibility from common law, gives the real measure of the specificity of sporting contractual legal relations. It is noticeable(evident) that this institution holds the main position in the FIFA regulation regarding the stability of the contractual relations generated by sporting conventions. The analysis of the cases when the “sporting just cause” can be invoked leads to the conclusion that the regulated situations are considered to severely impact on the contractual relations between the parties, therefore the convention’s final purpose cannot be reached. Apart from the protective character offered to the parties of a sports contract, the “sporting just cause” also performs a selection of the contracts, which cannot perform the function they were concluded for.

In conclusion, we can state that the general regulation of the sporting conventions ensures the guaranteeing of the stability of the contractual balance starting from the provisions of common law, which offer the grounds for the conclusion of such contracts, and going to the specificity of the sporting regulation, which offers a specific character to the generation, development and conclusion of the legal relations arising from the football activity.

## THE REGULATION OF EMPLOYMENT CONTRACTS FOR PROFESSIONAL FOOTBALL PLAYERS: THE CASE OF RUSSIA

by *Olga Rymkevich\** and *Nikolay Grammatikov\*\**

SUMMARY: 1. Introduction – 2. Contractual terms – 3. Temporary transfer of the sportsman to another employer (Art. 348.4 TK RF) – 4. Termination of employment contracts with professional sportsmen

### 1. Introduction

Since the collapse of the Soviet Union and the establishment of the free market economy in Russia, the regulation of professional sport has undergone profound changes. During the Soviet period, with the confrontation between the two superpowers, the USA and USSR, world class sport was an arena of competition. As President Kennedy proclaimed in one of his speeches in 1960, “all the problems of the world could be solved on the basis of the number of missiles and gold medals”. At that time a considerable amount of money was invested in world class sport.<sup>1</sup>

Today, since the removal of barriers to the international movement of individuals, and the admission of Russia to the international sports federations, a profound rethinking of approaches to the regulation of the activity of professional sportsmen is required.

In the Soviet era, relations with professional sportsmen were regulated by the Soviet Labour Code (1971) which applied to this category the same criteria as for regular employees. Initially, even the new Labour Code (2001) did not give due recognition to the need for specific regulation of the activity of professional sportsmen and women (hereinafter, professional sportsmen), reflecting the significantly higher than average physical and psychological efforts, shorter professional career, increased risk of injury, and finally the entertainment and commercial aspects of sport.

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<sup>1</sup> S. V. ALEKSEEV, *Sport law of Russia*, UNITI-DANA, 2005, 49.

The problem was partially resolved only after the adoption of Federal Law 13-FS on 28 February 2008 On the amendments to the Labour Code (hereinafter, LC RF) that included section 54.1 regulating the employment of professional sportsmen. This provision left a lot of legal gaps, especially with regard to controversial issues such as the transfer of sportsmen and the termination of employment contracts which in light of the substantial financial implications often give rise to litigation at national and international level. Considering the need for a differentiated approach to the regulation of professional sportsmen also a special law 329-FS of 4 December 2007 was enacted substituting the previous law of 29 April 1999, N 80-FS, On physical culture and sport in the Russian Federation.

However, even if some progress has been made with this law in the regulation of professional sports contracts, substantial problems regarding the transfer of players and the termination of employment contracts remained unresolved. Today, pursuant to the Russian legislation, sports activity is regulated by special norms of the Labour Code applying differentiated norms to the professional sportsmen,<sup>2</sup> by federal laws, the regulations of professional sport associations and individual contracts; aspects such as working hours, night work, holidays and salaries of sportsmen can be regulated by collective agreements and local normative measures.

Employers of professional sportsmen can be legal and physical persons registered as individual entrepreneurs. In this connection LC RF (Art. 348) establishes the peculiarities of the adoption of local normative measures regulating relations between coaches and sportsmen and specifies that these measures must be adopted by the employer according to Art. 8 LC RF considering norms laid down by the All Russia Sports Federations and opinion of trade union. The All Russia Sports Federations are public state accredited organisations whose aim is to promote one or more sports, the organisation of sporting events and the training of members of sports teams.

## 2. *Contractual terms*

Pursuant to Art. 348.2 LC RF, athletes and coaches can conclude either open-ended or fixed-term contracts for up to five years like with any other category. Fixed-term contracts can be concluded without consideration for the nature of the work and terms of its performance. If there is no specific agreement on a fixed term, the contracts are deemed to be open-ended. There is no minimum term. Pursuant to Art. 57 LC RF establishing general terms for the conclusion of fixed-

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<sup>2</sup> The Russian legislation does not provide a definition of the term “sportsmen” but implicitly it should be applied only to professional sportsmen and women, i.e. those who practise sport as their main activity and earn income from it. This omission is linked to the fact that until 1988 it was forbidden by the International Olympic Committee for professional sportsmen to take part in the Olympics. Even though the International Olympic Committee now allows the participation of professional sportsmen in the Olympic Games, in the Olympic Charter the notion of professional sportsmen is still missing.

term contracts, the legislator added other provisions to be included in the employment contract with professional sportsmen. The employer is required to:

- ensure the training of sportsmen and their participation in competitions under the guidance of coaches;
- ensure that sportsmen comply with the regulations and prepare for competitions;
- ensure that sportsmen take part in competitions only at the employer's request;
- ensure that sportsmen do not use doping or similar prohibited substances, and administer doping tests;
- take out life, health and medical insurance for the sportsmen.

Some additional conditions may be adopted. In particular, the sportsman may be required:

- to give permission for their personal data and a copy of their contract to be transmitted to the All Russia Sports Federation;
- to wear the kit provided by the employer;
- to comply with competition regulations for their particular sport;
- to pay an indemnity to the employer in case of termination of the employment contract pursuant to Art. 348.12 LC RF.

Moreover, employers are obliged at the time of hiring and for the entire period of validity of the employment contract to inform the sportsmen about the norms adopted by the All Russia Sports Federations, the regulations on competitions, the contractual terms between the employer and the sponsors, and the organisations of sporting events in relation to the employment contract.

### 3. *Temporary transfer of the sportsman to another employer (Art. 348.4 TK RF)*

At present, certain controversial issues such as the transfer of sportsmen are not regulated by law.<sup>3</sup> Even the appropriate terms are absent from the legal provisions. A definition of the legal nature of the transfer contract is not provided, and whether it should be regulated by norms of commercial or labour law is doubtful. The legislator regulates only temporary transfers to another employer (Art. 348.4 LC RF). In cases where the employer cannot ensure the participation of a sportsman in competitions, it is possible to transfer them on a temporary basis to another employer for a period no longer than one year. In this period, the temporary employer concludes with the sportsman a fixed-term contract (pursuant to Art. 348.2 LC RF) while the contract with the main employer is suspended and consequently all the rights and obligations ensuing from the labour contract and collective agreement are suspended with the exception of the matters regulated by Article 348.7<sup>4</sup> of the LC RF. The terms of the original employment contract

<sup>3</sup> U. V. ZAITZEV, *Legal nature of transfer of sportsmen, Economics, Law and Management*, 2009.

<sup>4</sup> Art. 348.7 LC RF, Peculiarities of combining jobs with other employers of sportsmen and coaches (*sovmestitelstvo*). Sportsman and coaches have a right to combine jobs as sportsmen and coaches with other employers only with the permission of the main employer. During the period of temporary transfer, the permission must be issued both by the original employer and temporary one.

continue to be applied. After the expiry of the term of the temporary transfer, the original employment contract becomes fully valid again, starting from the date immediately after the termination of the temporary transfer. In the course of the transfer both the sportsman and the employer are required to respect the rules established by labour law and other normative acts. The temporary employer cannot transfer the sportsman to third parties. In case of premature termination of the fixed-term contract, the original contract comes back into force on the date immediately after. If upon termination the sportsman continues to work for the employer to whom he had been temporarily transferred and none of the parties asks to terminate the relationship, the original contract ceases and the temporary contract is prolonged by a term agreed by the parties. In the absence of such an agreement on a fixed term, the temporary transfer contract is then deemed to be concluded for an indefinite period. The employer may also refuse to renew the contract upon termination, but it is not clear how sportsmen can defend their rights.

In the absence of legislative regulation, the solutions to any problems regarding transfers should be sought in the regulations of the sports federations. Transfers of players are regulated by norms of international federations that must be complied with in their turn by national federations. In this regard the Regulation of the Russian Football Union<sup>5</sup> can be taken as an example. The Russian Football Union Regulation (2011) contemplates norms concerning the transfer of football players and defines transfers as relations regulated by FIFA and the Regulation linked to the change of the football club (or training school) with which the player is registered. As a result transfers are regulated by sporting regulations and relate to the registration of the player with the club in order to take part in the competitions. The Russian Football Union Regulation of 2011 also changed some matters concerning transfers of young players up to the age of 16 within the Russian Federation. Before 2011 no limits existed and now, pursuant to Art. 20 and Annex 2 of the Regulation, such transfers are prohibited except when:

- the parents of the young player move to a permanent place of residence in another region of the Russian Federation for the reasons *not* linked to the transfer of the player to another club (school) in the region;
- the transfer is carried out between football clubs legally and factually situated in the same region of the RF;
- the Committee on the status of players adopts a decision that a player must be moved because of insufficient training in the current club.

According to some experts, this is a negative limitation as it violates constitutional rights for labour and it can quite easily be bypassed by clubs wishing to recruit a young player. As for FIFA regulations, they prohibit the international transfer of players up to the age of 18 but do not limit national transfers on the basis of age or nationality.

The new regulation also increased the amount of compensation on signing the first professional contract. Previously, pursuant to the regulation of 2006 when

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<sup>5</sup> Available at <http://sportslaw.ru/data/files/regstatus2011.pdf> (accessed on 30 October 2011).

players signed their first professional contract, the amateur football club or school was entitled to compensation of 100,000 roubles multiplied by the coefficient of the new football club: a multiple of three for premier league clubs, two for first division clubs, one for second division clubs. As a result, the maximum amount of compensation was up to 300,000 roubles. This compensation was paid only to the last amateur club (school) with which the player was registered.

At present, pursuant to the Art. 22 of the regulations, the basic sum of compensation is calculated on the basis of the number of years the player was registered with the club (school) as follows: 12-15 years: 20,000 roubles; age 16-21 years: 40,000 roubles. This amount is multiplied by the coefficient of the club with which the player signed his first contract (three for the premier league, two for the first division, one for the second division).

Due to this innovation the final amount of compensation to the previous clubs that trained the player increased and all the clubs are compensated, not just the last one as was previously the case. These norms are in accordance with FIFA norms.

Also the calculation of compensation in case of transfers of players up to the age of 23 years has changed. Previously at the time of transfer of professional football players up to the age of 23 years, after the expiration of his employment contract the previous club had a right to compensation calculated on the basis of the salary (including premiums) for all the years spent with the club but not more than five, multiplied by the coefficient of the new club (three for the premier league, two for the first division, one for the second division). Now this compensation has been abolished with one exception. Under Art.23 of the regulations, this compensation must be paid to the previous club only if in the 60 calendar days prior to the expiry of the contract the club offered the player a new contract with terms equivalent to or better than the terms of the expiring contract. In cases in which the player turns down the offer of a new contract, at the time of the transfer the old club receives compensation for training, but the calculation rules have been changed. Now this compensation is calculated according to the salary of the player, without consideration of any extra remuneration, multiplied by the number of years spent with the club. The new measure abolished the multiplication on the number of years based on the coefficient of the new club. This is an important innovation in favour of young players, as in the past very large amounts of compensation were required. No compensation is due if the old club does not offer a new contract.

FIFA supports the abolition of compensation only in cases in which the new club does not offer a new contract in the European Union. As for the calculation of compensation, it is paid at the transfers of players up to the age of 23 after the expiry of their contract and is calculated by multiplying the number of years spent with the club (for a maximum of five) by the fixed sum (the hypothetical expenses of the new club to train the player to the same level). The fixed amounts are: 60,000, 30,000 and 10,000 roubles annually.

#### 4. *Termination of employment contracts with professional sportsmen*

The termination of employment contracts is one of the most important and controversial problems in professional sport that may entail serious financial losses for both parties. On the one hand, clubs usually spend a considerable amount to compensate the player's previous club who are not interested in losing the player. On the other hand, players can experience difficulties in finding a new club wishing to pay conspicuous amounts of money to the old clubs in order to be transferred. Until recently no special rules on the termination of employment contracts were contemplated in the LC RF and federal laws, so general rules of employment contract termination were applied (art. 77- 83 LC RF). However, LC RF leaves the list of possible reasons for termination open.

The general rules for the termination of employment contracts at the employee's initiative are laid down in Art. 80 LC RF, pursuant to which the employee can inform the employer in writing of his intention to terminate his employment contract two weeks before the expiry date if no other term is laid down by the LC RF or other federal law in cases of:

- impossibility to continue employment because of admission to an educational institution, or retirement
- violation by the employer of the norms of labour law and other legal acts containing norms of labour law, local normative measures and terms of the collective agreement or individual employment contract.

But in case of professional sportsmen a term of notice of one month rather than two weeks as for other workers is laid down. Only in cases of contracts concluded for a period of less than one month is a general two-week term of notice is applicable. If a sportsman intends to unilaterally terminate the contract without just reasons, he must pay the employer the corresponding indemnity in cases in which such a clause has been included in the contract. If a time period for the payment is not agreed on, in general a two-month term for payment is applied. The LC RF does not specify what a justified reason is, so Art. 80 LC can be applied by analogy. According to this provision, the following reasons justify dismissal: admission to an educational institution, retirement, and violations of labour law provisions in general or of the employment contract in particular.

Some experts propose considering the following as justified special sporting reasons:<sup>6</sup>

- lack of regular participation in competitions, meaning less than 10% of official matches in the season in the case of football;
- failure to include the sportsman in the current season if not related to full or partial inability to play;

<sup>5</sup> Available at <http://sportslaw.ru/data/files/regstatus2011.pdf> (accessed on 30 October 2011).

<sup>6</sup> U. V. ZAITZEV, *Peculiarities of termination of labour contract with sportsmen*, *Materials of the Second International Conference on "Sports law: perspectives of development"*, D. I. Rogachev, M. A. Prokopetz eds., M., 2009, 65.

- violation by the employer of laws and other normative acts, collective agreements, or the individual employment contract;
- relegation of the club to a lower division;
- exclusion of the club from participation in sporting events;
- return to amateur status of the sportsman;
- termination of sporting career.

These matters were governed by the Russian Football Union Regulation according to the relevant FIFA Regulations. Art. 12 of the Russian Football Union Regulation now makes more specific provision for the termination of employment contracts for sporting reasons. Before the amendments it was possible for an established football player who played less than 10% of matches in a given season. Now the contract can be terminated for sporting reasons by a player who has reached the age of 21. Goalkeepers included in the season are excluded. Sporting reasons cannot be applied in cases in which player took part in fewer than 10% of matches for reasons linked to the:

- temporary inability because of sport injury or health reasons in general
- sport disqualification and prohibition from any football activity for a period of longer than three months
- temporary transfer to another club.

The position of FIFA in this regard is similar. The only difference of approach is that FIFA calculates 10% of matches in season considering the number of minutes spent on the field while Russia calculates the number of matches.

The regulation also specifies justified reasons for the unilateral termination of the contract by a football player. Previously this point was regulated by the Chamber of the Russian Football Union in specific cases. At present Art. 11 of the regulation applies the case law of the Chamber<sup>7</sup> with regard to justified reasons:

- violation by the club of laws and other normative acts, collective agreements, or the individual employment contract;
- loss of the professional status of the club
- return to amateur status of the sportsman pursuant to the Regulations
- arrears in the payment of salary to a football player for more than two months from the date due of payment or in the case of litigation, from the date of entry into force of the court ruling
- failure to include a professional sportsman who has reached 21 years in the current season not linked to the temporary inability to work, disqualification or temporary transfer to another club
- other violations by the club recognised as violations by the Chamber.

The FIFA regulation does not include a list of justified reasons for termination and each case is considered separately by the FIFA Dispute Resolution Chamber. This approach is reasonable as FIFA has extensive case law practice that has been consolidated over time.<sup>8</sup>

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<sup>7</sup> M. A. PROKOPEZ, *Transfer revolution*, 2011, [www.sports.ru/tribuna/blogs/lexsportiva/204563.html](http://www.sports.ru/tribuna/blogs/lexsportiva/204563.html).

<sup>8</sup> Prokopez, *ibid*.

The individual employment contract can include other clauses. LC RF art. 348-12 establishes that the parties can stipulate in the contract the obligation of a sportsman to compensate the employer in case the contract is terminated at the initiative of the sportsman without justified reasons or at the initiative of the employer in case of disciplinary sanctions, (Art 192 (3) LC RF). In case of disciplinary sanctions the sportsman is also required to compensate the employer.<sup>9</sup> The employer can dismiss the sportsman as a disciplinary sanction for the non performance or inappropriate performance of his contractual duties. Pursuant to Art. 348.12 the amount of such compensation can be defined in the employment contract as a period of two months if the contract does not provide otherwise.

However there are frequent abuses by clubs in the case of the dismissals and they often make use of the pretext of disciplinary sanctions as in the cases cited below of David Mujiri and Igor Strelkov.

David Mujiri<sup>10</sup> claimed breach of the contract by the Lokomotiv Moscow FC. A new coach wanted to replace some members of the team including Mujiri. The player was refused permission to train with the team in Turkey and was left behind in Moscow to train individually. The player also complained about pressure on the part of management forcing him to unilaterally terminate the contract on his own initiative. As a result he continued to train individually under the supervision of the coaches and then he was fired for disciplinary reasons, i.e. an unjustified four-hour absence from the work place. Lokomotiv Moscow FC claimed that the player was required to arrive at his training session earlier than the other members of the team. However, the player claimed he was never informed about this obligation. Moreover there was a risk of paying indemnity to the club for breach of contract by the player.

Another claim was presented by Igor Strelkov who was on a fixed-term contract with Krylia Sovetov FC, Samara.<sup>11</sup> The player was pressurised by the club management to terminate the contract on his own initiative and moreover, pay compensation to the club. The player had put forward a number of requests to take part in the pre-season training camp. On 02.02.2011 he was required to train individually according to the individual training plan and in accordance with the agreement between the Krylia Sovetov sports director and the player, he was required to start training on 01.02.2011. The player denied the existence of such an agreement. However, he was dismissed for a disciplinary sanction for absence from the work place without valid reasons. The Russian National Dispute Resolution Chamber supported this decision. In the meantime the transfer window was closed and the player was not registered for participation in the Russian Football Premier League Championship.

These examples clearly demonstrate the possibility of clubs to exercise

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<sup>9</sup> Paras. 5,6,9 or 10 art. 81 LC RF, comma 1 art 336 LC RF, 7,8 art. 81 if the actions were committed at the work place in course of labour activity.

<sup>10</sup> Contractual dispute petition of D. Mujiri, 02/02/2010.

<sup>11</sup> Statement of professional player Igor Strelkov d/d 29.04.2011.

power over players and dismiss them unilaterally without justified reasons. As a result, stronger legal regulation of this matter is needed.

Following the introduction of the new section in the LC RF, pursuant to Art. 348.11 LC RF there are additional clauses permitting termination of the contract with the sportsmen, known as sporting reasons:

- disqualification of six months or more
- use (even just a single episode) of doping ascertained in course of doping tests according to the federal law

These reasons for dismissal are classified as disciplinary sanctions and consequently a specific procedure pursuant to Art. 193 LC RF must be observed.

Disqualification under the federal law on physical culture and sport of the RF<sup>12</sup> is the exclusion of sportsmen from competitions by the All Russia Sports Federation. It might take place because of the violation of the rules for some sports or norms adopted by international and national sport federations. This decision may be adopted by Russian Federations for various kinds of sport, including the Russian Football Union. In case of disqualification for a period of less than six months the contract cannot be terminated. There is no maximum limit for disqualification as it is possible to have a lifetime disqualification (for the second use of doping), in accordance with the International Antidoping Code (Copenhagen, 2003)<sup>13</sup> obligatory for all sportsmen in the world.

Each sportsman whose use of doping has been duly demonstrated, regardless of the reasons and circumstances, is condemned to two years of disqualification and in case of a second occurrence to a lifelong disqualification. The results of the competition may be annulled and the sportsmen lose their prizes and medals. Each year the WADA publishes an updated version of the list of prohibited substances. Russia takes part in the activity of WADA and created an independent anti-doping agency and special inspection at the Olympic Committee of Russia. According to a new version of WADA disqualification period is increased from two to four years. However, a disqualification can be set aside as Art 10.3 states that some substances that are acceptable for use by the general public may be used without intention. The minimum sanction in this case is a warning and maximum disqualification of up to one year.<sup>14</sup>

Now in RF there is a law on the organisation of anti-doping control in physical culture and sport in RF, 10 October 2003, No. 837. Moreover, disqualification may take place not only for doping but also for serious violations of sport and competition rules as well as norms established by national and international federations. The inclusion of this clause among the justified reasons for dismissal is important as it allows the club to dismiss the guilty sportsmen and also save their own reputation.

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<sup>12</sup> 4 December 2007 329-FS.

<sup>13</sup> www.wada.ama.org, new reduction from 1 January 2009.

<sup>14</sup> ZAITZEV, *op. cit.*



## COMPENSATION IN CASE OF BREACH OF CONTRACT IN CIVIL LAW COUNTRIES: SPAIN

by *Miguel Cardenal Carro\**

SUMMARY: Abstract – 1. A completely singular regulation of Labour Law – 2. Termination due to breach by the employer – 3. Breach of contracts attributable to the athlete – 4. Other ways of termination with compensation

*Abstract:* This article studies the singularity of the labour regulations in a Civil Law country, as is Spain, regarding the breach of contract by professional athletes and clubs. While giving an overview of the concept and types of contractual termination as regulated in Royal Decree 1006/1985, special focus is made on how the compensation legally foreseen, in the case of breach by either the employer or the athlete, has been fixed and awarded in recent Decisions of the Spanish Courts; this differs in many ways from the compensation awarded in similar cases by the international Federations and even by the Court of Arbitration for Sport.

### *1. A completely singular regulation of Labour Law*

As with others, the special labour relation of professional athletes is not regulated by the same Law as the majority of labour contracts: the Worker's Statute. As far as contractual stability is concerned, it must be pointed out that the general rule is that contracts are indefinite (article 15 of the Worker's Statute); however, for professional athletes they are fixed-term without any exception (article 6 Royal Decree 1006/1985).

In the general labour sphere, compensation for contract termination is only due by the employer, and it is a fixed amount, without room for discretion, calculated according to seniority and to the alleged cause, since the dismissal must

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in principle comply with the cases accepted by the legal system. Thus, if the causes are economic, 20 days per year worked are paid; if the cause is disciplinary, and it is not sufficiently proven or not a serious enough breach, the compensation is 45 days of salary per year of service. An employee is free to resign from his work post without having to compensate the employer (article 49.1-d Worker's Statute) except in the exceptional cases of very limited acceptance –permanency pact, article 21.4 Worker's Statute–, his only burden being to give notice according to the local custom, which is usually two weeks. The compensation for breach of this duty – which isn't caused by the termination of the contract –, is the amount of the salaries corresponding to the days of notice that have not been complied with.

The regulation on professional athletes, applicable to all fields of team sports, also deviates from the general rule. On one hand, it is a compensation that can be openly calculated, as it has a minimum amount but not a maximum, and, especially, it is possible that the employee must compensate the employer, as resignation here isn't free.

The possible compensations between employers and workers due to the *ante tempus* termination of the employment contract depend on the concurring cause in each case, and they are basically grouped in two cases, depending on the author of the breach, even though some clarifications must be made when studying these concrete causes.

The sports regulations are completely irrelevant, with Royal Decree 1006/1985 setting the rules for the termination, complemented by the respective Collective Bargaining Agreement according to the sports discipline at hand.

## 2. Termination due to breach by the employer

Royal Decree 1006/1985 puts the consequences of unfair dismissals on the same level as cases in which the athlete must request the termination of the contract due to serious breach by the employer, such as reiterated non-payments of salary or, according to the recent jurisprudence of the Spanish Supreme Court, leaving a player without a licence during a competition.<sup>1</sup> This would be an article similar to article 15 of the FIFA Regulations on the Status and Transfer of Players (RSTP), but which would additionally include a wider range of causes – along with the lack of effective occupation of the work post, mostly everything related to the non-payment of salaries –, and which also results in the same compensation in favour of the footballer as if he had been dismissed without just cause. There is not a *numerus clausus* of cases that allow the athlete to request the termination. For example, a Tribunal has accepted this year that the employer not complying with his insurance obligations has the same effect.<sup>2</sup> In fact, it is usual in Spain to refer to this figure, imported from the common labour regime, as the “indirect dismissal”,

<sup>1</sup> Spanish Supreme Court Decision of 28 April 2010. *Acuña case*.

<sup>2</sup> For more on this decision, see. K. Irurzun Ugalde, ‘El mercado de trabajo del fútbol profesional. Edificio en ruina’, *Revista Jurídica del Deporte*, nº 31, 2011.

as the employer's will to discharge the employee is obtained in a biased manner, but it still entails the same duty to compensate as in an unfair dismissal.

Indeed, according to article 16.2 of Royal Decree 1006/1985, "*the termination of the contract requested by the professional athlete, founded on one of the causes determined in article 50 of the Worker's Statute, shall cause the same effects as the unfair dismissal without reemployment.*"

This rule which it refers to is article 15.1 of Royal Decree 1006/1985, which states: "*in the case of unfair dismissal without reemployment, the professional athlete shall be entitled to a compensation which shall be determined judicially in the absence of an agreement, of at least two monthly periodic salaries, plus the proportional part corresponding to the supplements for quality and quantity of work received during the last year, per year of service. The concurring circumstances shall be taken into account for its fixation, especially the ones relative to the salary that has ceased to be received by the athlete because of the anticipated termination of his contract.*"

It is noteworthy that since the *Arteche* case, which was resolved by a Supreme Court decision of 12 February 1990,<sup>3</sup> the interpretation of the Spanish Supreme Court is that, unlike all other employment contracts, in this field there is no possibility of reaccepting the employee if the dismissal Sentence goes against the employer. As for the fixing of the compensation, given the existence of a minimum amount, it has even been considered that it could sometimes exceed the amount that would still have to be received for the whole contract. This is what happened in the *Arteche* case, although in 2002 the Supreme Court has later proved hesitant on the possible existence of a maximum amount.<sup>4</sup>

Even though it is true that a great amount of Decisions has shifted towards the employee receiving 100% of the salaries that he has ceased to perceive because of the *ante tempus* termination, it is possible to find numerous resolutions that do not go in that direction and limit themselves to paying what was left for that season, or two in the case that there were many which had not been completed in accordance with what had been agreed. It is therefore not possible to establish a general rule, not even to set out parameters on why in some cases Tribunals reason in one way or another.

Finally, it is necessary to specify on the termination requested by the athlete due to the employer's breaches. Although it is formally parallel to the dismissal, it is dysfunctional within the material setup of professional sport. Since a judicial decision must be obtained, and this one can also be appealed before higher instances, the athlete requires too many months – almost certainly more than a year – to know if the just cause exists. During this time, it is easy to presume that he will

<sup>3</sup> For more on this decision, a thorough study by J. Luján Alcaraz, 'La opción empresarial en el despido improcedente de un deportista profesional', *Aranzadi Social*, vol. V, 1991, 50.

<sup>4</sup> M. Cardenal Carro, '¿Puede la indemnización que corresponda a un deportista profesional tras su despido improcedente superar el importe de los salarios dejados de percibir por la extinción ante tempus?. Las incertidumbres provocadas por una Sentencia del Tribunal Supremo que probablemente incorpora en sus Fundamentos de Derecho un lapsus linguae', *Revista Jurídica del Deporte*, nº 11, 2004, 351-368.

remain inactive. The Spanish Tribunals have found an answer to this problem with a rather forced interpretation that has created a *tertium genus* within contract terminations by will of the athlete: in addition to the two foreseen in the regulations – with judicially recognized cause and without cause – it has added the termination with cause that is only judicially recognized once the employer claims that it has been a termination without just cause. A much talked of case was Vinokourov's, whom the anti-doping operation "Puerto" left without the possibility of competing in the Tour, as his team had been disqualified a month before the event. Without any time to request for such a decision on compensation, he left and, when he was later sued by the sports group ONCE, the Tribunals considered that there was in fact cause.<sup>5</sup>

### 3. Breach of contracts attributable to the athlete

Without a doubt, the most innovative aspect of the labour regulations on professional athletes in Spain has been the one regarding the breach of contract by the athlete. It has justly been affirmed that the regulation of FIFA article 17 is inspired in what had been occurring many years before in our country. Indeed, what is nowadays considered normal in light of the jurisprudence of the Single Judge – the breach of contract can take place in any case, and the athlete's employment for another company must immediately be accepted, regardless of the vicissitudes of the payment of the compensation which may be owed – is what article 16.1 of Royal Decree 1006/1985 meant when it stated: "*The termination of the contract by will of the professional athlete, without cause attributable to the club, shall give him the right to, where appropriate, a compensation that, in the absence of an agreement, shall be determined by the labour jurisdiction according to the sporting circumstances, the damage caused to the entity, the reasons for the breach and other elements that the player deems considerable.*"

The parallelism between the two precepts can be observed in the following table:

Royal Decree 1006/1985	Art. 17 FIFA RSTP
Supremacy of the <i>termination clause</i> "In the absence of an agreement"	"The amount may be stipulated in the contract" (Matuzalem)
* Other similar criteria: <ul style="list-style-type: none"> <li>• "sporting circumstances"</li> <li>• "reasons for the breach"</li> <li>• "damage caused to the entity"</li> </ul>	<ul style="list-style-type: none"> <li>* "taking the national legislation" (limited referral)</li> <li>• "specificity of sport"</li> <li>• "remuneration and other benefits due to the player under the existing contract and/or the new contract"</li> <li>• "the fees and expenses paid or incurred by the former club (amortised over the term of the contract)"</li> </ul>

<sup>5</sup> Madrid Labour Court n° 32 Decision of 21 May 2007.

It is precisely in the enforcement of this norm that the only discrepancy between the labour and sport systems arises. In the few cases in which a football player has resorted to this possibility of resigning while debating whether he must pay the amount of the disproportionate clauses, the sporting authorities – Royal Spanish Football Federation, Professional Football League – have refused to process the licence as long as the termination clause had not been paid, even though it was still, as has been pointed out, being discussed judicially (Zubiaurre case).

The situation nowadays is somewhat strange. When Royal Decree 1006/1985 was approved, incorporating other features as to the liberation of athletes – especially the non-existence of mandatory extensions at the end of the contract if these are not approved in a Collective Bargaining Agreement –, this had been the main concern of the clubs, and for this purpose they tried to obstruct such liberalization through a “Gentleman’s agreement”.<sup>6</sup> Only since 1992, when the goalkeeper of the Olympic national team that had won the gold medal, a young talent, breached his contract and was sentenced to pay only 60.000 euro as compensation according to the rules of the aforementioned article 16 Royal Decree 1006/1985, have termination clauses become generalized.<sup>7</sup> The price was so ridiculous when compared to the ones paid for transfers, that all clubs learned their lesson and imposed such clauses on their workers from that moment on.

Thus, what had until then occurred, that is, a few breaches in other sports without termination clauses, has now become something marginal. Nowadays, every time there is a breach, there will also be an assessment of damages that has been previously fixed by the parties. Some mistakes only seem to appear in minor sports, regarding low-profile athletes or in professions that aren’t strictly sports-related – coaches for example –. The compensations fixed are fairly limited and generally calculated on the basis of the contractual improvement obtained from the termination and, where relevant, a small penalty.<sup>8</sup>

Does this reality mean the end of the problem? Not at all. In no way can it be asserted that nowadays in Spain there is the desirable minimal legal certainty, and this factor undoubtedly contributes to there being fewer *ante tempus* terminations of contracts, in favour of the negotiation of transfers. In the cases that have occurred, a certain pendular movement has been followed: initially, when the dominant dogmatic trend continued to be very much influenced by decades of criticism to the intervention mechanisms in the labour market, the decisions were

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<sup>6</sup> At great length, J. Luján Alcaraz and J. A. Buendía Jiménez, ‘El despido del deportista profesional’, in VV. AA., *Los deportistas profesionales: estudio de su régimen jurídico laboral y de Seguridad Social*, dir. J. L. Monereo Pérez y M. Cardenal Carro, Comares, 2010, 457 and after.

<sup>7</sup> Zaragoza Labour Court n°1 Decision 797/92 of 4 March 1993: A commentary by M. Cardenal Carro, *Deporte y Derecho. Las relaciones laborales en el deporte profesional*, reimpression digital 2009, 425 and after. (Available at [www.derechodeportivo.es/images/stories/Cuaderno%203.pdf](http://www.derechodeportivo.es/images/stories/Cuaderno%203.pdf)).

<sup>8</sup> According to this Tribunal, this would be the highest possible salary improvement, plus one fourth of the annual salary received under the previous contract. These are Castilla y León Superior Court of Justice Decisions of 17 July and 16 September 2009.

very favourable to employees. While looking for more or less solvent ways out of this, they tried not to answer too generally on termination clauses, but rather to make their application an exception in the specific case. A paradigmatic example is that of footballer Loreto, forward who would have a long career in teams of the Spanish Professional Football League and who, at the beginning of his career, saw himself implicated in the middle of an *affaire* between rivals Betis and Sevilla F.C., in which, despite having signed a termination clause for 3 million euro, he was sentenced to pay only 15.000.<sup>9</sup>

The tides changed once the effects of the liberalization in this industrial sector of professional sport had been contemplated. Spain has one of the most indebted leagues in the world –as I write these thoughts, it is immersed in a player’s strike–, and its sporting balance is also close to being the worst among important competitions, given the evident reality that only two teams can realistically hope to win the championship. The function that termination clauses fulfil by containing salaries and providing a certain competitive balance has caused that these have been, at least in part, claimed by the doctrine against these so generalist accusations of the past,<sup>10</sup> built on the likeness of the so-called “golden slaves”.<sup>11</sup>

Tribunals have not been insensitive to these changes, and the situation nowadays, as has been pointed out, is somewhat undefined. When termination clauses were not very elevated, there have been no problems in enforcing them.<sup>12</sup>

When, as is more frequent, they have been of high amounts of money, the problems have appeared.

In principle, the structure of article 16.1 of Royal Decree 1006/1985 leads to the agreement between the parties prevailing over any other consideration. If this isn’t so, it is difficult to find a function to this agreement. Just as the CAS has been able to say that the pact prevails, while at the same time pointing out that the one included in a specific contract is not realistic and has an intimidatory function (Matuzalem), – something hard to reconcile under the requirements of the principle of non-contradiction –, in Spain their validity is accepted as long as they are not “abusive”, turning to the institution of *abuse of process* regulated in article 7.2 of the Spanish Civil Code. Few times has recourse to this institution taken place so inconsistently on the conceptual level, since the mentioned regulation has nothing to do with what has been alleged by the Courts. Indeed, the scrutiny to which termination clauses are subject is based on the amount being “disproportionate”.

This consideration needs a point of comparison: beyond the fact that Royal

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<sup>9</sup> Andalusia Superior Court of Justice Decision of 3 May 1994.

<sup>10</sup> In this regard, see, for example, the tenor of contributions included in the monograph dedicated to the Téllez case by *Revista Aranzadi Social*, vol. V, 1998.

<sup>11</sup> In Spain, the contribution of the doctorate thesis of its main labour expert, M. Alonso Olea, in charge of J. Cabrera Bazán, first division footballer and later Professor in Labour and Social Security Law, has been decisive: (*‘El contrato de trabajo deportivo’*, Instituto de Estudios Políticos, Madrid, 1961).

<sup>12</sup> Galician Superior Court of Justice, Labour Section Decision of 22 March 1999. (*Aranzadi Social*, 1999, 447).

This consideration needs a point of comparison: beyond the fact that Royal Decree 1006/1985 does not require their use, the use of any termination clause actually means the disapproval of these agreements, which only become valid insofar as they comply with the expected criteria that determine the border between what is abusive and disproportionate and what is admissible.

It seems natural to suppose that, since Royal Decree 1006/1985 includes some criteria that must be used to fix the compensation in the absence of an agreement, these instructions will be used to analyze the “fairness” of the termination clause. This is either the same or very similar to saying that the compensation is determined by the mentioned criteria, and that termination clauses therefore are worthless.

There has been a great dogmatic reflection in our country regarding termination clauses.<sup>13</sup> From doubting their validity in the case that the agreement is not subsequent to the breach, to holding their validity unconditionally, the positions among authors have been numerous. Maybe, given the experience, the conclusion that can be drawn from what has happened is that a more explicit wording of the applicable norm is necessary, as opposed to the established ambiguity of the actual wording.

Finally, the case is that Tribunals have changed the focus as mentioned, but without any great dogmatic plan. Even though the reasoning in some decisions is worthy of study, such as in the Téllez case, the present-day version seems almost based on a joke. Indeed, in the case of Miralles, a young basketball player on a two-year deal, he decided to terminate his contract during the summer between the two seasons. He was not an important player, to the extent that he had been loaned out, and the same fate awaited him for the following and final season of his contract. When considering whether the amount of 200 million pesetas (1.2 million euro) of the termination clause was “abusive” or not, the Mataró Labour Court nº 1, in its Decision of 21 March 2003, reasoned that “*The clause can’t be regarded as abusive, when the reality is that the amounts agreed as termination clauses by the claimant club – vid. Pages 276-280 – with players of similar or inferior characteristics are like the one of the defendant or even superior, as is the case of Alex M., pages 283-284 and Raúl L. pages 177-184. It can neither be regarded that the clause agreed by mister M. with CJB constitutes an abusive clause, when fellow youth team players, see pages 180-184, in similar conditions, have agreed to clauses of 500 million pesetas that the Club of Mister Florentino P. gladly pays.*”

The fact that Real Madrid – that the Judge takes the liberty of calling “the Club of Mister Florentino P.”, in reference to its President – had paid 3 million euro for another player of similar age – the only common factor between the two – a short time before, leads to it being considered reasonable that in this case 1.2

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<sup>13</sup> For all, the most recent authors to depict this debate are: E. García Silvero, *La extinción del contrato de los deportistas profesionales*, Aranzadi, 2008, and J. M. González del Río, *El deportista profesional ante la extinción del contrato de trabajo deportivo*, La Ley, 2008.

million must be paid. Ultimately, what makes a termination clause reasonable or not is that it falls within the parameter of what would be considered normal in a transfer, and a fact like the one provided is considered sufficient. It must be noted that recently, in the De Sanctis case, the CAS did not give any value to the assessments made by the Italian club regarding other goalkeepers transferred in previous seasons: as can be seen, the standard used by this specialized instance is much more subtle than the one of the Spanish jurisdiction.

This Judge's intuition, since there isn't really an explicit reasoning in the transcribed paragraph, is conceptualized in the Decision that resolves the appeal brought against it. The Superior Court of Justice of Catalonia, in its Decision of 2 February 2004, states: "*In the present case, it is obvious that the establishing of the termination clause did not have the goal of causing damage to the employee, but rather the safeguard of the sporting and financial interests of the employing club in the case of an anticipated termination of the contract by the player, without cause attributable to the club, as well as the ones of the player himself regarding the possibility of terminating the contract before the expiry of the agreed term, which is why the financial content of the clause shall only be considered abusive when it prevents the protection of any of the two aforementioned interests and, more specifically, from the point of view of the player's interests, when the «quantum» of the clause is of such size that it deters any other club from attempting to sign him, thus preventing him from changing club and ultimately acting as a right of retention of the player by the club.*" This idea somehow already appeared in the cited Téllez case, in which the Superior Court of Justice of Galicia faced the question of compensation parting from the need for the following to take place: "*1° the right of the footballer to resign at any moment, therefore terminating the fixed-term contract, and 2° the legitimate right of the company to foresee this contingency by agreeing on the payment of a financial compensation for the untimely breach of the contract whose amount is in no way strange to the usual presence of another club interested in acquiring the services of the footballer, and whom the law itself declares subsidiary responsible regarding the agreed compensation.*"

The transfer criterion, which, again, is not necessarily included in the cited sentence, finally appears connected with the functionality of the clause: the idea would be something like pre-fixing a price for which a transfer cannot be rejected. This is clearly contrary to what is taking place in the civil jurisdiction, where claims are lodged by clubs that have established penalty clauses in the contracts with the children from their youth teams that, due to their age, cannot even sign an employment contract. It is an obvious paradox that, given how (i) these adolescents are not protected, (ii) the absolute lack of balance between the reciprocal engagements and, (iii) so many other considerations that question the validity of these agreements, the cases that have occurred – Raúl Baena, Pacheco, Fran Mérida – all point to that, outside the tribunals specialized in labour disputes, it

seems less inconvenient to accept what has been signed by the parties, no matter what – *in casu*, the plain 3 million euro –, without further questioning.<sup>14</sup>

If the solution from one point of view can be considered reasonable, note that it is not the only possible one, not even the most probable one. In article 16.1 Royal Decree 1006/1985, the athlete is liable for paying the compensation, with the enormous tax costs that this entails – the amount paid will be considered as part of his income –, which has led to problems with footballers that have paid their termination clause. A notable difference with article 17 of the FIFA Regulations arises. Opposite to the successful approach of the international Federation, that makes the clubs jointly liable, the Spanish regulations, in article 16.2 of Royal Decree 1006/1985, only consider their subsidiary liability: “*In the case that the athlete’s services are hired by another club or sports entity within one year from the date of the breach, these shall be subsidiary liable for the payment of the indicated financial obligations.*”

The most relevant case that has occurred after this has been the one of footballer Zubiaurre, which was finally decided by the Decision of the Basque Country Superior Court of Justice of 17 October 2006. The same line of argument is again referred to, which in this case leads to the opposite conclusion in regards to the termination clause. While a 30 million euro clause had been set, the sentence was for only 5, with the argument that it was a reasonable amount for a transfer. In order to not consider those 5 million euro as abusive, the reasoning in the Decision regards the eventual transfer to be made by Real Sociedad: “*That the compensation fixed in this decision is, in the terms of the appellants, also as abusive as the termination clause. We understand that this is not so: if it is assumed that the contract was in force, since we have to consider the fact that the footballer belonged to the squad of Real Sociedad de Fútbol, SAD is an asset for that party, which then had expectations regarding the sporting development of this player (which is manifested already as of last season, in which he plays fourteen matches in the first division, and his performance is what makes Athletic Club try to hire him), hoping this will pay off in the year of the extension, either in the same club in the remaining year, or in another one by negotiating his definitive loan or transfer (article 13 point 1 letter a) with the consent of the employee. He is an asset whose loss we consider that the Royal Decree allows us to value in article 16 point 1, which we understand, precisely due to the literalness of the beginning of the first paragraph and that of its second paragraph, allows the fact of the withdrawal being based on the agreement to play with another team to be taken into consideration when fixing the amount of compensation (understandably because the professional conditions are improved when there is no record of the reason for the breach)*”.

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<sup>14</sup> A deep and reasoned analysis of these Decisions in J. Luján Alcaraz, ‘Los derechos de formación deportiva’, *Revista Jurídica del deporte*, nº 31, 2011.

In this case, the transfer price was determined without even having a point of comparison, but rather as an amount that the Tribunal considered reasonable, without need for more arguments: the transfer price is something that needs no explanation.

#### 4. *Other ways of termination with compensation*

The financial situation in football has led to clubs intensifying their resourcefulness. Since it must be supposed that their financial situation is hypothetically negative, dismissals for reasons not connected to the employee but related to the financial situation of the company offer an outlook as suggestive as the compensations foreseen in the Law are cheap: twenty days of salary per year of seniority. In a five-year contract, of which only two have been fulfilled, the club can save on the three remaining years of salary with one forty-day compensation.

If the company is not dissolved, the other cause related to this situation is the one described in letter f) of article 13 of Royal Decree 1006/1985. There, terminations are allowed “*Due to economic crisis of the club or sports entity that justifies a restructuring of the athlete squad, in accordance with the process mentioned in the previous section. Also, due to other kinds of crisis that prevent the normal development of the club or sport entity’s activity, through the same administrative process.*” With this formula, the dismissal process now called collective dismissal is being referred to within the general labour legislation, but it has been subject to profound changes since the approval of Royal Decree 1006/1985.

Therefore, even though the Supreme Court decided that individual dismissal (in an amount that does not require a Collective Redundancy Dismissal with administrative approval, usually of at least ten employees) is not possible in the case of athletes,<sup>15</sup> it is debatable that, after the changes performed, this theory is still valid, even though it is complicated for a company to take the risk of making sure of this, given the drastic consequences of sentences for dismissal. It is also unknown whether, in order to reach the necessary threshold of employees for the dismissal, it is possible to mix common workers with athletes. Actually, no Collective Redundancy Dismissal has concluded by merely alleging an economic crisis, but their mere initiation, as happens frequently, has allowed for the footballers affected to accept substantial reductions in their salary, in view of the risk of receiving only the trifling amount of compensation mentioned above.

Also, it is foreseen in Royal Decree 1006/1985 that if a player is injured, and this results in his disability as a footballer, the club must pay him 6 months of salary. This is so, even if the contract had already expired due to the completion of the agreed term, and the player had therefore been paid 100% of the salary that had been agreed.

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<sup>15</sup> Decisions of 21 January and 6 February 2002.

## CONTRACT STABILITY IN THE NETHERLANDS

by *Steven F.H. Jellinghaus* and *Marjan Olfers*\*

SUMMARY: 1. Introduction – 2. Regulation by the KNVB – 3. Regulation by the Dutch legislator – 4. Implementation in practice: effectuation in jurisdiction – 5. Transfer provisions and transfer fees – 6. Unilateral option clause – 7. The resolution of international disputes, unilateral termination and compensation – 8. The European perspective – 9. EU, from Bosman to Bernard

### *1. Introduction*<sup>1</sup>

With more than 1.2 million players football is a national sport in the Netherlands. The organising body behind this sport is the Dutch Football Association KNVB, the “Koninklijke Nederlandse Voetbalbond”, and the amateur and professional football competition are organised under the responsibility of this association.<sup>2</sup> The Netherlands do not have specific sports laws such as an anti doping law or a law governing professional athletes.<sup>3</sup> For that reason sports are governed by national laws such as labour law and association law. In addition to that sports clubs can also law down binding regulations for their members under association law.

In the Netherlands, regulations for contract stability are a mix of regular labour law and regulations with respect to association law. That makes it necessary that one always verifies which regulation applies. In case of an international transfer namely, the FIFA regulation will apply first and foremost. In case of a transfer

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<sup>1</sup> Cf. for a general survey S.F.H. JELLINGHAUS, ‘*Het opleidings- en solidariteitssysteem van de FIFA: de stand van zaken*’, *Ara* 2005/2, 4-45.

<sup>2</sup> Incidentally, there is also an indoor football association (not FIFA accredited) that organises its own competition. This association is not taken into account.

<sup>3</sup> Our legal system does have the ‘Wet Maatregelen Bestrijding Voetbalvandalisme en Ernstige Overlast (Wet MBVEO)’ (Anti Football Hooligan Act). This law is also known under the name *Football Act*. Further there is the intention to provide a legal basis for doping tests of participants in competitions organised by sports associations.

within the Netherlands the KNVB regulation will apply.

This contribution first covers the regulations that apply within the KNVB. After that, Dutch legislation will be addressed. Next the implementation in case law will be dealt with, and after that several selected topics (such as amounts of fees, the option clause) will be considered. Finally the Dutch study will be discussed against the European perspective.

## 2. Regulation by the KNVB

The regulations of the KNVB consist of generally applicable articles of association and association regulations, and include specific regulations for amateur and professional football sections. Every player and professional football organisation is a member of the KNVB. As a consequence, they are all subject to the regulations. The KNVB is a member of UEFA and FIFA, and is subject to those regulations itself. However, a direct implementation of these latter regulations has not been provided for (with the exception of the rules of the sport).<sup>4</sup> The KNVB however, is obliged to implement UEFA and FIFA regulations under its own regulations.<sup>5</sup>

The Regulation on General Transfer Provisions, Training Compensation and Solidarity Contribution is an association regulation which has become effective in this form in 2004. It is the national implementation of the FIFA Regulations Regarding the Status and Transfer of Players. Briefly, this regulation prescribes that, in case of a player transfer from an amateur to a professional football organisation (below: PFO) or a transfer from a PFO to a different PFO, a compensation is paid to the (amateur and professional) football clubs, who trained and/or educated the player in the past.

On the basis of the Professional Football Regulation and the collective labour agreement for professional football, each player who participates in the professional football competition has a written employment contract.<sup>6</sup> It is also possible that a player is leased to a different PFO.

Just as the FIFA system the KNVB regulation distinguishes a training compensation and a solidarity contribution. The basic principle applies that a player must be eligible to play in order to be able to participate in matches. In case of a transfer of football club this transfer must also be registered by the KNVB, and a player may not play for more than one club only.

The training compensation is regulated by article 3 of the Regulation, which reads:

A professional football organisation is required to pay a training compensation in accordance with the provisions of this Regulation to the clubs with which the

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<sup>4</sup> Cf. article 7 para. 1 under a, KNVB Articles of Association.

<sup>5</sup> Cf. article 4 para. 2 under d, KNVB Articles of Association: ... *under which the KNVB undertakes to respect and comply with the articles, regulations and resolutions of FIFA and UEFA bodies, and to monitor the compliance by its own bodies and members.*

<sup>6</sup> Cf. article 53 Professional Football Regulation.

player was registered as an eligible member during his training period, in case:

- a. the player participated in five official competition matches of the first team of that professional football organisation, or;
- b. the player has entered into a player contract with the professional football organisation concerned, or;
- c. the player has entered into a consecutive player contract with that professional football organisation; prior to the end of the season in which the player has reached the age of 22.

The contents of this article do not apply to players who are active in the female first division.

The liability to pay the training compensation is provided for by article 4 of the Regulation, and reads as follows:

1. In case a contract player is transferred to a different professional football organisation during the term of a player contract, the latter professional football organisation shall divide among the clubs with which the player was registered as an eligible member between his twelfth and twenty-third year, 5% of the fee to be paid to the professional football organisation by way of a solidarity contribution, the above in accordance with the provisions of this Regulation.
2. The fee received by the professional football organisation on account of the premature termination of the player contract with the player to be transferred, shall determine the amount of the solidarity contribution as referred to in paragraph 1 of this article.

### 3. *Regulation by the Dutch legislator*<sup>7</sup>

Above it has been mentioned that the Dutch legislator has not created specific sports regulations. Also, as a consequence of the so-called Bosman ruling<sup>8</sup> the basis for contract stability lies in the concluding of contracts for a specific period of time. On the basis of Dutch labour law namely, it is not possible to terminate such an agreement prematurely.<sup>9</sup> This is different in one case only: if a provision for premature termination has been agreed as part of the employment contract. It must contain the provision that premature termination is possible. Incorporating such a provision in a contract is not customary in sports. The legislator however, has defined a number of measures in order to protect the employee. A temporary employment agreement for instance, cannot be entered into more than three times in a three year period. It is possible to deviate from this provision by means of a collective labour agreement, and that is what has been done in football. the collective labour agreement for contract players 2010-2014 has used this possibility

<sup>7</sup> Cf. for a general description S.F.H. JELLINGHAUS and M.J. MAESSEN, *The Netherlands*, in: F. Hendrick, *International Encyclopedia Sports Law*, Kluwer 2011.

<sup>8</sup> Case C-415/93 'Hof van Justitie 15 december 1995', NJ 1996, 637.

<sup>9</sup> Cf. article 7:667 para. 3 Dutch Civil Code.

to create an exception.

The basic principle therefore is, that a player, of whom the contract term has expired, may switch to a different PFO without payment of any compensation at all. One does not have to pay a fee for such a transfer, either. A player or PFO will always enter into an employment contract for a definite period of time. A permanent employment contract is not permitted on the basis of the collective labour agreement and the regulations. On the basis of article 6 of the collective labour agreement and article 53 of the Professional Football Regulation an employment contract must always end on 30 June of any year. By making it impossible to prematurely terminate these employment contracts, it is achieved that a player cannot switch to a different PFO during the term of the employment contract without committing a breach of contract. If he does commit a breach of contract, this means that in terms of labour law, this is a matter of a so-called resignation with liability for damages.<sup>10</sup> Then the employer may choose to claim a so-called compensation or full damages. In the first situation the compensation to be paid to the employer by the employee is determined on the basis of the amount of the remaining salary which the employee would receive until the end of the contract term. In the second situation one chooses to award a compensation for all damage caused. In that case it is the employer's responsibility to substantiate the extent of the actual damage caused. The onus of proof lies with the employer. For the player that creates an uncertain situation.

Usually, a player who faces this, will choose for (financial) certainty. In order to facilitate his possible transfer he will have to resign. Because of the (financial) uncertainty that is caused in case of unilateral termination of the employment Dutch legislation has a possibility for both employer (PFO) and/or employee (player) to ask the court to terminate the employment contract due to a change of circumstances.<sup>11</sup> The court must first establish whether there actually is a change in circumstances that justifies a termination. If that is established by the court, it can terminate the employment contract, and award a *fair* compensation to either party concerned. This fair compensation may (positively or negatively) differ from the actual damage. For the calculation of this fair compensation the courts have issued a guideline. The calculation basis of this guideline is that the fair compensation is calculated by one monthly salary for each year of employment, which may be increased on account of a factor for age, and which may also take into account the question as to who was responsible for the termination of the employment. The guideline is not established law but is widely used in jurisdiction.

#### 4. *Implementation in practice: effectuation in jurisdiction*

Next, we can look at the implementation of these provisions in practice. We can conclude that, due to the articles of association of KNVB, disputes in this field are

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<sup>10</sup> Article 7:680 Dutch Civil Code.

<sup>11</sup> Cf. article 7:685 Dutch Civil Code.

never submitted to a court of law. Any dispute between members of KNVB namely, must be settled by the KNVB Arbitration Committee (Cf. article 8 of the articles of KNVB). Jurisdiction therefore is only provided by this committee.

Usually, players who seek a premature termination of the employment contract request the committee to rescind the employment contract. The reason for this is that, on the basis of Dutch labour law the player can withdraw the request for a rescission in case the decision would not be in the player's favour. In other words: if the compensation awarded to the PFO would be too high in the opinion of the player (in fact, usually the player's new PFO).

The jurisdiction of the Dutch arbitration committee is currently shaped in a number of cases. One of the more well-known cases is the matter concerning the De Boer brothers, back in 1998. These well-known football players were employed by PFO Ajax and had received the offer to enter the employment of Barcelona.<sup>12</sup> The request to rescind the employment contract was rejected by the committee. According to established case law such a request is only accepted in case of a financial improvement and an improvement of the player's position. It was established that that was not the case. It should be noted that, in the season immediately prior to this procedure, Ajax had played the final of the Champions League. It was further moved that a conflict of trust existed. The latter was not accepted: according to the committee it was essentially a business conflict.

The principle in jurisdiction therefore is that premature termination of the employment contract between a player and a PFO is only allowed in case of a financial improvement and an improvement of the player's position. It is the responsibility of the player to substantiate that both improvements apply. That this is the case, is not easily accepted. Leading decisions of the KNVB Arbitration Committee with respect to this are the cases of Bakens-RKC<sup>13</sup> and Suarez-Groningen.<sup>14</sup> Both these cases, that were conducted at (almost) the same time concerned players who, for reasons of their own, wished to obtain a transfer to a different club. In the case of Suarez-Groningen the committee decided that a transfer from Groningen to Ajax would not result in an improvement of both the financial situation and the player's position, and the termination of the employment contract was refused. The case of Bakens was a transfer from a relegating club, RKC, to Heracles Almelo, and in this case the transfer was allowed, however, upon payment of a compensation of more than two annual salaries, although the contract of Bakens had a remaining duration of only one year.

In both cases the committee repeated that arrangements made as a starting point, must be honoured. Certainly now, when players are usually supported by professional consultants when they enter into a contract. Unlike Suarez, Bakens had a contract containing a provision with respect to a possible premature termination of the employment. As a result of that a premature termination was

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<sup>12</sup> Arbitration committee KNVB 30 June 1998, JAR 1998/171.

<sup>13</sup> Arbitration committee KNVB 8 August 2007, no. 1165, JIN 2008/525 with remark Van Geel.

<sup>14</sup> Arbitration committee KNVB 8 August 2007, no. 1164.

indeed possible. However, the compensation linked to that termination (*ex aequo et bono*) is considerable. Incidentally, the result of these procedures is that eventually Suarez did make the transfer to play for Ajax (but at a much higher transfer fee), and that Bakens finished the season with RKC. The conclusion is that in practice, there is a heavy onus of proof on the player to substantiate that an improvement of their financial position and position in the sport apply. That is different in case the employment contract contains the provision which allows for a premature termination. In addition to that premature termination (failing any specific arrangements for that) may result in a considerable financial compensation.

### 5. *Transfer provisions and transfer fees*

The Regulation on General Transfer Provisions, Training Compensation and Solidarity Contribution of the KNVB applies to the transfer of a contract player to an amateur club, for which he wishes to participate in official competition matches as a member, the transfer of an amateur player from an amateur club to a professional football organisation with which he has entered into an employment contract, the transfer of a youth player who plays as an amateur for a professional football organisation to a different professional football organisation with which he has entered into a player contract, and the transfer of an amateur player from an amateur club to a professional football organisation for which he will play as an amateur player in competitions of the professional football section.

The player is required to apply for the transfer personally, using a transfer form. The transfer is granted by the Association Board. This power may be delegated to a Section Board. An application can be granted only if the applicant is able to show that he has met his financial obligations towards the club he wishes to leave. These financial obligations include any contribution obligations and personal fines and costs which are borne by the player.

An amateur player who is eligible to play for a club has a limited eligibility. He is not allowed to participate in training or matches of a different club. It is possible to make an exception in case he has obtained the written approval of the club for which he is eligible. An amateur player who is not yet given the approval for a transfer, is allowed to participate in training and other than official competition matches with his new club during the time from 1 June through 31 July, provided that the transfer form has been received by the secretariat of the association, and the competition of the club he has left, has ended. If a player does not correctly observe the limitations of his eligibility, the Board of the Association may decide not to look into the transfer applied for, or to refuse a transfer, or to withdraw a registration that has already been effected. the Association Board may also withdraw the decision to allow a transfer in case it should appear at a later stage, that the transfer form had not been completed truthfully.

A requested or already allowed transfer may also be withdrawn at the request of the applicant. In case the application for a transfer is withdrawn, a new

application for a transfer of the same player cannot be looked into in the transfer period during which the application was submitted, unless in case he has signed a player contract with a professional football organisation. If a transfer that was already allowed, is withdrawn, the amateur player will be eligible to play for his previous club, effective on the date at which the decision that the withdrawal was allowed, was given.

In case a transfer has been granted to a player who has been suspended or disqualified, this player will not become eligible to play for his new club until after the end of the suspension or disqualification.

A professional football organisation owes a training compensation to the clubs with which the player was registered as an eligible player during his training period, in case:

1. the player has participated in five official competition matches of the first team of the professional football organisation;
2. the player has entered into a player contract with that professional football organisation;
3. the player has entered into a consecutive player contract with that professional football organisation.

All three circumstances above must apply before the end of the season in which the player reaches the age of 22.

For the calculation of the training compensation the principle applies that the training period is no more than twelve months. The period up to and including the club year in which the player turns nine years old is considered one year of training. For the period after that each club year up to and including the club year in which the player turns twenty, is considered one year of training. The amount of the training compensation is 1.355,- euro for each year of training during which the player had been registered as an eligible player.

The training compensation is paid to all clubs for which the player was eligible to play during the training period. In case the professional football organisation has entered into a consecutive player contract with the player, the training compensation is only paid to the last club with which the player was registered as an eligible member. Once the training compensation is due, this cancels the obligation to pay a compensation on account of a next transfer of this payer, except in case a consecutive player contract has been entered into.

A professional football organisation that is obliged to pay a training compensation in accordance with this regulation, must have paid this compensation to the club entitled to that compensation within thirty days after the player has participated in the fifth match of the first team of the professional football organisation, or after the player has entered into a player contract with the professional football organisation. Should the organisation fail to comply with this obligation, the KNVB will pay the clubs that are entitled to the compensation upon their request. After this, the KNVB has a claim on the professional football organisation.

If a contract player is transferred to a different football organisation during the term of the player contract, the latter club must pay a solidarity contribution of 5% of the fee paid to the football organisation from which the player is transferred, which contribution is divided among the clubs with which the player had been registered as an eligible member between the ages twelve through twenty-three. In case the age of twenty-three has not been reached yet, and/or part of the training has taken place with a foreign club, the contribution is decreased by 0.5 percent per year for each year that the player is younger than twenty-three, or has been trained with a foreign club.

The professional football organisation from which the player is transferred, is obliged to report to KNVB in writing and within fourteen days after the transfer of the player to which contribution the organisation is entitled due to the premature termination of the player contract with the player to be transferred.

The solidarity contribution must be paid to the clubs that are entitled to this payment within thirty days. In case the organisation does not comply with this, the KNVB will pay the clubs that are entitled to the compensation upon their request. After this, the KNVB has a claim on the professional football organisation.

The Regulation on General Transfer Provisions Professional Football applies to transfers of contract players and senior amateur players. It applies to this latter group only if the amateur player is eligible to play in competitions of the professional football section, in case of transfers within the professional football section and in case of international transfers from and to the professional football section.

A transfer of a player is required if the player wishes to play as a field football player for a different professional football organisation than the one for which he is eligible. The transfer can be granted by the Professional Football Board only, and must be applied for with the Board by the player.

A player who is eligible to play for a professional football organisation is not allowed to participate in training or matches of a different professional football organisation or field football club, unless he has obtained the written approval of the organisation for which he is eligible to play. In case of violation of this restriction to play the Professional Football Board may decide not to look into an application for a transfer, or to refuse a transfer, or to withdraw a registration that has already been effected. The Board may also withdraw the decision to allow a transfer in case it should appear at a later stage, that the transfer form was not completed truthfully by the player.

The transfer is granted after the notification of the Professional Football Board has been received by the player and/or the new professional football organisation. In case a transfer has been granted to a player who has been suspended or disqualified, this player will not become eligible to play until after the end of the suspension or disqualification.

The Training Pool regulations apply to transfers of youth players (from 11 through 19 years old) in training who are active as amateurs, from a professional

football organisation to a different professional football organisation. These players are those participating in matches and training organised and/or approved by the KNVB.

In case a transfer has been approved, the professional football organisation that has trained the player is entitled to a compensation from the pool for the training cost incurred by the professional football organisation for the player concerned, to be paid by the professional football organisation. Once a compensation from the pool has been received, the entitlement to training compensation or solidarity contribution does not exist any longer.

The amount of the compensation for training costs of a player to be paid to the professional football organisation which has provided training to a player from the pool is determined on the basis of the number of training years during which the player was registered with the training organisation as an eligible player, and depends on the amount of the training compensation per player per training year as determined by the Professional Football Board. A training year is understood to mean the time from 1 August through 31 July of the next calendar year.

The pool is managed by the Pool Committee. An organisation which claims a compensation for training costs for a player from the pool must notify the professional football secretariat of this within 30 days after the effective date of the transfer granted. It is possible to appeal against the decision to grant or reject a pool compensation with the Pool College.

## 6. *Unilateral option clause*

Many employment contracts for a specific period of time contain an option clause in favour of the employer. The employer can decide to extend the employment contract with the player by means of a simple statement to that effect. The legal acceptability of such a provision is still a subject of discussion in the Netherlands<sup>15</sup> because it breaks the system of dismissal subject to certain reasons. The Dutch court has not been asked to express an opinion on this question until today. The KNVB arbitration committee however, declared that it does not consider such a provision a violation of the legal dismissal system that applies to the termination of an employment contract.<sup>16</sup> The option provision is considered an irrevocable offer of the player to the PFO to extend the employment contract. The arbitrators do not consider this a violation of the provisions of the well-known Bosman ruling, either. In addition to that the arbitration committee also considers that the player was assisted by consultant when concluding the contract. The agreement reached has been recorded in writing and has been signed by the parties.

<sup>15</sup> With respect to this Cf: J. VAN DRONGELEN, '*Het eenzijdige optiebeding*', Tijdschrift voor Sport en Recht 2010, 1-6, and A.F. BUNGERER AND E. VERHULP, '*De eenzijdige verlengingsoptie in de arbeidsovereenkomst*', Arbeidsrecht 2004, no. 64, D.S. NIEUWLAND, '*De eenzijdige optie nader beschouwd*', Rechtshulp 2004, 6/7, 37 ff. and S.F.H. JELLINGHAUS, '*Het opleidings- en solidariteitsstelsel van de FIFA: de stand van zaken*', ArA 2005/2, 11-15.

<sup>16</sup> College of Arbitrators KNVB 4 June 2004, JAR 2004/29 Ajax/Trabelsi.

We can conclude that – with this approach - the arbitration committee of the KNVB uses an approach that differs from those of the DRC and the CAS. The arbitration committee of the KNVB fully and unconditionally acknowledges the possibility for a PFO to include a unilateral option clause into an employment contract.

7. *The resolution of international disputes, unilateral termination and compensation*

FIFA, UEFA and the KNVB prefer a system where disputes are to be resolved within the football structure. When it comes to disputes with an international dimension, the Dispute Resolution Chamber (DRC) of FIFA has jurisdiction. These are disputes with respect to employment contracts and disputes about the solidarity contribution. The Court of Arbitration for Sport (CAS) has jurisdiction in appeal cases.

It is important that the parties mutually agree about the choice of law that applies to the contract. In case the parties do not make this choice, the CAS will determine which legal system applies. In general the CAS applies the FIFA regulations, and where necessary the CAS looks for additional legal bases in Swiss law.

The most important rulings about the amount of the compensation concern the cases of Webster and Matuzalem.<sup>17</sup> In both cases the issue was the unilateral termination of the employment contract by the player without valid reasons, after the protective period.

Webster left Heart of Midlothian (Hearts) for Wigan Athletic AFC (Wigan). Webster and Wigan did not pay a compensation to Hearts. Although Hearts claimed about 5 million pounds, the CAS decided on a considerably lower amount, namely the amount of 150.000 pounds. The CAS ruled that the compensation that Webster had to pay, consisted of the *residual value* of the contract that had been terminated unilaterally, i.e. the remaining salary for the period of time during which Hearts had not been able to use Webster's services.

In the Matuzalem case the CAS came with a different view.<sup>18</sup> The CAS presented a number of criteria on the basis of which the amount of the compensation is determined. First, the CAS verified whether the 'previous club' was entitled to a compensation. The basic principle, according to the CAS, is and remains that a contract must be honoured, also after the protective period. In this case too, it was a player who unilaterally terminated the contract prematurely. So he was obliged

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<sup>17</sup> *Heart of Midlothian v Webster and Wigan Athletic*, (2008, CAS Decisions: 2007/A/1298-1300). CAS 2008/A/1519, *FC Shakhtar Donetsk / Mr. Mutuzalem Francelino da Silva & Real Zaragoza & FIFA*; CAS/2008/A/1520 *Mr. Mutuzalem Francelino da Silva & Real Zaragoza/ FC Shakhtar Donetsk & FIFA*.

<sup>18</sup> CAS 2008/A/1519, *FC Shakhtar Donetsk / Mr. Mutuzalem Francelino da Silva & Real Zaragoza & FIFA*; CAS/2008/A/1520 *Mr. Mutuzalem Francelino da Silva & Real Zaragoza/ FC Shakhtar Donetsk & FIFA*.

to pay a compensation to his former club, Shakhtar Donetsk. Next, the CAS determined what the amount of the compensation should be, and whether there were reasons to adapt the amount of the compensation. The CAS considered it important that the parties had not agreed an amount in advance. After that the CAS calculated the value of the services of Matuzalem during the time that Shakhtar Donetsk was not able to use the services of Matuzalem. Next, the CAS reduced that amount by the salary which Shakhtar Donetsk was no longer required to pay. Further, it ruled that an additional amount was to be paid to Shakhtar Donetsk due to the fact that Matuzalem was a very important player for Shakhtar Donetsk, and due to that, calculated a 'fair amount'. Eventually the CAS ruled that the new club, Real Zaragoza, was obliged to pay the compensation.

#### 8. *The European perspective*

Within the European Union, sport is socially acceptable by stressing the virtues to society by means of education, health, teamspirit and fair play.<sup>19</sup> 'Sporting activity in the strict sense, that performs a social integrating and cultural function, should be preserved.'<sup>20</sup> Today the European Union has its own sports-specific article. Article 165 TFEU states that the Union shall contribute to the promotion of sporting issues, while taking into account the specific nature of sport, its structure based on voluntary activity and its social and educational function.<sup>21</sup> It asks the European dimension in sport to be developed 'by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportspeople'. The European Union has now partial competence over sport, like the way it deals with education and culture.<sup>22</sup>

The sports association is both subordinate to the hierarchical legal system but to a certain extent also coordinate to the legal system in the sense that the sports organization claims its own place within the legal system.<sup>23</sup> Most cases are

<sup>19</sup> M. Olfers, *Sport en mededingingsrecht*, Deventer: Kluwer, 2009, 6.

<sup>20</sup> Mario Monti European Commissioner for Competition Policy Sport and Competition Excerpts of a speech given at a Commission-organised conference on sports Brussels, 17 April 2000.

<sup>21</sup> See about sports and EU Law: R. BLANPAIN, M. COLUCCI & F. HENDRICKX, *The Future of Sports Law in the European Union: beyond the EU Reform Treaty and the White Paper*, Alphen aan de Rijn, Kluwer Law International, 2008.

<sup>22</sup> According to the head of the Commission's sports unit, Krejza an EU sports programme could be designed to: Contribute to the promotion of European values (physical and moral integrity of sportspersons, fairness of competitions): projects could address issues such as doping, racism and protection of minors; foster the social and educational function of sport: projects could address issues such as gender equality, disability and co-operation between sports organisations; promote the transfer of knowledge, innovation, dialogue and good governance in the sector: projects could address issues such as licensing rules for clubs and mobility of sports experts; contribute to the promotion of a physically-active lifestyle: projects could address issues such as health promotion, and; foster co-operation with third countries and with international organisations in the field of sport.

<sup>23</sup> On a national level there is a concept of (very) limited judicial review of sport rules. The national

dealt with, within the sport structure it selves. Throughout the years, the self regulation of sport associations and the legal autonomy have become subject to closer judicial review.<sup>24</sup> This is particularly true at European level.

The European Court of Justice put in a case by case review forward that with regard to the objectives of the Community, sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of art. 2 of the EC Treaty'.<sup>25</sup> The ECJ stated that the provisions on the free movement of workers and services apply to the activities of professional or semi-professional sportsmen or sportswomen, when such economic activity has the character of gainful employment ('worker') or provide a remunerated service ('service provider').<sup>26</sup> In general, a professional football player is to be considered a worker under European law, art. 45 TFEU. This means that 'professional sport' with an EU dimension cannot escape the applicability of European law.<sup>27</sup>

### 9. EU, from *Bosman* to *Bernard*

In 1995, the famous *Bosman* ruling questioned the applicability of Community Law to two important sporting rules: a) restrictions on nationality: limitation of the number of players in the national club competition having the nationality of other member states, and b) the transfer-system: the transfer of players requiring the new club within a member state to pay a fee to the old club within a member state. Clubs required fees that exceeded the costs of the player's training and development. The *Bosman* case was limited to EU players whose contract had ended.<sup>28</sup> Both

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courts in most western countries will review a voluntary association's rules only if one of the following conditions are present: 'the rules violate public policy because they are fraudulent or unreasonable; the rules exceed the scope of the association's authority; the organization violates its own rules; the rules are applied unreasonably or arbitrarily; the rules violate an individual's constitutional rights.' R. C. BERRY & G. M. WONG, *Law and business of the sportsindustries*, volume II, second edition, Westport, Connecticut: Praeger 1993, 36-37.

<sup>24</sup> K. VIEWEG, *The legal autonomy of sport organisations and the restrictions of law*, in A. Caiger, S. Gardiner (eds) *Professional sport in the EU*, The Hague: Asser Press, 2000, 83. See also S. VAN DEN BOGAERT AND A. VERMEERSCH, *Sport and the EC Treaty: a Tale of uneasy bedfellows*, (2006) 31 ELRev 821.

<sup>25</sup> The ECJ repeated (again and again and again) that sport is subject to Community law as far as it constitutes an economic activity and continued that this is the case of the activities of professional or semi-professional footballers, where they are in gainful employment or provide a remunerated service. see Case 36/74 Walrave and Koch [1974] ECR 1405, para. 4; Case 13/76 Donà [1976] ECR 1333, para. 12; Case C-415/93 Bosman [1995] ECR I 4921, para. 73; Joined Cases C-51/96 and C-191/97 Deliège [2000] ECR I 2549, para. 41; and Case C-176/96 Lehtonen and Castors Braine [2000] ECR I 2681, para. 32 Case C-519/04 P Meca-Medina and Majcen v Commission [2006] ECR I-6991, para. 22.

<sup>26</sup> Case C-519/04 P Meca-Medina and Majcen v Commission [2006] ECR I-6991, para. 23.

<sup>27</sup> See for the difference between amateurism and professionalism within a EU context: M. OLFERS, *Sport en mededingingsrecht*, Deventer: Kluwer, 2009, 101-109.

<sup>28</sup> UEFA adopted in 2003 the '3 + 2' rule permitting each national association to limit to three the number of foreign players whom a club may field in any first division match in their national championships, plus two players who have played in the country of the relevant national association

rules infringed the EC Treaty rules relating to the freedom of movement and provision of services.<sup>29</sup> The ECJ argued that the regulations did not create a financial or competitive balance between club and that the rich clubs were still able to obtain the talented players. The Court referred to AG Lenz and put forward that the transfer costs were in most cases not related to the real developing costs of the players.

In the Bosman case, the Court added to the sports sector two general interest objectives, a) maintaining a financial and competitive balance and b) supporting the search and training of young players.<sup>30</sup> After the Bosman-case, the European Commission forced the FIFA to develop new regulations. The system of transfer fees after the expiry of a contract have been replaced by a system based on compensation due for the breach of contract or undue termination of the contract. In March 2001 the FIFA and the European Commission decided on the basic principles of a new regulatory regime which contains, next to contractual stability, training compensation for young players, a solidarity mechanism, a minimum and maximum duration of contracts, etc.<sup>31</sup> The FIFA transfer regulations, see para. 2. changed over time and play a crucial role in football today.

On 16 March 2010 the European Court of Justice delivered its judgment in the case Bernard.<sup>32</sup> In this case the young promising football player Olivier Bernard signed a youth training contract with Olympique Lyonnais. At the end of this contract he decided to sign a contract with Newcastle United. This was against the French Charter for *joueurs espoirs*.<sup>33</sup> The employment of football players was regulated in France by this Charter, a collective agreement. Olympique Lyonnais went to Court and the French court asked the ECJ whether the rules according to which a '*joueur espoir*' may be ordered to pay damages if, at the end of his

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for an uninterrupted period of five years, including three years as a junior. The same limitation also applies to UEFA matches in competitions for club teams.

<sup>29</sup> WEATHERILL, S. (2003) '*Fair Play Please!* Recent Developments in the Application of E.C. Law to Sport', Common Market Law Review, No. 40: 51-73; PARRISH, R. (2003) '*Sports Law and Policy in the European Union*', Manchester University Press CAIGNER AND GARDINER, (2000) *Professional Sport in the European Union: Regulation and Re-regulation*, TMC Asser: The Hague.

<sup>30</sup> M. OLFERS, *Sport en mededingingsrecht*, Deventer: Kluwer, 2009, 355.

<sup>31</sup> M. OLFERS, *Sport en mededingingsrecht*, Deventer: Kluwer, 2009, 349-351.

<sup>32</sup> *Olympique Lyonnais v Olivier Bernard, Newcastle United FC* (Case C-325/08). European Sports Law and Policy Bulletin, *Bernard Case Sports and training compensation*, 2010.

<sup>33</sup> At the end of his training with a club, the Charter obliged a '*joueur espoir*' to sign his first professional contract with that club, if the club required him to do so. In that regard, Article 23 of the Charter, in the version applicable at the material time in the main proceedings, provided:

'...On the normal expiry of the ["*joueur espoir*"] contract, the club is then entitled to require that the other party sign a contract as a professional player.

...'. According to French law: Article L. 122-3-8 of the French Code du travail, in the version applicable to the facts in the main proceedings, provided:

'In the absence of agreement between the parties, a fixed term contract may be terminated before the expiry of the term only in the case of serious misconduct or force majeure. ... Failure on the part of the employee to comply with these provisions gives the employer a right to damages corresponding to the loss suffered.

training period, he signs a professional contract, not with the club which provided his training, but with a club in an-other Member State, constitute a restriction within the meaning of Article 45 TFEU and, if so, whether that restriction is justified by the need to encourage the recruitment and training of young players. The Court stated that Bernard is to be considered a worker within the meaning of European law, and that the collective agreement, the French Charter for *joueurs espoirs*, falls within the scope of the Treaty. The Court points out that the obligation to conclude his first professional contract with the club which trained him is a restriction on the freedom of movement for workers. This restriction can be justified by the objective of encouraging the recruitment and training of young players. This restriction however, needs to be appropriate and proportionate.

The ECJ stated:

“Article 45 TFEU does not preclude a scheme which, in order to attain the objective of encouraging the recruitment and training of young players, guarantees compensation to the club which provided the training if, at the end of his training period, a young player signs a professional contract with a club in another Member State, provided that the scheme is suitable to ensure the attainment of that objective and does not go beyond what is necessary to attain it.

A scheme such as the one at issue in the main proceedings, under which a ‘*joueur espoir*’ who signs a professional contract with a club in another Member State at the end of his training period is liable to pay damages calculated in a way which is unrelated to the actual costs of the training, is not necessary to ensure the attainment of that objective.”

The Court in Bernard didn’t give its blessing to the FIFA rules. The Court examination is important for (future) testing of compensation regulations. Further the Court in Bernard did not consider the case from a competition law perspective. The reason is that the Court in France did not raise the question whether the rules infringe the EU competition laws.

#### 10. *The Dutch situation, tested*

As stated before, Dutch labour law is not sport-specific. The Netherlands Government points out in the Bernard case that in general ‘there are reasons in the public interest, related to training objectives, which could justify rules by virtue of which an employer who provides training to a worker is justified in requiring the worker to remain in his employment or, if he does not do so, to *claim damages* from him. The Netherlands Government considers that, in order to be proportionate, compensation must fulfil two criteria, namely that the amount to be paid must be calculated in relation to the expenditure incurred by the employer in that training and account must be taken of the extent, and for how long, the employer has been able to enjoy the benefit of the training.’<sup>34</sup> The Netherlands Government stated that the case is related to a more general (not sport specific) issue: the will of the

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<sup>34</sup> *Bernard*, para. 26.

employer to invest in training an employee but reluctant to see that employee immediately carry off the valuable skills acquired and place them at the service of a competing employer. The Court in Bernard, doesn't answer this more elementary wider questions.

### *KNVB Regulation*

The Court in Bernard points out that it must be accepted that the prospect of receiving training fees is likely to encourage football clubs to seek new talent and train young players. Supporting the search and training of young players is a legitimate aim under EU law. See par. 2, the training compensation in the Netherlands is regulated by article 3 of the Regulation, which points out that there are certain criteria to pay a training compensation. Taking into account the legitimate aim, the payment of a training compensation does in itself not infringe European law. The same will be true for the solidarity contribution provided for by article 4 of the Regulation.

In any case it's important that the costs are calculated in relation to the training costs incurred by the club providing that training. The problems arise the moment the costs are calculated in "a way which is unrelated to the actual costs of training". AG-Stix-Hackle states in the Balog-case in 2001: 'The question of necessity of payments on the occasion of the transfer of a player depends essentially on the occasion of *the size of the payment*'.<sup>35</sup> So only the actual costs are acceptable. This means that compensation based on the player's prospective earnings or on the club's prospective (loss of) profits is not acceptable. The Court in Bernard doesn't determine however what the real costs of training are and how the real costs need to be calculated.

The training compensation is in our view not disproportionate. The size of the payment (1355,-) for each year of training seems reasonable.

### *Calculation of the compensation for early termination of contract*

Next to this, according to general (not sport-specific) Dutch labour law, see par. 2, a *breach of contract* is a matter of a so-called resignation with liability for damages.<sup>36</sup> The employer makes a choice between a compensation based on the remaining salary which the employee would receive until the end of the contract term or a compensation for all damage caused. In general the obligation to pay damages in case of a breach of contract makes it for a player less attractive to sign a contract in another member state. A requirement to pay is an important consideration for a worker contemplating refusing one offer of employment in

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<sup>35</sup> *Stix-Hackle, Tibor Balog versus Royal Charleroi Club ASBL*, Case 264/98, 29 March 2001, para. 115, Removed from the register on 2 April 2001. This case handles with the competition law aspects of transfers.

<sup>36</sup> Article 7:680 Dutch Civil Code.

order to accept another. In general there is a tension between the obligation to pay damages for a breach of contract and the freedom of movement for workers. Next to this the damage may result in a considerable financial compensation.

According to the Dutch labour law system, the premature termination of contract may result in a considerable financial compensation, not related to “the real training costs” but related to “real damages” because of the premature termination of the contract. As long as this actual damage is calculated in relation to the expenditure incurred by the employer in that training and takes into account the extent, and for how long, the employer has been able to enjoy the benefit of the training, we think, although never tested under EU law, there is no infringement of the freedom for workers. The actual damages are acceptable.

### *Age limits*

The Court in Bernard didn't answer the question whether age limits are a restriction of movement for workers or a violation of the competition laws. 3 c states that a football organisation is required to pay a training compensation in case the player has entered into a consecutive player contract with that professional football organisation; prior to the end of the season in which the player has reached the age of 22.<sup>37</sup> It is still disputable whether age limits are legitimate under European competition law. Age limits seem to be accepted due to socio-political motives, like the protection of minors.<sup>38</sup>

### *Transferwindows*

In football there are two periods during which a player is allowed to transfer from one club to the other, the so-called transferwindow. Article 6 of RSTP, provides that players may only be registered during one of the two annual registration Periods. These periods are fixed by the relevant association. Transfer *deadlines in principle adversely affect freedom of movement*, because once they had expired they prevent players from leaving their club within the EU in order to play for another club within the EU.<sup>39</sup> The player-employee cannot switch from one club to a different one and play for that club at any given point in time.

In the case Lehtonen the EC Court of Justice has ruled that a transfer deadline does not violate the free movement of employees, provided that the rule is appropriate, necessary and proportionate for the orderly progress of the competition.<sup>40</sup> More specific these rules are justified because these sport-specific

<sup>37</sup> See also the FIFA regulations, f.e. Annexe 4, art. 2 para. 1 of the FIFA Regulations 2009.

<sup>38</sup> Compare Linseman versus World Hockey Association, 439 F. Supp. 1315 (D. Conn. 1977).

<sup>39</sup> Case C-176/96 *Lehtonen and Castors Braine* [2000] ECR I 2681

<sup>40</sup> Case C-176/96 *Lehtonen and Castors Braine* [2000] ECR I 2681. In this case however the ECJ dealt with the transferwindow of a basketball association, which applied different transferperiods to players within Belgium and outside Belgium. This system was discriminatory.

rules were adopted to ‘ensuring the regularity of sport competitions’. In the Lehtonen case however a stricter transfer-deadline applied to players coming from a European association than those who came from another association. The ECJ concluded therefore that the rules were disproportionate.<sup>41</sup> In the Netherlands transfers of players still take place after the national competition has already started. As a result of that, there is no orderly progress of the national competition, but rather a nervous start (of the progress) of the competition season. It might be that this system goes beyond the proper functioning of the competition.

### *Concluding remarks*

The Regulation on General Transfer Provisions, Training compensation and Solidarity Contribution of the KNVB is to be considered the implementation of the FIFA regulations. The freedom of movement for workers does not preclude a scheme which, in order to attain the objective of encouraging the recruitment and training of young players, guarantees compensation to the club which provided the training. In the Netherlands a training compensation is paid to the amateur and professional clubs who trained and educated the player in the past. Although the ECJ never explained what the real training costs are and how these costs need to be calculated, the calculation principles in the Netherlands (an amount of 1355 for each training year) seems reasonable and proportionate from an EU perspective. Next to the rules and regulations from the KNVB, Dutch labour law contains certain provisions that influence the players freedom of movement. The Dutch legislator has not created sports specific regulations. *Pacta Sunt Servanda* is (also) a core principle in the Netherlands. In general a premature termination is not easily accepted, and is only allowed in case of financial improvement and an improvement of the player’s position. In the Netherlands it’s all about a “fair compensation”, but this fair compensation doesn’t necessarily resemble the real training costs. A premature termination may result in a considerable financial compensation. The question is still whether this system is EU-proof. We think that as long as the actual damage is calculated in relation to the expenditure incurred by the employer in that training and takes into account the extent, and for how long, the employer has been able to enjoy the benefit of the training, we think, although never tested under EU law, there is no infringement of the freedom for workers.

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<sup>41</sup> For other sport related cases in the field of the freedom of movement see also Case C-438/00 *Deutscher Handballbund eV v Maros Kolpak* [2003] ECR I-4135. Case C-265/03 *Igor Simutenkov* judgment of 12 April 2005.



## COMPENSATION IN CASE OF BREACH OF CONTRACT ACCORDING TO COMMON LAW PRINCIPLES

by *Paolo Lombardi\**

SUMMARY: 1. Introduction – 2. Civil Law vs. Common Law – 3. How Common Law deals with contractual breach and compensation for contractual breach – 4. Differences between English and Scottish Contract Law – 5. Article 17 of the FIFA Regulations on the Status and Transfer of Players: Consequences of terminating a contract without just cause – 6. Analysis of a leading case: Andrew Webster

### *1. Introduction*

Common Law is a body of law derived from the system applied in the Middle Ages in England and which today is used in most countries that have or had British influence. It is a legal system based on custom which is administered and developed by the courts in judicial decisions; it has based its legal structure more on jurisprudence than in the laws. Together with Roman-Canon law, it represents one of the most relevant contemporary legal families. Both have been adopted by numerous countries around the world and have influenced the formation of many other legal systems, hence their importance.

Equity complemented and mended Common Law until their fusion during the Nineteenth Century. Both had their origin in the judicial activity, the first one in the chancery and the second one in the royal tribunals. The division between Common Law and Equity cannot be found, however, in all the laws that form part of this legal family.

The Common law system possesses the flexibility that judicial precedent and statutory interpretation can offer judges. Although American law for instance has its roots in English law, there are major differences between the legal systems

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of both countries. There are diverse reasons, both historical and political, to explain this. The causes of the main differences between law in England and United States lie in the fact that the latter, after its independence, adopted a political structure different from that of England. There have also been other influences in the formation of the law in the United States such as the customs of Native American Indians and the law of other European nations that colonized that territory: Holland, Sweden, France and Spain. Apart for French law, the others did not have much of an influence hence it can be said that it is English law that played a major role in the formation of American law. It is also to be highlighted that the coexistence of legal systems belonging to different legal families caused the emergence of mixed or hybrid systems which can be considered as subsystems such as Quebec in Canada and Louisiana in the United States. The British approach of respecting the law of the territories that already had their own legal organization when becoming British colonies may be one of the reasons that explains this phenomena.<sup>1</sup>

## 2 *Civil Law v Common Law*

Common law and civil law contracts have been traditionally seen as distinctive and quite diverse. Convergence between both legal systems in certain areas is however not new, it traces its roots to the Enlightenment and has been a slow and gradual process. This does not mean that civil law and common law are one and the same. The differences between common law and civil law are mainly in style, terminology, interpretation, conception and emphasis on certain elements over others rather than on their structure or fundamental philosophical conceptions. Both civil law and common law share similar fundamental social objectives, which include the protection and encouragement of individual and personal rights and are both enrolled in a liberal philosophy and conception of the world. They both divide private law into large legal fields, such as property, tort, and contracts, among others, and analyse these fields in a similar way. The organisation of the law and its larger concepts are also alike even if particular rules are not. There are still however important difference between these two systems as will be analysed below.<sup>2</sup>

Some of the basic principles that differentiate Civil and Common Law are the following:<sup>3</sup>

<b>CIVIL LAW JURISDICTIONS</b>	<b>COMMON LAW JURISDICTIONS</b>
Relies primarily on legislation to develop and enact laws.	Relies primarily on court decisions to interpret legislation as well as develop law

<sup>1</sup> M. MORINEAU, *Introduction to Common Law*, 133-137.

<sup>2</sup> J. HERMIDA, *Convergence of Civil Law and Common Law Contracts in the Space Field*, 1-5.

<sup>3</sup> [www.docstoc.com/docs/15223141/BASIC-PRINCIPLES](http://www.docstoc.com/docs/15223141/BASIC-PRINCIPLES).

CIVIL LAW JURISDICTIONS	COMMON LAW JURISDICTIONS
Historical Concept: A <u>single</u> , complete, coherent, and logical system to govern <u>all</u> legal relationships was possible to develop and follow.	Historical Concept: Legislation (by the ruling authority) was considered as a suspension of the “common law” that governed the everyday affairs of men; thus, people were suspicious of how legislation was to be applied.
Favours predictability and stability, but is generally very inflexible because it can be changed only by legislative action.	Favours flexibility, although predictability comes from the principle of <i>stare decisis</i> (do not disturb a settled point).
Civil law attorneys tend to interpret the law expansively in order to add the flexibility necessary to apply the legislation to new situations when they arise. However, the current trend in some civil law jurisdictions is for lawyers to keep informed about (and often use) prior judicial decisions in new cases.	While common law attorneys tend to interpret legislative law narrowly, common law <u>courts</u> tend to interpret legislation more broadly than civil law courts, and this provides the flexibility to address new situations without new legislative action.
Trial judge has the responsibility to “find the truth.” Thus, the judge (court) often identifies the legal issue(s), investigates the facts, selects and questions the witnesses, and assumes the procedural initiative.	Relies on the “adversary system”; thus, the court is “passive.” The court solves only those issues that are put before it; the attorneys identify and frame the issues and then are the advocates for their respective sides. “Truth” is ultimately found by the court, with help from the jury, through the passive decision making that separates persuasive arguments and evidence from unpersuasive ones.
Relies primarily on deductive reasoning.	Relies on a combination of inductive, deductive, and analogical reasoning.

### 3 *How Common Law deals with contractual breach and compensation for contractual breach*

#### 3.1 *Nature of contractual breach<sup>4</sup>*

Breach of contract cases in England and Wales constitute a major part of civil law (within common law). As a general definition, a breach of contract occurs where a party to a contract fails to perform, precisely and exactly, his obligations under the contract; it constitutes therefore any departure from the agreed terms and conditions of a contract. The obligation may be express (that is, agreed in writing or orally) or implied by common law or statute. Where a breach has caused one or more parties to suffer a loss or damage, that party may find itself entitled to be compensated for losses that are not “too remote”.

<sup>4</sup> GoldSmith International Business School, *Breach of Contract and Remedies*, 1-2.

### 3.2 *Effects of breach*

The majority of breaches will not necessarily render a contract void, nor will they signal an immediate termination of a legal relationship. Minor breaches can often be repaired with damages and the contract can continue with the agreement of both parties. However, some breaches are so severe that the relationship between the contracted parties is irreparably damaged and the contract must be terminated. Such breaches are known as *repudiatory breaches* and in many cases, the injured party will be entitled to compensation.

The three *repudiatory* breaches which give the innocent party the option of terminating the contract are: renunciation, which occurs when a party refuses to perform the obligations under the contract (express or implied); breach of condition which, as its name indicates, occurs when the party in default has committed a breach of condition; and fundamental breach that occurs when the party in breach totally fails to perform the contract or has committed a serious breach of a contractual term that may turn out to be either a condition (integral to the contract) or a warranty (incidental to the contract) depending on its effect on the innocent party.

### 3.3 *Remedies for breach of contract UK law*<sup>5</sup>

When there has been a breach of contract the innocent party has various remedies available; the main one is damages. However, there are a number of equitable remedies attainable in certain situations to grant an appropriate remedy to the claimant. Such remedies are discretionary and will not be granted as of right. There are two types of equitable remedies available: specific performance and injunctions.

#### 3.3.1 *Unliquidated damages*

“Unliquidated damages” are assessed by the court and are designed to compensate the innocent party for any losses incurred as a result of a breach of contract. However, where loss cannot be proved, the innocent party will only be entitled to claim nominal damages. E.g.: *Surrey CC v Bredero Homes, 1993*; *Chaplin v Hicks, 1911*. Unliquidated damages are not a means by which to punish the defendant and punitive damages will not be awarded for a breach of contract. They are also not a way to recover any gain made by the defendant as a result of a breach. Loss includes any harm or damage to the claimant themselves. However, in calculating the loss and awarding damages, if the claimant has obtained any benefit from the breach the court will not usually allow the claimant to be put in a better position than they would have been had the breach not occurred. Therefore, any benefit received must be set off against the loss. There are three ways of

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<sup>5</sup> <http://leighellis.articlealley.com/remedies-for-breach-of-contract—uk-law-577398.html>.

calculating loss and which one is used will depend upon the type of loss incurred and which one will be best for the claimant.

### *3.3.1.1 Expectation loss or loss of bargain*

This is the traditional basis upon which damages are assessed and is designed to put the claimant in the same position they would have been had the contract been performed. There are two ways of quantifying the damages for expectation loss: the cost of cure measure or the difference in value measure. Which method is used depends on various factors including the reason for the performance; the impact of the claimant's attempts to mitigate their loss; and whether the court believes that the claimant will carry out the cure if awarded on this basis. E.g.: *Radford v De Froberville, 1977; Tito v Waddell (no 2), 1977.*

There are a number of limitations on the principle of expectation:

a) Remoteness of damage: Where a claimant's losses are too remote, damages cannot be recovered. They must be "within the reasonable contemplation" of the parties. The application of remoteness can either be from imputed or actual knowledge. Any knowledge of any special circumstances needs to be precise E.g.: *The Heron II, 1969; Simpson v L and NWR, 1876; Horne v Midland Railway, 1873.*

b) Type of loss: pecuniary loss is the usual ground upon which damages are awarded for breach of contract. However, damages for non-pecuniary loss are sometimes awarded in certain circumstances, such as: pain and suffering as a result of a physical injury; physical inconvenience; damage to a commercial reputation; and any distress caused to the claimant.

c) Mitigation: the claimant is under a duty to mitigate their loss, but only once there has been a breach of contract. Where a claimant has managed to avoid any losses, they cannot recover damages for that.

d) Causation: the breach of contract which occurs must have caused and preceded the loss. It is possible for the chain of causation to be broken by a third party, but only if it is unforeseeable.

### *3.3.1.2 Reliance loss*

Reliance loss arises when the claimant has incurred out of pocket or wasted expenditure in preparation of or partial performance of the contract. Where expectation loss cannot be recovered, reliance loss will be claimed.

### *3.3.1.3 Restitution*

Restitution is where the claimant has conferred a benefit on the defendant in performing their contractual duties and wants to claim that benefit back. It will only be permitted if there is a serious breach and a total failure of consideration.

An example of this is where the claimant has *paid in advance for goods which have not been delivered*.

### 3.3.2 Liquidated Damages

“Liquidated damages” refers to damages set by the parties themselves where they decide upon a fixed sum being payable in the event of a breach of contract (e.g.: buyout clause). Where the sum is a genuine pre-estimate it will be enforced by the court. However, where it is not a genuine pre-estimate it will be regarded as a penalty which will not be enforced by the court unliquidated damages will be awarded instead. *Dunlop Pneumatic Tyres Ltd v New garage and Motor Co. (1915)* set down guidelines to distinguish between liquidated damages and penalties.

## 4. Differences between English and Scottish Contract Law

Remedies for breach of contract represent one of the most significant differences between English and Scots contract law.

In Scots law, a party is entitled to an order compelling performance. Of course, there are categories of cases in which specific implement will be refused. Examples include contracts that depend on a highly personal relationship (such as partnership or employment), circumstances in which performance has become impossible, or where performance could reasonably be obtained from another source. In Scotland, therefore, the innocent party is able to choose, as of right, between damages and specific implement.

English law begins from the opposite standpoint. Although damages are available as of right, specific performance – as an equitable remedy – was historically available only where damages were an inadequate remedy. It seems that the law is more liberal now and will grant specific performance in a broader range of cases than before. Therefore, the practical outcome in Scottish and English cases will be the same on many, but not all, occasions.

There are many other differences, too, as would be expected of separate legal systems. To highlight but a few, Scots law does not require consideration for a contract to be formed; recognises a concept of “unilateral promise”, by which a party can bind itself to an obligation without any need for acceptance; recognises third party rights at common law (via a concept known as *jus quaesitum tertio*) and so the relevant rules differ from those under the Contracts (Rights of Third Parties) Act 1999; also prescription rules differ.

## 5. Article 17 of the FIFA Regulations on the Status and Transfer of Players: Consequences of terminating a contract without just cause

In its regulations FIFA has given special attention to the general principle of “PACTA SUNT SERVANDA” captured under Chapter IV titled “Maintenance of

Contractual stability between professionals and clubs” and more specifically in article 13 of the FIFA Regulations on the Status and Transfer of Players. According to this provision a contract can be:

- naturally terminated upon expiry of the term of the contract, or
- friendly and contractually terminated by mutual agreement of the parties.

The parties are free to include in the contract an option for rescinding their contract –compensation clause- subject to the payment of a stipulated amount for the early termination of the employment relationship.

Unilateral termination of the contract is regarded as a breach of contract and its consequences depend on whether the contract has been breached with or without just cause. Articles 14 and 15 of the FIFA Regulations on the Status and Transfer of Players seem to regulate the repercussions of unilaterally terminating the contract with just cause whereas the subsequent article 17 determines the consequences of terminating a contract without just cause, among which the payment of compensation and sporting sanctions.

Unlike some who consider that article 17 of the FIFA Regulations recognises the unilateral breach of contract without just cause subject to the payment of compensation, in our opinion the purpose of such provision is to regulate the compensation itself in the event of such a breach. In this sense, we do not assume that Article 17 of the FIFA Regulations recognises a right to breach a contract or stipulates an exception to the contractual stability but rather regulates the consequences of such occurrence. This interpretation would seem to be in harmony with the principle of *pacta sunt servanda* and the essence of Section IV which is the discouragement of players and clubs from unilaterally terminating their contract, particularly in an industry where temptations for clubs to not respect the contracts are substantial when a player is not performing as they wished and for players when they get better offers from other clubs. The introduction of a protected period and the threat of sporting sanctions as a deterrent for unilateral contractual terminations would seem to be in keeping with this approach.

Article 17 therefore regulates the compensation that is due to either party when the contract has not been terminated by mutual agreement and has been breached without just cause.

One of the criteria to be taken into account when calculating the compensation due to the other party in cases where a contractual breach occurs is the national law of the country concerned. In this sense, article 17 stipulates that in all cases the party in breach shall pay compensation and “*unless otherwise provided for in the contract, compensation for breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the Former Club (amortised over the term of the contract) and whether the contractual breach falls within a Protected Period*”.

The language of this provision was however left (or ended up being) somewhat open, allowing room for discussion whether or not the national law shall be applied when calculating compensation for breach. The expression “*with due consideration for*” implies that national law is a matter to be *weighed or taken into account* when calculating the compensation for breach of contract, it does not necessarily mean that national law shall govern the decision-making process. Same applies to the wording “*any other objective criteria*” which means that any such criteria shall be *carefully assessed*, but not necessarily applied when the compensation is calculated. This clause has been further tangled up with an enumeration of criteria that can be considered an objective list that willing or not has been left undefined, which makes its interpretation more complex.

It would appear that article 17 has provided the deciding bodies mostly exposed to it, the Dispute Resolution Chamber (DRC) at FIFA or the Court of Arbitration for Sport (CAS) with a considerable scope for discretion, especially when deciding when national law should be applied; in this sense, although CAS applies essential principles of the common law system such as equity and fairness when making a decision, it still enjoys considerable discretion.

According to some authors such as Nafzinger, one of the main aspects of international sports law is that it uses the *jus commune*, that is, the general principles of international law.<sup>6</sup>

International sports law is, however, wider than those principles that can be deduced from public international law alone, and includes additional “rule of law” safeguards that are significant in sport. These include the principles underpinning constitutional safeguards in most western democracies. A provisional list would include clear unambiguous rules, fair hearings in disciplinary proceedings, no arbitrary or irrational decisions, and impartial decision-making. These are general legal principles that can be deduced from the judgments of national courts in sports law cases.

Some authors like Ken Foster are of the opinion that there is a distinction to be made between International sports law and Global sports law. The latter, by contrast, may be defined as a transnational autonomous legal order created by the private global institutions that govern international sport. Its chief characteristics are first that it is a contractual order, with its binding force coming from agreements to submit to the authority and jurisdiction of international sporting federations, and second that it is not governed by national legal systems.

According to Michael Beloff, sports law is “inherently international in character” because its ‘normative underpinning’ is in the constitutions of international sports federations. *Lex sportiva* for Beloff has three main elements:

- it has transnational norms generated by the rules and practices of international sports federations,
- it has a unique jurisprudence, with legal principles that are different from those

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<sup>6</sup> K.FOSTER, *Is there a Global Sports Law?*, 2,8,10,11.

of national courts, and which is declared by the Court of Arbitration for Sport, and

- it is constitutionally autonomous from national law.

*Lex sportiva* invokes the concept of *lex mercatoria*. While there is no agreed meaning as to what is included in the concept of '*lex mercatoria*', three key characteristics may however be identified as follows:

- its norms are generated by the international custom and practice of commercial contracts and these practices have become standardised,
- arbitration is deemed to be superior to litigation as a method of settling disputes, and
- it can contain provisions to prevent the application of national laws.

These three key elements are more or less identical to the three elements that seem central to Michael Beloff's use of the concept *lex sportiva*. It seems relevant therefore to assume that the theoretical problems that are likely to be encountered in using the concept *lex sportiva* will mirror those that have already been widely discussed in the literature of *lex mercatoria*.

There is one fundamental question about the nature of *lex mercatoria* that is to be highlighted. Can an arbitrator decide an international dispute on principles of law that are independent of any national legal system? This question implies that there are general principles of law independent of national legal systems, which can be easily identified. One list includes the following: '*pacta sunt servanda*', equity, the doctrine of proportionality, doctrines of personal liability, the prohibition of unjust enrichment, and the doctrine of '*clausula rebus sic stantibus*'. These are general principles, however, that may not be entirely independent of national systems.

For the purpose of our argument, does this mean that the result of applying a national law based on Common Law would differ from a decision based on a Civil law system?

In this respect, let us observe the possible consequences of applying Common Law to one of the leading cases of unilateral termination of contract.

6. *Analysis of a leading case: Andrew Webster (CAS 2007/A/1298 Wigan Athletic FC v/ Heart of Midlothian & CAS 2007/A/1299 Heart of Midlothian v/ Webster & Wigan Athletic FC & CAS 2007/A/1300 Webster v/ Heart of Midlothian, award of 30 January 2008)*

Football player Andrew Webster signed a four-year contract with Scottish club Hearts of Midlothian on 31 March 2001, shortly before his 19<sup>th</sup> birthday. In July 2003 the contract was extended until June 2007 and in January 2006 Hearts entered into negotiations with Webster in order to further extend his stay with the Edinburgh side. No agreement could be reached, thereby causing a breakdown in the relations between the player and the club. Webster gave notice to Hearts on 26 May 2006 that he was unilaterally terminating his contract on the basis of article 17 of the

FIFA Regulations for the Status and Transfer of Players. His termination occurred outside the Protected Period of three years commencing from the date he last signed with Hearts. Scottish club Hearts of Midlothian filed a claim with FIFA claiming compensation for breach of contract in excess of £5 million against the player and his new club as they were deemed jointly and severally liable for having induced the breach. The Dispute Resolution Chamber found there had been a breach by Webster, and assessed compensation at £625,000. Both sides appealed to CAS.

The main issue in this case was to define whether the compensation should be based on an assessment of the loss suffered by the player's former club or whether it should be limited to the residual value of the contract, which essentially means the sum of the player's salary payments until the natural expiry of the contract.

Hearts' approach was that the compensation should be measured by the cost of replacing Webster with a player of similar age, ability and experience or, alternatively, the loss of opportunity to receive a *transfer fee*.

Webster and Wigan Athletic on the other hand considered that compensation should be limited to the residual value of the contract as any higher compensation would impose heavy restrictions on the free movement of players.

The CAS Panel found that compensation should be limited to £150,000. CAS reached this figure as it felt that article 17 only allowed the Court to value the player's contract's residual value, based upon his salary for the remainder of his contract, not the player's market value.

As to the applicable law, more often than not an employment contract contains a clause indicating the law governing their relationship in which the tribunal or the arbitration panel can rely on and this will usually be the one to be taken into consideration. If there is no such clause, the issue of the governing law has to be addressed by the deciding body.

In the case involving the player Webster the agreement was made in Scotland, which is where the contract was performed and where both parties were domiciled. Therefore, Scottish law should be taken into consideration.

This is particularly relevant as the parties' intention to have the rules of the Scottish Football Association and of Scottish Premier League govern any issue pertaining to the suspension and termination of the contract was manifestly expressed in clause 26 of the relevant employment contract.

In any case, the application of Scottish regulations and Scottish law would have to be claimed by at least one of the parties and in this case they were requested by Hearts of Midlothian. Also, Scottish law would have to recognise the points of both parties in order to be accepted. Webster (& Wigan Athletic) claimed that compensation should be limited to the residual value of the contract, which would seem to comply with this second requirement as well.

As result it would seem that Scottish law could have been applied, at least to the dispute between the player and Hearts.

The CAS approach was however that of applying the FIFA regulations and, additionally, Swiss law, as enunciated by article 62 par. 2 of the FIFA Statutes. Even then, in doing so it would appear that Scottish law should in principle have played a major role in the calculation of the compensation, especially considering that “*article 17 of the FIFA Status Regulations gives primacy to the parties’ contractual agreement in terms of stipulating types and amounts of compensation*”. Where this very aspect was not clearly provided for in the contract or agreed between the parties, it was however stipulated that Scottish Law would apply to any conflict arising from or in connection with the contract. In fact, clause 21 of the employment contract stated that “*The Club may offer the Player a further period of engagement under the Rules of The Scottish Premier League and the Player shall not be registered for any other club without payment of a compensation fee (fixed in manner provided by the Rules of The Scottish Premier League) by that other club to the club which previously held the Player’s Scottish Premier League registration if and so long as the Club has offered to engage the player on terms which are in the opinion of the Board no less favourable in all monetary respects that those applicable hereunder.*” Although article 17 does not require that compensation be determined in application of a national law or that the rules on contractual damage contained in the law of the country concerned have priority over other elements and criteria listed in article 17, it would seem possible to have done so.

Although the employment contract does not contain a clear choice-of-law clause it specifies that the parties “*shall observe and be subject to the Rules regulations and Bye-Laws of the Scottish Football Association, The Scottish Premier League (...)*”. The domicile of the Association and the League is Scotland and also of the parties and the contract. Hence, it would seem that the intention of the parties was to have Scottish law as the governing law of the contract. According to article R58 of the CAS code: “*The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such choice, (...)*”. This implies that the application of Scottish Law would be in accordance with CAS provisions and the dispute could be decided according to Scottish Law. Furthermore, article 62 par. 2 of the FIFA Statutes stipulates that “*the provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings*”. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law. Therefore it would be possible to apply Scottish Law to the proceedings, also taking into account FIFA regulations and Swiss Law additionally.

Article 25 par. 6 of the Regulations on the Status and Transfer of Players would seem to further support this argument: “*The Players’ Status Committee, the Dispute Resolution Chamber, the single judge or the DRC judge (as the case may be) shall, when taking their decisions, apply these regulations whilst taking into account all relevant arrangements, laws and/or collective bargaining agreements that exist at national level, as well as the specificity of sport.*”

The purpose of this analysis is however not to determine whether Scottish law should have been applied by CAS to the present case and/or how, but rather to highlight the fact that common law could have been applied or it may be applied in future by the Court of Arbitration for Sport and what the implications of doing so would be.

As we have seen above, according to Common Law, *in casu* Scots Law, remedies for the breach of contract are based on the *restitutio in integrum*, which attempts to return the injured party to the same position it would have been in had the breach not occurred. It should also be taken into account the *lucrum cessans* suffered by the aggrieved party. In Common law therefore the judging authority shall be led by the principle of the so-called positive interest or “expectation interest”.

1) *The residual value of the contract*

When calculating the compensation, the residual value of the Player’s employment contract remaining after its termination (GBP 150,000) was accepted by both parties.

CAS did not apply the principles of aggravating circumstances or contributory negligence argued by the parties; the CAS Panel instead expressed the following:

*“although the Panel is not convinced that the concept of aggravating factors or of contributory negligence are legally relevant or applicable to the calculation of compensation under the criteria of article 17 par.1 of the FIFA Regulations, the legal question can be left open because the Panel finds there is no sufficient evidence that either party (Hearts or the Player) in fact had ill intentions or misbehaved in their attitude with regard to each other”.*

It would seem however that the Panel took into consideration the circumstances of the player, who although did not claim he had just a cause to terminate the contract showed and proved to have been treated badly by Hearts.

From a common law perspective the pressure exercised by Hearts on the player could be considered a form of contributory negligence on the part of the club that could have the effect of diminishing any amount of compensation, should sufficient evidence have been brought before the Panel. Contributory negligence in common-law jurisdictions applies to cases where a plaintiff/claimant has, through his own negligence, contributed to the harm he suffered; the negligence is not a complete defence and can reduce the amount of damages.

On the other hand, Hearts alleged the existence of aggravating factors maintaining that the player, knowing that the end of his contract was approaching and despite having received several offers from the club, unfairly refused to negotiate a further extension of his employment contract, and then made a deliberate attempt to circumvent the requirement of transfer compensation. Whether this

could have been considered as an aggravating factor it is something that is difficult to determine, and it would have had to be sufficiently proved. It is possible that it would have been seen as a way by the aggrieved party (the club) of mitigating or reducing damages by reasonable means, which is considered a duty in common law.

2) *The market value of the player*

Hearts claimed as loss in profit (or as the replacement value of the player) an estimated value of the player on the transfer market (valued at GBP 4 million). CAS considered that this could not be taken into consideration when determining compensation on the basis of article 17 because such form of compensation was not agreed upon contractually and would cause the Club to be enriched and be punitive for the player.

In the case *Gary Smith & Anr and Ben Collett* it was decided that a football player could be compensated for future earnings that were lost as a result of a dangerous play on the football field. Mr Collett issued civil proceedings against Middlesbrough Football Club and Mr Gary Smith claiming that he had been deprived of his chance to pursue a lucrative career as a professional footballer. The calculation of the compensation for future earnings was based on hypothesis, statistics and non-corroborated evidence and by applying a percentage discount to the total for contingencies that could have occurred.

Although the substance of the case is different from that of Mr Webster, we can see by analogy how the calculation of the lost profit made by Hearts based on the transfer market value could be justified. From a common law perspective this compensation would not need to be agreed upon contractually but it would need to be considered something foreseeable by the parties. This criterion is often used when calculating the total amount of the so-called *buyout clauses* (at least nowadays, after the Webster case) or even by CAS in other cases post-Webster.

In the same way, Heart's claim for GBP 70,000 for alleged sporting and commercial losses could have been taken into consideration should the club have been able to prove the existence of damage and/or causality following the player's termination.

3) *The fees and expenses paid by the former club*

The amounts that had been invested by the club in training and developing the player were not considered by CAS when calculating the amount of compensation since those are not factors relevant under article 17. They would not seem to be points to be taken into consideration when applying common law principles either, as they appear to be expenses inherent to the business of football which the club would most probably incur anyway.

4) *The remuneration and benefits due under the new contract*

This criterion could also have been argued under common law principles. Whether the result of the interpretation would be the same as that of CAS or not will have to remain unanswered. In this sense CAS considered that this was “*not the most appropriate criterion on which to rely in cases involving unilateral termination by the Player beyond the Protected Period because rather than focusing on the content of the employment contract which has been breached, it is linked to the Player’s future financial situation and is potentially punitive*”.

It is possible that the compensation claimed by Hearts (GBP 330,524) based on the difference between the value of the old and the new contract would have been accepted instead of applying the criterion of the residual value of the contract, meaning the remuneration remaining due to the Player under the employment contract upon its date of termination (GBP 150,000).

5) *Joint and several liability of the new club*

The player’s new club Wigan was considered by the CAS Panel to be jointly and severally liable with the Player for the payment of GBP 150,000 in compensation to Hearts in application of article 17 par. 2.

An ordinary Court, not taking into account FIFA regulations, would most probably not have held Wigan jointly and severally liable, particularly in this case where the player recognised that he breached the contract without being induced by the new club. It seems appropriate however to deem the regulation provided for under 17 par. 2 “*a form of strict liability, which is aimed at avoiding any debate and difficulties of proof regarding the possible involvement of the new club in a player’s decision to terminate his former contract and as better guaranteeing the payment of whatever amount of compensation the player is required to pay to his former club*” as highlighted by CAS.

## CONTRACTUAL STABILITY AND EU COMPETITION LAW

by *Gabriele Coppo*\*

SUMMARY: 1. Introduction – 2. The FIFA Regulations on the Status and Transfer of Players and the principle of contractual stability – 3. The application of EU competition law to sporting rules – 4. Are the contractual stability rules compatible with EU competition law? – 5. Conclusion

*Abstract:* The purpose of the present article is that of analysing the compatibility of the rules on contractual stability provided for by FIFA Regulations on the Status and Transfer of Players with EU competition law and, in particular, with Article 101 TFEU. Before carrying out the analysis, the article will focus on the description of the rules under scrutiny and the legal principles underlying the analysis, namely the principles enounced by the European Court of Justice in the *Meca-Medina* judgment. The conclusion that will be drawn is that the rules on contractual stability are likely to infringe Article 101 TFEU.

### 1. Introduction

The compatibility of FIFA's regulations on transfer of players with EU law, and in particular with EU competition law, has been highly debated over the last fifteen years. The origin of the debate dates back to the famous *Bosman*<sup>1</sup> case, probably the landmark case for European sport, in which the ECJ found that the rules concerning the transfer of players in professional football – in particular, the rule providing for the payment of a transfer fee in order to release footballers from their former club after the expiry of the employment contract – were found to violate the Treaty provisions on free movement of workers, now Article 45 of the Treaty for the Functioning of the European Union ('TFEU').

In *Bosman* the ECJ was asked to decide, *inter alia*, whether the FIFA rules on transfer of players (namely, the FIFA rules which were applicable at the

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<sup>1</sup> Case C-415/93, *Bosman*, ECR [1995] I-4921.

time of the judgment) were compatible with Articles 101 and 102 TFEU. However, the Court did not address this point since the case was decided exclusively on the basis of Article 45 TFEU. Nevertheless, AG Lenz concluded in his opinion that FIFA rules on transfer of players – and, in particular, the rules providing for the payment of a transfer, training or development fee to the former club of the footballer – were in breach of Article 101 TFEU. No infringement was established in connection with Article 102 TFEU.

Although *Bosman* was concerned the legality of the transfer fees due at the expiry of players' contracts, it became clear that the entire transfer system was susceptible to legal scrutiny from the point of view of EU law, including competition law. In this respect, the most important issue not raised in *Bosman* was whether a transfer fee paid for a player sold before his contract had expired would be considered compatible or not with EU competition law.<sup>2</sup>

After the *Bosman* judgment, FIFA had to amend its rules concerning the transfer of players whose contract had expired. However, following a number of complaints the Commission decided to go through the entire FIFA transfer system. On 14 December 1998, the DG Competition issued a Statement of Objections to FIFA regarding the rules applicable to the international transfer of players (which were not addressed by the *Bosman* judgment), and the obligation imposed by FIFA to national associations within the EU to establish national transfer systems. In particular, the Commission objected to FIFA rules prohibiting the transfers of players that had unilaterally terminated their contracts – even if those players had compensated their clubs in accordance with applicable national laws – while in case of termination of contract by mutual consent the applicable rules continued to impose on players' new clubs the obligation to pay a transfer fee to the selling clubs. Moreover, the Commission raised objections against the FIFA rules which continued to require the payment of international transfer fees regardless of whether the contract of the player had expired.

In March 2001 an agreement on 'Principles for the amendment of FIFA rules regarding international transfers'<sup>3</sup> was reached between the Commission, on the one hand, and FIFA and UEFA, on the other hand (the '2001 Agreement'). The 2001 Agreement was formalized with an exchange of letters between FIFA's President, Mr. Blatter, and the Commissioner for Competition, Mr. Monti. The Commission agreed to treat the new transfer rules, which will be described in the following section, as compatible with competition law. In June 2002, the Commission formally closed its investigation.<sup>4</sup>

Although the agreement concluded between the Commission and FIFA could appear as the final word on the matter, many commentators think it is not.<sup>5</sup>

<sup>2</sup> BELOFF, M., KERR, T., DEMETRIOU, M., *Sports Law*, Hart, Oxford, 2009, 78.

<sup>3</sup> See press release IP/01/314 of 5 March 2001.

<sup>4</sup> See press release IP//02/824 of 5 June 2002.

<sup>5</sup> See e.g. WEATHERILL S., 'Fair Play Please!': *Recent Developments in the Application of EC Law to Sport*, C.M.L.R. (2003) 40, 51, PARRISH R., *Sports law and policy in the European Union*, 2003,

The fact that the agreement between FIFA and the Commission served as legal basis for the new FIFA transfer rules (currently in force, with minor modifications) does not mean that those rules must be necessarily deemed compatible with EU competition law. The Commission itself has shown not to have put an end to the issue concerning the relationship between FIFA transfer rules and EU competition law. In its Communication '*Developing the European Dimension in Sport*' adopted on 18 January 2011,<sup>6</sup> the Commission has expressed its intention to launch a study on the economic and legal aspects of transfers of players and their impact on sport competitions and, in this context, provide guidance on transfers of players in team sports. Such a study will certainly provide an important contribution to the discussion concerning the compatibility of FIFA transfer rules – and, in particular, the principle of contractual stability – with EU competition law.

## 2. *The FIFA Regulations on the Status and Transfer of Players and the principle of contractual stability*

The 2001 Agreement between FIFA, on the one hand, and the Commission, on the other hand,<sup>7</sup> focused on some fundamental points which came to form the general principles of the revised FIFA Regulations on the Status and Transfer of Players ('RSTP') that entered into force on 1 September 2001.<sup>8</sup> The transfer system thus created can be summarised as follows:

- the minimum and maximum length of contracts is fixed in 1 and 5 years respectively;
- transfers can only take place during two transfer windows per season, with the limit of one transfer per player per season;
- the unilateral termination of a contract gives rise to the obligation to pay financial compensation to the former club of the player;
- contracts are irrevocable for the first 2 or 3 years (depending on the age of the player), unless a just cause or a sporting just cause exists;
- players and clubs are subject to sporting sanctions for a unilateral breaches of a contract during the protected period.

The specific rules governing the transfer of players are provided for by Articles 13 to 17 of the RSTP. The transfer system created by such rules, which is due to preserve the 'contractual stability' between players and clubs, can be summarised as follows.

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149, GARDINER S., *Sports Law*, 2001, 410, EGGER A., STIX-HACKL C., *Sports and Competition Law: A Never-Ending Story?*, E.C.L.R. (2002) 23(2), 91.

<sup>6</sup> COM(2011)12 final.

<sup>7</sup> See IP/01/314 of 5 March 2001.

<sup>8</sup> A revised version of the RSTP entered into force on 1 July 2005. The new RSTP, which were largely based on the RSTP of 2001, have substantially remained unchanged to date.

(i) *Termination of the contract*

In accordance with the general principles of labour law, Article 13 of RSTP provides that ‘*a contract between a professional and a club may only be terminated upon expiry of the term of the contract or by mutual agreement*’. It follows that if a player wants to terminate his contract he has to obtain, in principle, the consent of his club. The old club can refrain from giving its consent to the transfer if it is not satisfied with the terms of the agreement which normally include a transfer fee to be paid by the new club.<sup>9</sup> In addition, Article 14 of the RSTP provides that the contract may be unilaterally terminated with no consequences (either the payment of compensation and imposition of sporting sanctions) if a ‘just cause’ exists. The RSTP do not provide any guidance as to the meaning of ‘just cause’ although the commentary accompanying the RSTP provides some examples.<sup>10</sup>

(ii) *Termination of the contract with the obligation to pay compensation*

Pursuant to Article 17(1), if a contract is unilaterally terminated without just cause, the party in breach shall pay compensation. The provision lists a number of different factors that may be taken into account in order to determine the amount of the compensation due to the other party.<sup>11</sup> The vague formulation of the criteria that can be used for calculating the compensation gave rise to several problems in the application of Article 17(1).<sup>12</sup> In any case, the amount of the compensation may be stipulated in the contract or agreed between the parties. According to Article 17(2), the player and his new club are jointly and severally liable for the payment

<sup>9</sup> Any transfer between national associations is subject to the issuing of an International Transfer Certificate (“ITC”). A precondition for registering a player is that his ITC has been validly transferred from the association of his old club to the association of his new club. The national association from which the ITC is requested must contact the player and his old club to ascertain whether a contractual dispute exists. In this case, the national association shall not issue an ITC. If a player moves under contract without the consent of his old club the association to which the old club is affiliated, will inform the new association that the ITC cannot be issued because the contract between the old club and the player has not expired and that there has not been a mutual agreement regarding its early termination, RSTP, Annex 2, Article 2.4

<sup>10</sup> FIFA, Commentary on the Regulations for the Status and Transfer of Players, 39-40.

<sup>11</sup> Pursuant to Article 17(1) ‘Subject to the provisions of Art. 20 and annex 4 in relation to Training Compensation, and unless otherwise provided for in the contract, compensation for breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the Former Club (amortised over the term of the contract) and whether the contractual breach falls within a Protected Period’.

<sup>12</sup> See e.g. PARRISH R., *Contract Stability: The Case Law of the Court of Arbitration of Sport*, in this volume.

of the compensation.

Compensation (only) is due when the contract is unilaterally terminated out of the so-called 'protected period' or when the contract is terminated during the 'protected period' if a 'sporting just cause' exists.<sup>13</sup>

(ii) *Termination of the contract with the obligation to pay financial compensation and the imposition of sporting sanctions*

In addition to the obligation to pay compensation, sporting sanctions are to be imposed on a player terminating his contract during the so-called 'protected period', i.e. a period of three years following the entry into force of the contract, if such contract was concluded prior to the 28<sup>th</sup> birthday of the player, or a period of two years following the entry into force of the contract, if such contract was concluded after the 28<sup>th</sup> birthday of the player. Pursuant to Article 17(3), a player who breaches his contract during the protected period can be prohibited from playing in official matches from four to six months.<sup>14</sup> The protected period starts again when, while renewing the contract, the duration of the previous contract is extended. Pursuant to Article 17(4), sporting sanctions are also imposed on the clubs that unilaterally terminate the contract during the protected period. The clubs that recruit a player who has unilaterally terminated the contract with his former club without just cause are deemed to have committed the offence of inducement to breach unless it can establish otherwise. In both cases, the club shall be banned from registering any new player for two registration periods.<sup>15</sup>

### *3. The application of EU competition law to sporting rules*

Once described the transfer system created by the RSTP, the next step to be undertaken is that of verifying whether such system is fully compatible with EU competition law.

In this respect, it must be noted at the outset that although it reflects the 2001 Agreement between FIFA and the Commission, the transfer system created by the RSTP could nevertheless result to be in breach of EU competition law, and in particular of Article 101 TFEU. Such an apparent contradiction is explained by a number of different reasons.

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<sup>13</sup> According to Article 15, "[a]n established professional who has, in the course of the season, appeared in fewer than ten per cent of the official matches in which his club has been involved may terminate his contract prematurely on the ground of sporting just cause."

<sup>14</sup> Disciplinary measures may be imposed outside the protected period for failure to give notice of termination within 15 days of the last official match of the season (including national cups) of the club with which the player is registered.

<sup>15</sup> According to Article 17(5) of RSTP, any other person subject to the FIFA statutes and regulations (such as club officials or players' agents) who acts in a manner designed to induce a breach of contract between a player and a club in order to facilitate the transfer of the player shall be sanctioned.

First of all, even though it is true that the Commission closed its investigation following the conclusion of the 2001 Agreement, it must be pointed out that no formal decision declaring FIFA transfer rules compatible with Articles 101 and/or 102 TFEU was adopted. Even those authors maintaining that the Commission is bound by the agreement concluded with FIFA recognize that the binding effect of such undertaking does not extinguish completely the Commission's power to review the case. For instance, the case could be reopened if the Commission would come to the conclusion that the rules applied in practice by FIFA and/or national associations are in breach of EU competition law. In such a case, the Commission could finally adopt a formal decision on this point.<sup>16</sup>

Second, the fact remains that the only EU institution which is entitled to take a definitive decision on the compatibility of FIFA transfer rules with Articles 101 and 102 TFEU is the European Court of Justice ('ECJ'), which has not been asked to rule on this issue so far.

Third, and more importantly, after the conclusion of the 2001 Agreement the interaction between sporting rules and competition law has fundamentally changed following the *Meca-Medina*<sup>17</sup> judgment, the first ECJ's decision concerning the application of Articles 101 and 102 TFEU to regulations adopted by sporting organizations.<sup>18</sup> The principles enounced in *Meca-Medina* and reaffirmed by the Commission in its '*White Paper on Sport*'<sup>19</sup> and the accompanying *Staff Working Document*,<sup>20</sup> adopted in 2007, provide important guidance as concerns the methodology to be followed for the assessment of the compatibility of FIFA transfer rules with EU competition law.

In order to assess whether the contractual stability rules resulting from the 2001 Agreement should be considered as compatible with EU competition law, it is therefore necessary to briefly analyze the principles governing the application of EU competition law to sporting rules in the light of the *Meca-Medina* judgment.

(i) *Applicability of EU law to sporting rules*

It is well established case law of the ECJ that EU law is applicable to sport and to sporting rules, in so far as the practice of sport constitutes an 'economic activity'

<sup>16</sup> EGGER A., STIX-HACKL C., *Sports and Competition Law: A Never-Ending Story?*, E.C.L.R. (2002) 23(2), 81-91.

<sup>17</sup> Case C-519/04P, *Meca Medina*, [2006] ECR I-6991.

<sup>18</sup> In previous cases where Articles 101 and/or 102 TFEU were pleaded, the ECJ had only ruled on the basis of free movement provisions of the Treaty (see Case C-415/93, *Bosman*, [1995] ECR I-4921; Joined Cases C-51/96 and 191/97, *Deliège*, [2000] ECR I-2549; Case C-176/96, *Lehtonen*, [2000] ECR I-2681) although various Advocate-Generals had included analysis of the competition law claims in their opinions (AG Lenz in *Bosman*, AG Cosmas in *Deliège*).

<sup>19</sup> Commission (EC), "*White Paper on Sport*" (White Paper) COM (2007) 391 final, 11 July 2007.

<sup>20</sup> Commission (EC), '*The EU and Sport: Background and context. Accompanying document to the White Paper on Sport*' (Commission staff working document) COM (2007) 395, 11 July 2007, Annex 1, [2.2.2.4.2].

within the meaning of the Treaties.<sup>21</sup> It follows that the regulations adopted by sporting associations and organizations fall within the scope of EU law, including competition law, unless it is demonstrated that the activities to which they apply does not constitute an ‘economic activity’.

Although EU law is in principle applicable to sport, it does not cover all aspects of it. In particular it must be noted that, since sport can take place only within fixed rules, the Treaties do not preclude regulations which are exclusively of sporting interest, such as the rules of the game (i.e. the length of a match or the number of players in a team). It is in this context that in *Walrave* the ECJ ruled that the Treaty provisions on freedoms of movement do not affect rules concerning questions which are of ‘purely sporting interest’ and, as such, have nothing to do with economic activity.<sup>22</sup> In *Walrave*, a rule restricting the nationality of an athlete on a national cycling team was deemed to be ‘purely sporting’ and therefore falling outside the scope of EU law. The ECJ followed the same approach in *Donà*.<sup>23</sup>

In *Deliège*<sup>24</sup> and *Lehtonen*<sup>25</sup> the ECJ suggested that rules which are inherent in the conduct or organization of sporting events do not, in themselves, infringe EU law. In relation to such rules, the ECJ recognised that it is for the sports federations to decide what the appropriate measures are.<sup>26</sup>

(i) *Applicability of EU competition law to sporting rules*

A similar approach was followed by the ECJ in the *Meca-Medina* which is, as mentioned above, the first case ever in which the Court has pronounced on the application of Articles 101 and 102 to regulations adopted by sporting organizations.

In *Meca-Medina*, the ECJ clarified that even if the rules which are purely sporting in nature ‘do not constitute restrictions on freedom of movement because they concern questions of purely sporting interest and, as such, have nothing to do with economic activity, that fact means neither that the sporting activity in question necessarily falls outside the scope of Articles [101 TFEU] and [102 TFEU] nor that the rules do not satisfy the specific requirements of those articles’.<sup>27</sup> It follows that no sporting rule can automatically escape from the application of EU competition law.

Having rejected the relevance of the simple reference to ‘purely sporting

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<sup>21</sup> See Case 36/74, *Walrave and Koch*, [1974] ECR 1405, para. 4; Case 13/76, *Donà*, [1976] ECR 1333, para. 12; Case C-415/93, *Bosman*, [1995] ECR I-4921, para. 73; Joined Cases C-51/96 and C-191/97, *Deliège*, [2000] ECR I-2549, para. 41; Case C-176/96, *Lehtonen*, [2000] ECR I-2681, para. 32.

<sup>22</sup> Case 36/74, *Walrave and Koch*, [1974] ECR 1405, para. 8.

<sup>23</sup> Case 13/76, *Donà*, [1976] ECR 1333.

<sup>24</sup> Joined Cases C-51/96 and C-191/97, *Deliège*, [2000] ECR I-2549.

<sup>25</sup> Case C-176/96, *Lehtonen*, [2000] ECR I-2681

<sup>26</sup> TURNER-KERR P., BELL A., *The place of sport within the rules of Community law: clarification from the ECJ? The Deliege and Lehtonen cases*, E.C.L.R.(2002) 23(5), 256.

<sup>27</sup> Case C-519/04P, *Meca Medina*, para. 31.

rules', the ECJ went on to describe the methodological approach to be applied to decide whether a sporting rule infringes Articles 101 and 102. The ECJ held that '[n]ot every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article [101(1) TFEU]. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects and, more specifically, of its objectives. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives and are proportionate to them'.<sup>28</sup>

The decision in *Meca-Medina* relied on the conclusions reached by the ECJ in *Wouters*, a controversial judgment which attracted much criticism in that it contrasted with previous case-law which excluded the existence of a so-called "rule of reason" in the application of Article 101(1) TFEU.<sup>29</sup> In *Wouters*, the ECJ decided that non-economic objectives of public interest (in that case, the integrity of the system of justice) can justify a restriction of competition inherent in the regulation (the prohibition for lawyers to form multi-disciplinary partnerships with accountants).<sup>30</sup>

The significance of *Meca-Medina* is that the *Wouters* criteria can now be applied to all sporting rules which have an economic effect. *Meca-Medina* implicitly recognises the impossibility to draw a clear distinction of the 'purely sporting rules' from rules having economic effects, in sports where a decision of a sporting federation can lead to large shifts in revenues for clubs or athletes.

*Meca-Medina* has pervaded the Commission's 2007 *White Paper on Sport*, and the accompanying *Staff Working Document*,<sup>31</sup> which set out the methodology that the Commission will follow in the future for applying Articles 101 and 102 TFEU to rules adopted by sporting associations:

- Step 1.* Is the sports association that adopted the rule to be considered an 'undertaking' or an 'association of undertakings'?
- a. The sports association is an 'undertaking' to the extent it carries out an 'economic activity' itself (e.g., the selling of broadcasting rights).
  - b. The sports association is an 'association of undertakings' if its members carry out an economic activity. In this respect, the question will become relevant to what extent the sport in which the members (usually clubs/teams or athletes) are active can be considered an economic activity and to what extent the members exercise economic

<sup>28</sup> Case C-519/04P, *Meca Medina*, para. 42.

<sup>29</sup> According to such case-law, a restriction on competition could only escape the scope of Article 101(1) TFEU on the basis of an economic or commercial necessity. See e.g. Case 56/65, *Société Technique Minière*, [1966] ECR 235; Case 42/84, *Remia BV*, [1985] ECR 2545.

<sup>30</sup> As a consequence, the rule at stake was declared compatible with Article 101(1) TFEU, with no need to justify it pursuant to Article 101(1) TFEU.

<sup>31</sup> See footnotes 17 and 18 above.

activity. In the absence of ‘economic activity’, Articles [101] and [102 TFEU] do not apply.

*Step 2.* Does the rule in question restrict competition within the meaning of Article [101(1) TFEU] or constitute an abuse of a dominant position under Article [102(1) TFEU]?

This will depend, in application of the principles established in the *Wouters* judgment, on the following factors:

- a. the overall context in which the rule was adopted or produces its effects, and its objectives;
- b. whether the restrictions caused by the rule are inherent in the pursuit of the objectives; and
- c. whether the rule is proportionate in light of the objective pursued.

*Step 3.* Is trade between Member States affected?

*Step 4.* Does the rule fulfil the conditions of Article [101(3) TFEU]?

The *Working Document* also indicates the types of sporting rules which the Commission considers as compatible with EU law, and also the approach it will take in the future in applying competition law to such rules. In this respect, it is worth to note that the Commission considers the rules governing the transfer of athletes between clubs (except transfer windows) as sporting rules which ‘*represent a higher likelihood of problems concerning compliance with Articles [101 TFEU] and/or [102 TFEU], although some of them could be justified under certain conditions under Article [101(3) TFEU]*’.

#### 4. *Are the contractual stability rules compatible with EU competition law?*

The principles arising from *Meca-Medina* and reaffirmed in the Commission’s *White Paper on Sport* must be applied in the assessment of the compatibility of FIFA rules on contractual stability with EU competition law. From a methodological point of view, since the rules relating to the contractual stability between players and clubs are strictly intertwined, they will be examined as a whole. Moreover, the analysis will be limited to the assessment of the compatibility of such rules with Article 101 TFEU. Indeed, as it results from *Bosman* and *Meca-Medina* that it is Article 101 TFEU, more than Article 102 TFEU, the provision which could more likely be invoked to challenge the contractual stability rules.

##### (i) *The nature of FIFA as an association of undertakings*

First of all, it is necessary to establish whether FIFA can be considered an undertaking or an association of undertakings within the meaning of Article 101 TFEU.

The concept of undertaking, according to the ECJ’s case law, covers ‘every entity engaged in an economic activity, regardless of the legal status of the

entity and the way in which it is financed'.<sup>32</sup> In this respect, the ECJ clarified that 'an activity consisting in offering goods or services on a given market is an economic activity'.<sup>33</sup>

In light of the above, there can be very little doubts that professional football clubs constitute undertakings within the meaning of Article 101(1). As a matter of fact, professional football clubs are involved in a wide range of economic activities such as the organization of sporting events, sports merchandising, selling of tickets, selling of broadcasting rights. Some professional football clubs are even quoted on the stock exchange in the form of public limited companies.

Since professional clubs can be regarded as undertakings, the national football associations may be considered associations of undertakings,<sup>34</sup> and the international organizations such as UEFA or FIFA may be considered groupings of associations of undertakings.<sup>35</sup> In *Piau*, the General Court recognized that '*FIFA's members are national associations, which are groupings of football clubs for which the practice of football is an economic activity. These football clubs are therefore undertakings within the meaning of Article [101 TFEU] and the national associations grouping them together are associations of undertakings within the meaning of that provision*'.<sup>36</sup>

Since FIFA is to be considered as an association (of associations) of undertakings, the RSTP – which are adopted by FIFA and are binding for all its members – can be seen as a decision of an association of undertakings within the meaning of Article 101(1).<sup>37</sup>

## (ii) *Restriction of competition*

Like every decision of an association of undertakings, the RSTP fall within Article 101(1) TFEU only if they have as their '*object or effect the prevention, restriction or distortion of competition within the common market*'. It is therefore necessary

<sup>32</sup> Case C-41/90, *Macrotron*, [1991] ECR I-1979.

<sup>33</sup> Case C-180/98, *Pavlov*, [2001] ECR I-6451.

<sup>34</sup> It does not make a difference to that assessment that amateur clubs also belong to the national associations, in so far as the associations are at least formed by economically active clubs. See AG Lenz in Case C-415/93, *Bosman*, para. 256; AG Cosmas in Joined Cases C-51/96 and 191/97, *Delière*, para. 104, and AG Alber in Case C-176/96, *Lehtonen*, para. 103.

<sup>35</sup> In addition, international sporting associations such as FIFA may be also considered undertakings within the meaning of Article 101(1) in so far as they themselves are engaged in economic activity. For instance, FIFA takes a share of receipts of its members (i.e. the national associations) coming from ticket sales, advertising rights, rights for television and radio broadcasts, etc. See e.g. Commission decision of October 27, 1992, Cases COMP IV/33.384 and IV/33.378 - *Distribution of package tours during the 1990 World Cup*.

<sup>36</sup> Case T-193/02, *Piau*, [2005] ECR II-209, para. 69.

<sup>37</sup> In *Bosman* it was asserted that transfer rules merely faithfully reflect the will of the members of the associations. However, in such a case the rules may just be regarded as horizontal agreements between the clubs (see AG Lenz in Case C-415/93, *Bosman*, para. 258). Anyway, since Article 101(1) applies to both decisions of associations of undertakings and agreements between undertakings this distinction is irrelevant.

to verify whether such conditions are met.

### *The relevant market*

Market definition plays a fundamental role in competition analysis, whether under Article 101 or 102 TFEU. Market definition is the tool to identify and define the boundaries of competition between firms and to analyse the practical effects of their behaviour on the competitive environment.<sup>38</sup> Under Article 101(1) TFEU, market definition is a key-element in defining the potential anticompetitive effects of an agreement or practice. It is therefore important to define the relevant market in which the RSTP display their effects.

As per the relevant geographic market, it must be noted that the RSTP establish uniform rules for the transfer of players between clubs belonging to the national associations of Member States. That the geographic market covers the territory of the European Union is therefore self-evident.

As per the product market, it can be useful to refer to the detailed analysis carried out by Egger and Stix-Hackl,<sup>39</sup> who have distinguished three relevant markets affected by FIFA transfer rules:

- (i) the exploitation market, i.e. the downstream market in which both individual clubs and national and international associations act as undertakings and exploit their performances (e.g. the selling of broadcasting rights);
- (ii) the sporting contest market, i.e. the main market in which football clubs organise and offer to the public sporting performances by playing against each other, with the intervention of external factors such as spectators and sponsors;
- (iii) the acquisition market, i.e. the upstream market where the clubs act as purchasers and/or suppliers of players' services. Indeed the players, as production factors, form one of the most important sources of supply for the individual clubs. In this context it is therefore not the players who act as purchasers or suppliers, but the club themselves.

The relevant market in which the RSTP display their effects is therefore the the acquisition market where football clubs buy and sell players's services, although it cannot be excluded interferences with the downstream markets.

As a matter of fact, although their object is that of regulating the engagement of players, the RSTP are essentially aimed at governing competition among clubs in the acquisition market rather than the employment relationship between clubs and players. Needless to say, the fact remains that the so-called principle of contractual stability affects the players' opportunities to find an employment and the terms under which such employment is offered.<sup>40</sup>

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<sup>38</sup> See, e.g., Notice on the definition of the relevant market for the purposes of Community competition law, OJ 1997 C372/5.

<sup>39</sup> EGGER A., STIX-HACKL C., *Sports and Competition Law: A Never-Ending Story?*, E.C.L.R. (2002) 23(2), 81, 86-87.

<sup>40</sup> Case C-415/93, *Bosman*, para. 75.

### *Appreciable restriction of competition*

In assessing whether a decision of an association of undertakings distorts competition in the relevant market, it is necessary to examine the competition within the actual context in which it would occur in the absence of such decision.<sup>41</sup> In the present case, this would mean comparing the transfer system created by FIFA rules on contractual stability with a transfer system where players could terminate their contract unilaterally without any limitation other than the respect of national labour law rules (such as the obligation to give prior notice and to pay compensation for unjustified breach of the employment contract).<sup>42</sup>

Such analysis leads to the conclusion that the principle of contractual stability, by limiting the possibility for football clubs to engage players, has the effect of restricting the competition among football clubs in the market for the acquisition of players.

According to the analysis of AG Lenz in *Bosman*, which appears in fact still valid under FIFA transfer system resulting from the 2001 Agreement, *'those rules replace the normal system of supply and demand by a uniform machinery which leads to the existing competition situation being preserved and the clubs being deprived of the possibility of making use of their chances, with respect to the engagement of players, which would be available to them under normal competitive circumstances. If the obligation to pay transfer fees did not exist, a player could transfer freely after the expiry of his contract and choose the club which offered him the best terms'. [...] Since a transfer takes place only if a transfer fee is paid, the tendency to maintain the existing competition situation is inherent in the system.*<sup>43</sup>

Implicit in the system based on contractual stability is that contracts should be protected unless they are terminated by mutual consent, which implies the conclusion – among the player, the selling club and the buying club – of an agreement on the payment of a transfer fee. The rules on contractual stability, by imposing sporting sanctions on players terminating their contract during the protected period, act as a deterrent to unilateral terminations of contracts and basically serve to artificially increase the price of players, obliging clubs to agree on the payment of a transfer fee. Such a system has the effect of favouring the most important and financially viable clubs, since these clubs only can afford to pay high transfer fees and to offer lucrative salaries to players. Players' mobility tends therefore to be limited to transfer of players to the biggest and richest clubs. High transfer fees have the effect of reducing the choice available to the less

<sup>41</sup> Case 99/79, SA Lancôme and Cosparfrance Nederland BV v Etos BV and Albert Heyn Supermart BV [1980] ECR 2511, para. 24

<sup>42</sup> Player contracts might also have so-called buy-out clauses that stipulate in case of a transfer that the old club of the player is entitled to a transfer fee at a fixed amount. In that case, the payment of a transfer fee is not the result of FIFA transfer system, but of a contractual agreement between the player and his club. See AG Lenz in Case C-415/93, *Bosman*, para. 262.

<sup>43</sup> AG Lenz in Case C-415/93, *Bosman*, para. 262.

viable clubs in respect of players who might be recruited by them.<sup>44</sup>

Needless to say, the RSTP affect players as well. In the absence of contractual stability rules, players would be free to look for a club interested in their services and, at the end of the season, terminate their contract unilaterally even though they would probably be held to be in breach of their contract and would have to compensate their former club. On the contrary, the rules on contractual stability put the selling club in a position of bargaining power, since this club has the power to release or not the player at its own discretion. Alternatively, the selling club could easily require the payment of a very high transfer fee. In such a case, it is likely that the buying club would react by depressing the level of player's salary to compensate the high transfer fee or it would renounce to purchase the player's services.

In conclusion, as explained by Roger Blanpain, 'A system of this kind has a destabilising effect because big money can be made by organizing transfers. Although a player is tied (indissolubly) to his club for a minimum of two or three years [...] [t]he club can still sell the player after just one year by de facto forcing him to agree if necessary [...] [T]he stability of teams, which is purportedly a prime consideration, is undermined by the fact that transfers are an easy way of making big money. The system has a counter-productive effect'.<sup>45</sup>

### *Possible justifications*

Although the contractual stability rules may affect competition between clubs, such rules may result not to breach Article 101(1) TFEU to the extent they pursue a legitimate objective and their restrictive effects are inherent in the pursuit of that objective and proportionate to it (which means, *inter alia*, that these rules must be applied in a transparent, objective and non-discriminatory way). As pointed out by AG Cosmas in *Deliège*, indeed, Article 101(1) TFEU 'does not apply to restrictions on competition which are essential in order to attain the legitimate aim they pursue. That exception is based on the idea that rules which, at first sight, reduce competition, but are necessary precisely in order to enable market forces to function or to secure some other legitimate aim, should not be regarded as infringing the Community provisions on competition'.<sup>46</sup>

Since it was established that the RSTP have restrictive effects on competition, it must be established whether they pursue, nevertheless, legitimate objectives.<sup>47</sup> Then, it must be considered whether the restrictions caused by the

<sup>44</sup> EGGER A., STIX-HACKL C., *Sports and Competition Law: A Never-Ending Story?*, E.C.L.R. (2002) 23(2), 81, 88.

<sup>45</sup> BLANPAIN R., *The Legal Status Of Sportsmen And Sportswomen Under International, European And Belgian National And Regional Law* (2003) 59.

<sup>46</sup> AG Cosmas in Joined Cases C-51/96 and C-191/97, *Deliège*, [2000], ECR I-2549, para. 110.

<sup>47</sup> Legitimate sporting objectives recognized by the Commission include, e.g., the ensuring of fair sport competitions with equal chances for all athletes, the ensuring of uncertainty of results, the

RSTP are inherent in the pursuit of such objectives, and proportionate to it.

The main legitimate objective invoked in order to justify the restriction of competition caused by the application of the RSTP is *the need of 'maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results'*.<sup>48</sup> In particular, in *Bosman* it was argued that the purpose of transfer rules is that of ensuring the survival of smaller clubs since in the absence of transfer fees (agreed by the parties or in the form of financial compensation) the wealthy clubs would easily secure themselves the best players, while the smaller clubs would get into financial difficulties and possibly even have to cease their activities. There would thus be a danger of the rich clubs always becoming even richer and the less well-off even poorer.<sup>49</sup>

Such concerns were justified. It is well known that, after *Bosman*, players' salaries started to increase exponentially with the effect of broadening the gap between top clubs and smaller clubs.<sup>50</sup> With the partial abolition of transfer fees, all clubs had greater access to the market for top players than in the past. The most important and rich clubs started competing for best players, which had become suddenly available. Money, which was paid earlier as a transfer fee, was offered directly to the best players in order to convince them to accept the transfer. As a result, rich clubs caused a generalised increase in the value and salary of players, including mediocre players.<sup>51</sup> Poorer football teams started experiencing financial troubles due to increasing costs (essentially, players' wages). As a matter of fact, the main effect of *Bosman* was that of driving the money from football clubs into the pockets of players with no advantage whatsoever for poorer and weaker clubs.

However, it would be not correct ascribing the problems experienced by football in the last fifteen years to the effects of the *Bosman* ruling only. Indeed, it is likely that the same problems would have occurred if the old transfer rules would have been in force. Even though *Bosman* may have had a role in the increase of players' wages, it cannot be contested that the main reason of such an increase is simply that European top club had a lot of money to spend. Such money was collected through the selling of broadcasting rights and, in general, through new source of incomes other than the traditional sale of tickets. What really happened in the years of *Bosman* is that the delta between the incomes of top clubs and the incomes of medium and small clubs increased exponentially, thus breaking

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protection of the athletes' health, the protection of the safety of spectators, the encouragement of training of young athletes, the ensuring of financial stability of sport clubs/teams or the ensuring of a uniform and consistent exercise of a given sport. See Commission Staff Working Document COM (2007) 395, para. 4.2.1.5.

<sup>48</sup> Case C-415/93, *Bosman*, para. 106.

<sup>49</sup> AG Lenz in Case C-415/93, *Bosman*, para. 219.

<sup>50</sup> GARDINER S., WELCH R., *The Impact of the Bosman Ruling*, Contemporary Issues in Law (1998), 3(4), 289, 309.

<sup>51</sup> William Duffy, *Football May Be Ill, but Don't Blame Bosman*, Sports Law Journal (2003) 10, 295, 307.

any possible ‘balance between clubs’.

In any event it is certain that, irrespective of whether the old transfer system would have produced less adverse effects, FIFA transfer system resulting from *Bosman* (that is, in essence, the system currently in force) was not able to achieve efficiently the objective of ‘*maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results*’.

On this point, it is still valid the conclusion that ‘*the application of the transfer rules is not an adequate means of maintaining financial and competitive balance in the world of football. Those rules neither preclude the richest clubs from securing the services of the best players nor prevent the availability of financial resources from being a decisive factor in competitive sport, thus considerably altering the balance between clubs*’<sup>52</sup> and that such aims could ‘*be achieved at least as efficiently by other means*’.<sup>53</sup> In particular, the maintenance of a balance between clubs – as to guarantee the uncertainty of sporting results – could be achieved more effectively by a system providing for a more equal distribution of incomes among clubs. Indeed, as shown by facts, it is the unbalanced distribution of incomes – such as those deriving from the selling of broadcasting rights – that threatens the preservation of a minimum degree of equality among clubs and of uncertainty in the results, which is the very essence of all sport competitions.

Another reason to justify the restriction of competition caused by the application of the RSTP would be that a system of transfer fees (namely as concerns the fees agreed between the selling club and the buying one) would guarantee more incomes for small clubs, if the latter were to succeed in unearthing talented players with the potential of playing in top clubs. However, also this justification has to be dismissed. As explained by AG Lenz, similar rule have the effect to ‘*force the smaller professional clubs to sell players in order to ensure their survival by means of the transfer income thereby obtained. Since the players transferred to the bigger clubs are as a rule the best players of the smaller professional clubs, those clubs are thereby weakened from a sporting point of view.*’ This would lead to further altering the sporting balance in favour of the larger clubs and widen the economic gap between the smaller and the larger clubs, since sporting success is very often intrinsically linked to financial success. Although smaller clubs could use the income generated by the transfer fees to sign new players, ‘*since the bigger clubs usually pay higher wages, the smaller clubs will probably hardly ever be in a position themselves to acquire good players from those clubs*’.<sup>54</sup> Again, it must be concluded that a system of transfer fees is not the right tool to guarantee a more balanced distribution of incomes among clubs.

As per the reasons that could justify the prohibition to terminate the contract

<sup>52</sup> Case C-415/93, *Bosman*, para. 107.

<sup>53</sup> Case C-415/93, *Bosman*, para. 110.

<sup>54</sup> AG Lenz in Case C-415/93, *Bosman*, para. 224.

in the protected period pursuant to Article 17(3) of the RSTP, it can be argued that such rule aims at preserving the regularity and proper functioning of sporting competition in the interest of players, clubs and public since the organisation of football competitions requires some stability during the season. In this respect, it suffices to say that it would be inconceivable to see football teams buying and selling players in the course of the season (or, maybe, just for a single match) depending on their present needs. Although the interest invoked to justify the above rule appears to be legitimate, it must nevertheless be verified whether the rule provided for by Article 17(3) of the RSTP is proportionate to the aim pursued. In this respect, it seems absolutely reasonable to limit the players' mobility during each season, since this guarantees the effectiveness of the competition among clubs. However, a different conclusion could be reached if we consider the actual length of the protected period (i.e. 2 or 3 years depending on the cases). Is that period reasonable and proportionate? It is certainly not easy to reach a definitive conclusion in this respect, but serious doubts exist about it.

Finally, some words need to be spent as regards the obligation to pay financial compensation provided for by Article 17(1) of the RSTP, in cases where there no agreement is reached between the selling and the purchasing club. Such a provision, which is clearly based on the general principles of labour law, does not appear in itself unjustified. It is obvious that the unilateral breach of a contract must give rise to an obligation to compensate the other party. The problem could be, rather, the amount of such a compensation. For instance, a methodology of calculation leading to very high compensations could result to be incompatible with Article 101(1) TFEU because the amount of the compensation would be disproportionate and would amount, *de facto*, to a transfer fee. Under the current system, the amount of the compensation is determined by the CAS on the basis of a number of different criteria listed in Article 17(2) of the RSTP. In the implementation of Article 17(2), the CAS has not followed, so far, a uniform methodology for the calculation of the compensation. Rather, the CAS has changed the criteria used for the calculation of the compensation on a case by case basis. This resulted in very different amounts of the compensation depending on the specific case. Such a lack of uniformity and legal certainty could raise problems as concerns the application of Article 101(1) TFEU, since non-discrimination is one of the conditions that need to be met in order to justify the restrictions of competition produced by the RSTP. Objective criteria are thus needed for the calculation of the compensation.

In conclusion, the arguments invoked to justify the maintenance of a system of transfer fees for players under contract are likely to be dismissed, since such fees do not appear to be indispensable and/or proportionate to attain the legitimate aims that they purportedly pursue. As already pointed out in *Bosman*, the maintenance of a competitive balance between clubs as to guarantee the uncertainty of sporting results could be achieved more effectively by a system where the incomes are (more) equally shared between the clubs belonging to the same league and by the establishment of a solidarity pool for lower leagues.

(iii) *Effect on trade between Member States*

The scope of Article 101 TFEU is limited to agreements, decisions or concerted practices which may affect trade between Member States. The inter-state trade clause has been given a wide interpretation by the ECJ, including in the field of competition law.<sup>55</sup> According to well-established case law, if a decision or agreement ‘is to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that they may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that they might hinder the attainment of a single market between Member States’.<sup>56</sup>

Provided that they apply *inter alia* to the transfer of players between clubs belonging to different national football associations, it is undisputable that the RSTP, and in particular the contractual stability rules, may affect inter-state trade. Moreover, it must be taken into account that the case law of the ECJ does not require that trade between Member States is actually affected, being sufficient a reasonable foreseeability of such an effect. European clubs have interest in looking across their national borders to recruit players from other countries, either for economic or sporting reasons. From their side, players may want to move to a club where they are paid according to their skills. It can be therefore concluded that players’ movement affects inter-state trade.<sup>57</sup>

Finally, even though the wording of Article 101 suggests that any effect on trade between Member States is sufficient to bring an agreement or practice within the scope of the prohibition, the ECJ in *Völk v. Vervaecke*<sup>58</sup> established a *de minimis* rule requiring that the effect be appreciable.<sup>59</sup> In this respect, it is worth to remember that AG Lenz found that such requirement was fulfilled in *Bosman* based on statistics showing that in the 1995-1996 season, 18 clubs in the Italian first league spent more than 50 million Euros on foreign players.<sup>60</sup> It can be hardly disputed that that situation has changed. On the contrary, it is very likely that the intra-state movement of players and the amounts spent by football clubs to purchase foreign players significantly increased since 1995.

<sup>55</sup> Case 155/73 *Sacchi* [1974] ECR 409; Case 172/80 *Züchner* [1981] ECR 202, para. 18.

<sup>56</sup> Case C-306/96, *Javico International*, [1998] ECR I-1983; Case 5/69, *Völk*, [1969] ECR 295, paras. 5-7.

<sup>57</sup> In this respect, it is worth to note that according to the opinion of AG Alber in *Lehtonen*, it must be possible “to find that trade is affected in a case in which the exercise of fundamental freedoms is obstructed”. See AG Alber in Case C-176/96 *Lehtonen*, para. 104.

<sup>58</sup> Case 5/69, *Völk v. Vervaecke*, [1969] ECR 295.

<sup>59</sup> The effect has to be appreciable on the basis of economic evidence. See Case 27/87 *Louis Erauw-Jacquery v La Hesbignonne*, [1988] ECR 1919, para. 19.

<sup>60</sup> AG Lenz in Case C-415/93, *Bosman*, para. 57.

(iv) *Exemptions under Article 101(3) TFEU*

Article 101(3) is fundamentally aimed at ensuring that agreements and practices which may be found to have restrictive elements under Article 101(1) are not prohibited when they generate overriding efficiency gains. Article 101(3) may therefore be thought of as a balancing mechanism by which an agreement's pro-competitive benefits are weighed against its restrictive effects. In order to benefit from the exemption of Article 101(3), an agreement or practice:

- must contribute to improving the production or distribution of goods (or services) or to promoting technical or economic progress;
- must allow consumers a fair share of the resulting benefit;
- must *not* impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and
- must *not* afford undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Efficiencies can be taken into account for the granting of the exemption if they result in objective benefits that compensate for the harm to competition produced by an agreement.<sup>61</sup> Since it is doubtful that FIFA contractual stability rules produce an objective benefit to football, it appears unlikely that they could benefit from the exemption provided by Article 101(3) TFEU. Moreover, it has been demonstrated that the rules on contractual stability are not indispensable for attaining the objectives they are intended to pursue, which is required by Article 101(3).

Another interesting element must be taken into account. Before the conclusion of the 2001 Agreement, the Commission considered the possibility to draft guidelines on the application of competition law to sports.<sup>62</sup> In this occasion, the Commission expressed the view that '*where rules of a sporting organization have an economic impact or effect prohibited by Article [101(1)], then it will either not be affected by the said article or it will be given exemption in terms of Article [101(1)].*' It appears therefore that the Commission would grant such exemption only when the sport organizers can show that the rule is necessary to achieve specific benefits for the sport and those who participate in it. Furthermore, the impact of the rules should be proportionate to the importance of the objective being pursued.<sup>63</sup> All these conditions, as already explained, are unlikely to be met.

Finally, it cannot be excluded that FIFA transfer rules which are currently in force could be found to constitute an obstacle to the freedom of movement of workers. For instance, the impossibility to terminate the contract during the protected period could result in a limitation of players' freedom to seek for a new job within

<sup>61</sup> See Case T-65/98, *Van den Bergh Foods v. Commission*, [2003] ECR II-4653.

<sup>62</sup> See MARIO MONTI, *Excerpts of a speech given at a Commission-organised conference on sports Brussels*, 17 April 2000, SPEECH/00/152.

<sup>63</sup> GARDINER S., *Sports Law*, 2001, 400.

<sup>64</sup> AG Lenz in Case C-415/93, *Bosman*, para. 278.

the Union. In such a case, an exemption under Article [101(3)] would have to be ruled out.<sup>64</sup>

## 5. Conclusion

The short analysis carried out in the present article demonstrates that the RSTP could result to be in breach of EU competition law, and in particular of Article 101 TFEU.

The RSTP, by limiting the possibility to engage players, have the effect of restricting the competition among football clubs in the market for the acquisition of players. By imposing sporting sanctions on players terminating their contract during the protected period, such rules act as a deterrent to unilateral terminations of contracts and therefore artificially increases the price of players, since it provide an incentive to clubs to agree on the payment of a transfer fee. A similar system has the effect of favouring top clubs, since they only can afford to pay high transfer fees and to offer lucrative salaries to players. As a result, the mobility of players under contract tends to be limited to transfer of players to the biggest and richest clubs. On the contrary, the weakest and smallest team are prevented, in practice, to buy players which are in the protected period so that reduce their choice in respect of players who might be recruited by them.

Although it is accepted that the restrictive effects created by the rules on contractual stability may be found to be inherent in the pursuit of a legitimate objective such as the maintenance of a balance between clubs and the preservation of a certain degree of uncertainty as to results of the sporting competition, it must nevertheless be noted that the RSTP have shown to be unable to achieve efficiently such objectives. The hybrid system created after *Bosman* was not able to guarantee an effective competition between clubs in the market for the acquisition of players' services, neither to attain the objective to preserve the competitive balance among clubs and a certain degree of uncertainty as to results of the sporting competition. Indeed, in the last years the rich clubs became even richer and the less well-off even poorer. Many smaller clubs got into financial difficulties and/or went bankrupt. It is then difficult to conclude that the restriction of competition produced by the RSTP is legitimately justified. In light of the foregoing, it is well possible that the RSTP could be found to infringe Article 101 TFEU.

It is worth pointing out again one concept which has been often enounced, but scarcely applied. Transfer fees and sporting sanctions are not the right tools to achieve the legitimate objectives that they are said to pursue. The maintenance of a balance between clubs, that is the very essence of all sport competitions, would be achieved more effectively by a system providing for a fair distribution of incomes among clubs. Such a system would have more chances to be found compatible with Articles 101 and 102 TFEU in light of the 'specificity of sport'.



## CONTRACTUAL STABILITY AND TRANSFER SYSTEM FROM AN ECONOMIC POINT OF VIEW

by *Marc Valentin Lenz\**

SUMMARY: 1. Introduction – 2. Economics of Contractual Stability – 2.1 Contracts from an Economic Perspective – 2.1.1 Information Asymmetry – 2.1.2 Completely Specified Contracts – 2.1.3 Incompletely Specified Contracts – 2.1.4 Efficiency of Contracts – 2.2 Commitment and Risk Allocation – 2.3 Renegotiations – 2.4 Breach of Contract and Damage Measures – 2.4.1 Damage Measures – 2.4.2 Buyout-Clause – 3. Status Quo Ante: Contractual Stability within the Transfer Systems over time – 3.1 First Steps of a Transfer System: Players' Registration (1885) – 3.1.1 Brief description – 3.1.2 Impact on the Economics of Football – 3.1.3 Impact on Contractual Stability – 3.2 Retain-and-transfer system with a maximum wage restriction (1891–1961) – 3.2.1 Brief descriptions – 3.2.2 Impact on the Economics of Football – 3.2.3 Impact on Contractual Stability – 3.3 Retain-and-Transfer System without Wage Restriction (1961–1963) – 3.3.1 Brief description – 3.3.2 Impact on the Economics of Football – 3.3.3 Contractual Stability – 3.4 Option and Transfer System (1963–1978) – 3.4.1 Brief description – 3.4.2 Impact on the Economics of Football – 3.4.3 Impact on Contractual Stability – 3.5 Freedom of Contract System (1978–1995) – 3.5.1 Brief description – 3.5.2 Impact on the Economics of Football – 3.5.3 Impact on Contractual Stability – 4. Status Quo: Contractual Stability after Significant Amendments of the Transfer System – 4.1 Regulatory Amendments due to the Bosman-Verdict – 4.2 Regulatory Amendments after the Intervention of the European Commission – 4.3 Economic Tendencies and their Impact on Contractual Stability – 4.3.1 European Football Market – 4.3.2 Club Financials – 4.3.3 Transfer Volume – 4.3.4 Player Mobility and Migration – 5. Conclusion

*Abstract:* Contractual stability is essential in order to benefit from the transfer system through stabilization, the redistribution of wealth from “big” to “small” clubs and secured investments in youth development. Economic realities and tendencies within the European Football Market demonstrate the importance of contractual stability, but further indicate imperfections that threaten its maintenance.

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This paper will contribute with an introduction on the economics of contracts and an insight on transfer systems over time, highlighting various economic implications and tendencies and their effect on contractual stability.

## 1. Introduction

The legal perspectives expressed so far in this edition discuss the legislative framework and juridical tendencies in securing contractual stability. Further emphasis has been on the interplay between national respectively supranational law and the sporting regulations of football's world governing body FIFA.

As Economics and the legal framework have always been interdependent, the extension of the legal perspective with the economic point of view is a valuable complement. Likewise, too is the establishment of a transfer system as a mechanism by which clubs acquire the services of players. From the first order to register players around 1891, through the "retain-and-transfer" and the "freedom of movement" system to the Bosman ruling: On the one hand, economic principles, argumentations and foresights have been used to restrict individual rights with reference to the specific aims and environments of sports leagues. On the other hand, legal interventions have secured individual's rights. Resulting amendments of legal frameworks had partially tremendous impact on the economics 'of the game'. The trade-off between legal and economic principles in football comes down to the question, whether exceptional rights for sporting environments can be reasonably justified so that the restrictions of essential individual's rights are acceptable.

A related key issue within the football industry is the interdependence between the free movement of workers and contractual stability – both significantly influenced by the transfer system. The starting point for the analysis of contractual stability is therefore the constituted transfer system and the economic actions of clubs and players within the drawn framework.

As the emphasis of this bulletin is on contractual stability, this paper will contribute with an insight on transfer system(s), resulting economic implications and tendencies, and their effect on contractual stability. The main features of the economic contract theory are stated in Chapter 2, all in relation to contractual stability and the football regulatory framework. Key points of the various transfer systems over time are summarised subsequently (within Chapter 3 for the pre-Bosman transfer system and within Chapter 4 for the post-Bosman system),<sup>1</sup> highlighting economic consequences and their impact on contractual stability.

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Law". The views expressed in this article are those of the author alone and do not necessarily reflect those of ISDE.

<sup>1</sup> This differentiation accounts for the major influence on contractual stability, firstly, through deregulation of the transfer market on the basis of the Bosman-verdict and secondly, based on further intervention by the European Commission in 2001.

## 2. Economics of Contractual Stability

Contractual Stability is a principle of major importance for securing sporting and economic interests. Both clubs and players are looking for planning security.

Focusing on the club's economic perspective, players are considered assets and thus, directly reflected in accounts and balance sheets of clubs respectively, their affiliated companies. A lack of contractual stability reduces planning security and influences the clubs' finances significantly: Firstly, the squad defines the foundation of sporting and commercial success. Secondly, taking the external ownership structures of clubs into account, investors build expectations and react consistently on the stock market.<sup>2</sup> The withdrawal of majority shareholders – i.e. due to reduced profit expectations – can lead to a chain reaction as new stakeholders reduce their expectations and takeover bids accordingly.<sup>3</sup> Players consequently do have a strong signalling function for the sporting success that leads to major importance of contractual stability if only from a pure economic point of view.

From the player's perspective, the specificities of a career in sports – i.e. the short career period and the high risks associated with their activities – necessitate contractual planning security and outweigh the constrained freedom of movement.

### 2.1 Contracts from an Economic Perspective

The conclusion of a contract ensures the provision of the player's services exclusively for one club during the stipulated duration.<sup>4</sup> Contracts define the framework by creating guidelines, reducing uncertainty or transforming uncertainty in risks.<sup>5</sup> The contract theory focuses on contractual arrangements in the presence of information asymmetries, which are pervasive in economic relationships.

Economic models can be distinguished on various grounds, *inter alia* depending on private information and the resulting distribution of power, the strategic approach of the parties on the market as well as the design of contracts, such as completely specified or incompletely specified contracts.

#### 2.1.1 Information Asymmetry

Players and clubs are “monopolist” over their private information, which can be

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<sup>2</sup> Additional example: Borussia Dortmund. Successful games raised the expectations and attracted investors during the season 2008/09. However, the team missed the qualification for the UEFA Europa League on the last match day. Their share price dropped by 20 percent on the following Monday within the first few minutes of trade.

<sup>3</sup> Additional example: AS Rom. Decrease of share price in April 2011 of up to 38% following the announcement of a takeover for a share price of Euro 0.6781. In effect, this meant a 42% deduction on the share price.

<sup>4</sup> J. McCUTCHERON, *Negative Enforcement of Employment Contracts in the Sports Industry*, *JLS*, vol. 17, 1997, 67.

<sup>5</sup> D. DEQUECH, *The New Institutional Economics and the Theory of Behaviour Under Uncertainty*, *JEB*, vol. 59, 2006, 120.

manipulated in order to achieve the individual's interests.<sup>6</sup> The acquisition of information *ex-ante*, signalling and screening are methods to reduce the information deficit. Clubs reduce their risk *ex-ante* by acquiring information about the player's sporting performance – i.e. via scouting measures – as well as financial conditions of a transfer. Players in turn improve their situation of imperfect information through consultation of their agent and network. They are further willing to take the risk of imperfect information if the hard facts of the contract are satisfying. Nevertheless, the decision on signing a contract is still influenced by the remaining information asymmetry.

### 2.1.2 *Completely Specified Contracts*<sup>7,8</sup>

A contract is called “complete” if it defines the parties' obligations and specifies further the legal consequences and prospective payments under each conceivable contingent. Unforeseen changes of the contractual environment are anticipated and result in the activation of the ad hoc provision in the contract.<sup>9</sup> It binds the parties until the end of their contractual relationship which excludes the possibility of renegotiations. The drawn assumptions of this concept are strong. It implicitly assumes that the costs of including a specific clause for an unlikely contingency are outweighed by the benefits.

### 2.1.3 *Incompletely Specified Contracts*<sup>10</sup>

Contracts typically abstract from all contingencies and consider the most relevant traceable variables, likewise in sporting contracts. This is, *inter alia*, the case as contracts are complex and the transaction costs high which implies that it is neither realistic nor economically justifiable to cover every contingency in a contract. In case an unforeseen contingency occurs, parties have the possibility to renegotiate. The option to renegotiate is, in economic terms, an *ex-ante* constraint to the parties and might therefore result in an efficiency loss.

### 2.1.4 *Efficiency of Contracts*<sup>11</sup>

Completely specified contracts are “pareto-efficient”,<sup>12</sup> if no change can be made

<sup>6</sup> In reference: The “homo oeconomicus” concept: which describes humans as rational and narrowly self-interested, who further maximize personal utility, react to changing economic environments and have established preferences.

<sup>7</sup> B. SALANIÉ, *The Economics of Contracts*, Cambridge, MIT Press, 2005, 161ff.

<sup>8</sup> S. SHAVELL, *Damage Measures for Breach of Contract*, *Bell JE*, 1980, 466ff.

<sup>9</sup> B. Salanié, *The Economics of Contracts*, Cambridge, MIT Press, 2005, 193ff.

<sup>10</sup> S. SHAVELL, *Damage Measures for Breach of Contract*, *Bell JE*, 1980, 466ff.

<sup>11</sup> S. SHAVELL, *Damage Measures for Breach of Contract*, *Bell JE*, 1980, 467ff.

<sup>12</sup> Pareto-efficiency: Given an initial allocation of goods among a set of individuals, a change to a different allocation that makes one of the people more satisfied with his or her allocation without

which makes one contractual party better off without making any other worse. If no party is interested in beneficial changes, it is in their interest to be bound by the precise contractual terms. In this case, parties are willing to force compliance with the contract terms and conditions by setting damages for failure at a sufficiently high level. Nevertheless, as drafting of pareto-efficient completely specified contracts would be unfeasibly complex and costly considering contract negotiation and information costs, contracts are typically incomplete. As a result, these contracts are (most times) pareto-inefficient as an unexpected contingency can lead to a worse allocation for at least one party in comparison to the preceding allocation. This provides incentives to the parties to breach a contract. Contract law is therefore, considered to close gaps of incomplete contracts as contractual parties behave in a way “that approximates what they would have agreed on in a fully specified contract”. This is central in order to build a framework for contractual stability and efficiency, based on the support of voluntary and informed trading.

## 2.2 Commitment and Risk Allocation<sup>13</sup>

A further key element of contractual stability within the dynamic perspective is the parties' commitment. The ability to commit depends on the institutional setup, the value placed on credibility, the reputation of the parties as well as the relevant penalties to discourage a unilateral breach. Four types of commitment are distinguished (and relevant to understand prior to considering the different transfer systems described later):

- *No commitment*: Contract holds for the current period. Parties can resign a contract at the end of the contractual period.
- *Limited commitment*: Intermediate case between “no commitment” and “long-term commitment.”
- *Long-term commitment*: The entire duration of the contract is covered and an option to renegotiate multilaterally included.
- *Full commitment*: Contract covers the whole duration and cannot be breached or renegotiated.

A lack of commitment can be the result of various circumstances surrounding professional football. A significant factor that drives commitment over time is the allocation of risks and information asymmetries. Players and clubs cannot foresee the productivity of players.<sup>14</sup> External factors, such as the media, reputation and career concerns, can influence the productivity in addition to sporting aspects, such as training, success and injuries. Additionally, the player's career duration tends to be short in comparison with other labour groups. These factors

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making another person less satisfied is called a “pareto-improvement”. An allocation is defined as “pareto-efficient” when no further “pareto-improvements” can be made.

<sup>13</sup> B. SALANIÉ, *The Economics of Contracts*, Cambridge, MIT Press, 2005, 161ff.

<sup>14</sup> H. DIETL, E. FRANCK & M. LANG, *Why Football Players May Benefit From the Shadow of the Transfer System*, *Eur J Law Econ*, vol. 26, 2008, 131.

create strong incentives for players to maximize their short period of earning which can result in renegotiations or a breach of contract.

### 2.3 Renegotiations

Risk-averse players sign long-term contracts with a high share of fixed payments as risk insurance, covering the uncertainty of future earnings. The uncertainty of player's performance is often addressed in the employment contract via variable bonus payments. Nevertheless, in case the player's productivity turns out higher than expected, the player can seek renegotiations with his current club. *Vice versa*, the club can seek renegotiations in case the productivity is lower. Either way, the disadvantaged party tries to match wage level and productivity of the player. In general, risk-neutral clubs can diversify their risk of productivity variations based on their portfolio of players as well as a diversified ownership-structure.

Interestingly, the fact that the transfer system works in the context of renegotiations, risk and wages function as a "surrogate which makes insurance contracts complete", as Dietl, Franck and Lang (2008) express it. If players were granted the bargaining power to renegotiate their salaries permanently up to the amount reflecting their marginal productivity, clubs would have to cover the risk. Therefore, the transfer system creates an environment in which the player pays for his risk insurance' with a reduced freedom of movement and the obligation to stay at the club, even if the salary does not match the player's marginal productivity.

### 2.4 Breach of Contract and Damage Measures

A breach of contract occurs when one party fails to perform one or more of its defined obligations pursuant to the contract. While a breach of a condition might result in disciplinary sanctions, a fundamental breach – defined as repudiatory breach in which one party completely fails to perform – threatens contractual stability. Such a breach leads to the complete dissolution of the relationship between the parties, and of the contract itself.

As a result of this, internal rules governing the registration respectively eligibility of players and the transfer mechanisms have been designed to draw the framework within professional football, *inter alia*, in order to ensure contractual stability.

#### 2.4.1 Damage Measures

Damage measures can be considered as a second substitute for completely specified contracts.<sup>15</sup> As already explained in relation to the role of contractual law as a substitute, parties adjust their behaviour in a manner similar to the concrete actions they would have specified under a complete contract. Economic and academic

<sup>15</sup> S. SHAVELL, *Damage Measures for Breach of Contract*, *Bell JE*, 1980, 468ff.

discussions address the topic on how breaches of contractual promises are best compensated. Commonly used measures are the expectation measure (hereinafter as “positive interest”), the reliance measure<sup>16</sup> and the restitution measure.<sup>17</sup>

The principle of “positive interest” – by definition, to put the suffering party in as good a position as it would have been if the contract had been properly performed – is a fundamental principle in contract law, and of major importance in the sports law word. With respect to football, FIFA Regulations create the legislative framework, and the FIFA Dispute Resolution Chamber (DRC) and the Court of Arbitration for Sport (CAS) ensure the implementation of these regulations judicially. Article 14 and 15 of the FIFA Regulations on the Status and Transfer of Players (RSTP) provide a legal basis for unilateral termination of a contract based on just cause respectively sporting just cause.<sup>18</sup> In contrast, Article 17 FIFA RSTP does not provide a legal basis for a breach but stipulates the damage measure to be imposed with respect to the obligation to compensate. Thus, this article regarding consequences of a unilateral termination of contract without just cause maintains a key function for the establishment of contractual stability:

- *Art. 17 para. 1 FIFA RSTP*: The article has two key elements: Firstly, the assurance of compensation and secondly, the declaration regarding the calculation of compensation.

As the party in breach is obliged to compensate the other party, the promisor is, in principal, free to breach the contract. However, CAS jurisdiction clearly states “Article 17 of the FIFA Regulations does not provide the legal basis for a party to freely terminate an existing contract at any time, prematurely, without just cause. Rather, the provision clarifies compensation will be due”.<sup>19</sup> Article 17 para. 1 of the FIFA RSTP and the respective jurisdiction determine further the factors for calculation of compensation, the used method of expectation damages and consequently the allocation of risks. The purpose of the compensation is to set the non-breaching party in the situation that it would have been in if the contract had been properly performed. The prospective defaulting party does not wish, under this condition, to breach the contract and pay compensation unless it gains more from the breach than the suffering party loses. Crucially, neither the regulation nor jurisdiction facilitates a prediction of the amount of compensation that will be payable in case of a unilateral termination without just cause. This uncertainty is an

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<sup>16</sup> Reliance measure: The defaulting party compensates the other party for his reliance expenditures and returns to the other party payments that he made; thus except for foregone opportunities, the victim of breach is put in the position he was in before he made a contract (cf. S. SHAVELL, *Damage Measures for Breach of Contract*, *Bell JE*, 1980, 471).

<sup>17</sup> Restitution measure: The defaulting party returns only the payments made to him (cf. S. SHAVELL, *Damage Measures for Breach of Contract*, *Bell JE*, 1980, 471).

<sup>18</sup> Whether or not any reason for a unilateral termination of contract can be considered as “just cause” is a pure legal question (which will be decided on a case by case basis) and will therefore not be further addressed within this paper.

<sup>19</sup> CAS 2008/A/1519-1520.

intentional measure imposed by regulators and was correctly re-established by CAS jurisdiction in several judgements after the Webster-Case,<sup>20</sup> such as the Matuzalem,<sup>21</sup> the El-Hadary<sup>22</sup> and the De Sanctis<sup>23</sup> case. It firstly provides for all possible circumstances to adequately compensate the quantified and established losses suffered. It secondly withdraws the possibility of foreseeing whether a breach would be (financially) efficient or not. Even if the intending party has better alternatives – i.e. the player with an employment offer from another club – the financial gain and its distribution resulting from a breach are not predictable. As the amount of financial compensation is not foreseeable in advance, the risk of breaching a contract is *ex-ante* not quantifiable. Article 17 para. 1 FIFA RSTP therefore reduces the incentives for breaching a contract unilaterally.

- *Art. 17 para. 2 FIFA RSTP*: The joint and several liability of the new club regardless of any involvement or inducement also transfers significant risk to the club.
- *Art. 17 para. 3/4 FIFA RSTP*: Expanding the financial implications of a breach by imposing sporting sanctions for players and clubs is a highly valuable tool in maintaining contractual stability as it negates the main aim of the breach at least temporarily: that is, the player's services. The club can additionally face serious consequences that would limit its future transfer and business opportunities. Without a doubt, sporting sanctions for players and clubs increase the risk of breaching a contract significantly.
- *Art. 17 para. 5 FIFA RSTP*: As a matter of completeness, this provision extends the threat of sanctions for inducing a breach of contract to further stakeholders who are subject to the FIFA Regulations.

#### 2.4.2 Buyout-Clause

Taking the incompleteness of contracts into account, external factors can lead to a point in which it is in the joint benefit of the contractual parties that one breaches the contract. Contractual parties can therefore consider mutual advantageous situations *ex-ante*, resulting in the inclusion of a buyout-clause in the contract. This option is acknowledged by Article 17 FIFA RSTP by the conclusion of the terminology, "unless otherwise provided", and provides the legal basis to terminate the contract unilaterally at any moment and without a valid reason by simply paying the stipulated compensation. Furthermore, in such a situation a sporting sanction will not be imposed.

The effects of buyout-clauses are contradictory: As an advantage, the stipulated amount that has to be paid in case of unilateral termination by the player

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<sup>20</sup> CAS 2007/A/1298-1300.

<sup>21</sup> CAS 2008/A/1519-1520.

<sup>22</sup> CAS 2009/A/1880-1881.

<sup>23</sup> CAS 2010/A/2145-2147.

clarifies the situation and reduces information asymmetry. The parties can foresee whether a breach is efficient or not. Economically speaking, a breach would occur if performance under the current contract would prevent resources from their most valuable use.<sup>24</sup> Taking the economic relation between the marginal productivity and salary into account, this means in effect that the player will only breach the contract in case he/she has incentives – i.e. can earn a higher salary – under the new contract. The breach in this case is in mutual interest as long as the stipulated amount is advantageous for the club. Stipulating the amount demands intensive negotiation as the margin is limited: On the one hand, the amount has to be advantageous for the club. On the other hand, the amount has to be approved by the player and meet juridical criteria. Players obviously will aim for a low buyout clause in order to maximize their freedom of movement. Judicial requirements stipulate further that the amount must roughly approximate the anticipated damages. Under consideration of the aforementioned, a variable buyout-clause should be included which adjusts the amount of compensation in relation to indicated objective criteria. Nevertheless, it might be in the interest of the club to stipulate a minimum amount nevertheless.

The downside of a buyout-clause is that it facilitates a breach rather than the performance of a contract. The inclusion of the clause minimizes the uncertainty or risk associated with a breach from an economic perspective – focusing on the trade by itself – as the efficiency of a prospective breach is calculable *ex-ante*. It further has to be stated that the negotiation of a buyout-clause leads to advanced transaction costs.

### 3. *Status Quo Ante: Contractual Stability within the Transfer Systems over time*

Contractual stability and transfer systems are closely related. Transfer systems constitute a particular form of labour market restrictions which results in various consequences on wages, contract lengths, profits and player development. These factors influence the commitment of contractual parties and maintain a crucial impact on contractual stability.

This chapter provides a brief overview of the development and alteration of transfer systems, respectively the institutional amendments in labour market restrictions, and their impact on the economics of football and contractual stability.<sup>25</sup>

#### 3.1 *First Steps of a Transfer System: Players' Registration (1885)*

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<sup>24</sup> S. SHAVELL, *Damage Measures for Breach of Contract*, Bell JE, 1980, 466.

<sup>25</sup> The transfer system of the English Football Association (FA) will be in focus, as various transfer systems in association football originated in guidance with the concept of the English FA. Although the chronology and details of the transfer market reforms varied between countries and FAs within the years, key features have been equal and long term trends evident worldwide.

### 3.1.1 Brief description

The English FA and the English FL imposed the requirement to register players in 1885. This fundamental principle can be considered as the first stage of an organised transfer system within European Football.

- *Registration*: Players had to be registered with the English FA and the English FL in order to be employed and fielded by member clubs.
- *Availability*: Players could only play for the club they were registered for.

Member clubs were forced to register players annually on a one-year contract in order to employ and field the players. As players were free to register with another club the next season or – under the approval of the club and the governing bodies – even during an ongoing season, the free movement of players was not significantly restricted.

### 3.1.2 Impact on the Economics of Football

Under consideration of the (elementary) institutional characteristics of the players' labour market – particularly the players' status as free agents and no wage restrictions – the bargaining power was with prospective new clubs.<sup>26</sup> Incentives of the current club to invest in the player's human capital were reduced as a return on investment could not – neither in sporting nor in financial terms – be guaranteed.

The individual player wage was between the player's current Marginal Revenue Product (MRP)<sup>27</sup> and the highest MRP he could attain by transferring to another club.<sup>28</sup> In case the player did not transfer, his wage remained constant. However, taking the player's free agent position and the negotiation option into account, it was likely to cause a transfer to the club with which his MRP was the highest.

### 3.1.3 Impact on Contractual Stability

The development of the required annual registration and restriction to play for one team converted the player's services into a tradable commodity. However, the

<sup>26</sup> E. FEESS & G. MUEHLHEUSSER, *The Impact of Transfer Fees on Professional Sports: An Analysis of the New Transfer System for European Football*, *Scand. J. of Economics*, vol. 105, 2003, 146f.

<sup>27</sup> Marginal revenue product (MRP): Amount a player adds to the club's profit in case he is/would be signed.

<sup>28</sup> Following two basic economic perspectives are underlying: Firstly, profit maximising clubs offer wages up to the amount a player would add to club's revenues: his MRP. Signing a player for a wage lower than the player's MRP will increase the club's profit in comparison to the situation of non-signing, vice versa. Secondly, teams that are maximising utility – defined as playing success, attendance and profit – may sign players for wages higher than player's MRP, even though this approach is not profitable. Additional aspects – such as the characteristics of the transfer system influence the action of stakeholders (cf. S. DOBSON & J. GODDARD, *The Economics of Football*, Cambridge, Cambridge University Press, 2001, 210ff).

determined annually contracts implied “no commitment” of the contract parties. Players were free agents, and clubs with the largest resources tended to outbid their competitors – since wages were not restricted – in order to concentrate talent.<sup>29</sup>

### 3.2 *Retain-and-transfer system with a maximum wage restriction (1891–1961)*

#### 3.2.1 *Brief descriptions*

Football’s governing institutions have been aware of the mutual interdependence of clubs in order to create a balanced competition from the earliest days of professionalism. In order to prevent talent concentration and a resulting unbalanced league, the transfer system was amended by implementing the so-called ‘retain-and-transfer system’ and a maximum wage restriction. The following key features defined the transfer system during 1891 to 1961:

- *Wages:* Maximum wage restriction, determined by the English FA and English FL.
- *Contract:* Employment Contract could unilaterally be extended by the club annually.
- *Transfers:* Depending on approval by the club, the English FA and the English FL.
- *Transfer Fees:* Financial compensation for authorised transfers.

The key change was the unilateral option of the current club to extend an employment contract which shifted the market power to their benefit. Incentives to seek a transfer were further limited through the restriction of wages.

#### 3.2.2 *Impact on the Economics of Football*

These regulative changes resulted in a market monopsony<sup>30</sup> in which clubs consequently had employment control over their players, based on the following strategic options: Clubs could firstly retain the player by offering a new one-year contract at the prevailing minimum/retaining wage and conditions. Secondly, offer the player’s registration right on the transfer market, whereas the club was entitled to retain the right until a transfer agreement with another club was reached. Thirdly, the player’s registration could be cancelled by the club, giving him the possibility as a free agent to transfer to another club.

The indirect effect of the emerging imperfect market conditions was wage discrimination as a strategy of monopsonistic clubs to maximise their profits: Players

<sup>29</sup> S. DOBSON & J. GODDARD, *The Economics of Football*, ed. 1, Cambridge, Cambridge University Press, 2001, 210.

<sup>30</sup> Market monopsony: A market form in which only one buyer faces many sellers, consequently characterized by imperfect competition.

received different wages even if their MRP for the club was the same.<sup>31</sup> Considering the price elasticity of supply was low in general – as the player’s mobility was restricted and controlled by clubs – the status of players within a club and on the market influenced the individual’s elasticity. Players who were approached by other teams reacted more sensitively to changes in their offered wage. Their alternative option of a possible transfer determined the player’s elasticity of supply, provided that a transfer agreement was reached. Those players who had no alternative – neither the possibility to be transferred to another professional club nor a complementary prospective job in foresight – had to face lower wages.

In addition to the possibility for clubs to restrict transfers, the English FL tried to limit the desire of players to change teams (within the English FL<sup>32</sup>) by introducing the maximum wage criteria. In line with expectations of the governing body, the restriction – established in 1901 at a level of £4 per week – resulted in a uniform financial structure of English clubs in foresight of competitive balance in sporting terms.<sup>33</sup> The wage restriction caused a decreased wage level and the redistribution of welfare from players to clubs. It constituted the basis of several disputes between clubs, players and further stakeholders within the 1950s, which generated pressure for modifications and lead to steadily rising maximum wages:

**Table 1. English FL - Maximum wages (within season)**

<i>Date</i>	<i>1901</i>	<i>1924</i>	<i>1947</i>	<i>1951</i>	<i>1953</i>	<i>1957</i>	<i>1958</i>
<i>Max Salaries</i>	£ 4	£ 8	£ 12	£ 14	£ 15	£ 17	£ 20

Source: S. Dobson & J. Goddard (2011)<sup>34</sup>

### 3.2.3 *Impact on Contractual Stability*

The retain-and-transfer system ensured clubs the exclusive right to the service of the player for an unspecified time, regardless of the parties’ commitment. Players had the following limited options: Firstly, to accept the contract conditions and remain with the club. Secondly, to request their placement on the transfer list. In case the request was denied, the player was forced to stay with his club for an indefinite period, as the alternative would have been to stop playing professional

<sup>31</sup> As explained: Theoretically, players receive a wage equal to their MRP in a market with perfect competition.

<sup>32</sup> Some players transferred in the beginning of the twentieth century unexpectedly to clubs outside the English FL, i.e. the geographically nearby Southern League in which players could trade freely. However, the Southern’ Leagues top division was absorbed by the English FL in 1920.

<sup>33</sup> S. DOBSON & J. GODDARD, *Economics of Football*, ed. 2, Cambridge, Cambridge University Press, 2011, 180.

<sup>34</sup> S. DOBSON & J. GODDARD, *Economics of Football*, ed. 2, Cambridge, Cambridge University Press, 2011, 180.

football within the English FL. The club was explicitly entitled to keep the player's registration, if the player did not accept the offered contract conditions. These regulatory restrictions caused "contractual stability" in an extreme form in order to prevent talent concentration. The maximum wage restriction reduced further incentives of players to seek a transfer. Considering additionally that transfer markets were restricted on the basis of limited mobility, contractual stability was strong.

### 3.3 *Retain-and-Transfer System without Wage Restriction (1961–1963)*<sup>35</sup>

#### 3.3.1 *Brief description*

As the steadily increasing maximum wages in the 1950s already indicate, the pressure from players through the Professional Players' Association (PFA)<sup>36</sup> with respect to the restricted mobility and wages was vehement. Strike-threatens as well as political requests caused following adjustments:

- *Wages*: Abolishment of the maximum wage restriction.
- *Players' Rights*: Possibility to appeal if transfer was restricted based on an unreasonable asking price.

#### 3.3.2 *Impact on the Economics of Football*

The first key change was the abolishment of the maximum wage restriction. Against common concerns, wages did not rise dramatically. In fact, several clubs – including Manchester United and Liverpool – were reported to have introduced their own unofficial maximum wage in order to keep costs at a reasonable level.<sup>37</sup> Other clubs adjusted their numbers of hired players with the same intension. The second key change was the option for players to appeal if a club restricted the transfer based on an unreasonable asking price. They had further to be paid with the weekly minimum wage in case they were set on the transfer list or were in ongoing negotiations with the club for a new contract.

#### 3.3.3 *Contractual Stability*

Even though these adjustments improved the players' positions, their mobility was still entirely based on the decision of the club, regardless of whether they were at the same time bound to a contract. In case a prospective transfer was denied and

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<sup>35</sup> D. THOMAS, *The retain and transfer system*, in W. Andreff and S. Szymanski (eds.), *Handbook on the Economics of Sport*, Cheltenham, Edward Elgar Publishing Ltd., 2009, 630ff.

<sup>36</sup> Professional Footballers' Association (PFA): Founded in 1907, in order to protect, improve and negotiate the conditions, rights and status of all professional players by collective bargaining agreement (cf. PFA, *About the PFA*, available at [www.givemefootball.com/pfa/about-the-pfa/introduction](http://www.givemefootball.com/pfa/about-the-pfa/introduction) (July 2011)).

<sup>37</sup> S. DOBSON & J. GODDARD, *Economics of Football*, ed. 2, Cambridge, Cambridge University Press, 2011, 181.

the club and player could not agree on new contract terms, players had to remain with their club. The abolishment of the wage restriction could have influenced contractual stability, but stakeholders did not react with an adequately increased wage level.

The status quo of contractual stability was still strong. However, the increasing influence of the PFA was a first indicator for the future tendency of improved rights of movement.

### 3.4 *Option and Transfer System (1963–1978)*

#### 3.4.1 *Brief description*

Further amendments of the transfer system were made after the High Court declared in 1963 that the retain-and-transfer system was an “unreasonable restraint of trade”.<sup>38</sup> Nevertheless, the negotiations between the PFA, the English FA and FL resulted in a system in which clubs still retained the possibility of restricting players’ movement. The following key characteristics can be summarised:

- *Transfers:* Transfer had to be approved by the club, the English FA & FL. Player were considered as free agents in case the club did not cover the terms and conditions of the prior contract.
- *Contract:* Employment Contract (EC) included an optional period – exercisable by the club only – of similar duration and at least equal terms as the prior EC between the parties.
- *Players’ Rights:* Right for independent arbitration of salary disputes with simultaneous receipt of the previous season’s salary during a dispute.

#### 3.4.2 *Impact on the Economics of Football*

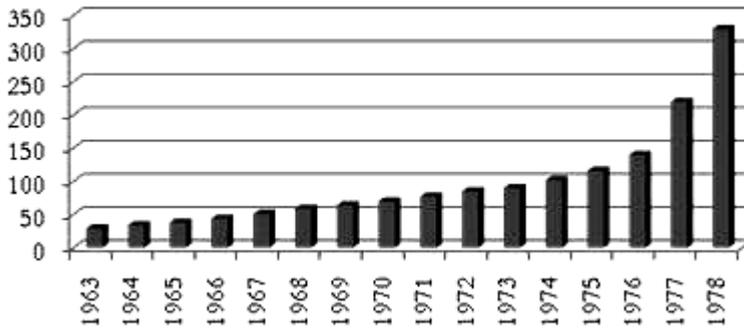
Although the High Court’s judgement negated the fundamental restriction of retaining a player, the legal framework did not change significantly. Nevertheless, effects of the previously abolished restriction of maximum wages became visible during this period. Between the period 1963 and 1974, the real increase in wages<sup>39</sup> was approximately 90 percent.<sup>40,41</sup> The following graph of the average weekly wages serves as an (approximate) illustration:

<sup>38</sup> George Eastham – a player who had been restricted to Arsenal and thus faces the minimum wage – had lodged a claim against his club Newcastle United, the Football Association (FA) and the Football League.

<sup>39</sup> Inflation adjusted increase. The graphic serves as an approximation only.

<sup>40</sup> S. SZYMANSKI & T. KUYPERS, *Winners and losers: the business strategy of football*, London, Viking, 1999 (according to S. Dobson & J. Goddard, *Economics of Football*, ed. 1, Cambridge, Cambridge University Press, 2011, 181).

<sup>41</sup> Excursus: Considering the average wage in 1968 of £59 per week within the English FL, the reported salary of George Best – £1000 per week – was exorbitant high. Economics explain this



As expected by the FA and FL in advance, the growth in salaries exceeded the growth in revenues. In addition, the feared imbalance of leagues loomed ahead: the first indicator was the fact that the growth of revenues and salaries were faster for “big” than for “small” clubs. The advanced spending of “big” clubs led to an evident discrepancy of individual wages which generally destabilized the medium salary level.<sup>42</sup>

### 3.4.3 Impact on Contractual Stability

The introduced “option clause” was nothing other than a unilateral option for clubs to retain players’ registration for a previously agreed optional period with salaries at least equalling the previous terms and conditions. Clubs therefore retained the power to decide unilaterally about the player’s registration.<sup>43</sup>

The outlined tendency of increased revenues and resulting spending of clubs could be seen as another threat for the concept of contractual stability as it influenced the commitment of contractual parties. Players further formed unions

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discrepancy with the so-called ‘superstar-effect’. Originator of the theory, Rosen (1981), defined superstars as “a small number of people, who earn enormous sums and dominate their industry”. Economic studies brought up two distinctive and contrary explanations: According to the first theory of Rosen, the positive effect of superstars is based on superiority of talent and the sporting performance. Since consumers prefer high quality and want to see the best players, less talented players are only imperfect substitutes. On the contrary, the theory based on Adler referred to the surplus created by their popularity. An increasing knowledge and awareness of consumers causes the appreciation of the sporting performances. Both theories give empirical justification for the trend of drifting salaries. Although empirical evidence highlights the positive effect of superstars on attendance figures and revenues, the profitability of hiring a superstar was – and still is – in regard to exorbitant salaries respectively transfer sums and the unclear return on investment – in sporting and economic terms – debatable.

<sup>42</sup> S. KÉSENNE, *The Peculiar International Economics of Professional Football in Europe*, SJPE, vol. 54, 2007.

<sup>43</sup> D. THOMAS, *The retain and transfer system*, in W. Andreff and S. Szymanski (eds.), *Handbook on the Economics of Sport*, Cheltenham, Edward Elgar Publishing Ltd., 2009, 632.

in order to match the power ratio of the FAs and FLs. As a result, the increased mobility and bargaining power, concomitantly with limited commitment, increased the risk of non-performance.

### 3.5 *Freedom of Contract System (1978–1995)*

#### 3.5.1 *Brief description*

The revision of the contractual relationship between players and clubs – in particular a definite contractual period and the freedom to renew the contract – was long demanded. An important step was reached by the time the issue was addressed by political stakeholders: This started in 1968 with the Chester Report,<sup>44</sup> in which an established committee of the Department of Education and Science recommended *inter alia* the complete abolition of the retain-and-transfer system.

The topic further considered by the Commission on Industrial Relations as a labour relation problem. Their report in 1974 declared the retain-and-transfer system as “a problem which required immediate attention” as it was likely to be judicially challenged: “If it were to be declared an unreasonable constraint of trade, clubs would immediately face a very uncertain situation from which it might take them some time to recover.”<sup>45</sup> Negotiations with the PFA, FA and FL – including a threatened strike of players – resulted in necessary amendments:

- *Status:* Player was a free agent at the end of his contract.
- *Transfer Fees:* Financial compensation for transfers of in- and out-of-contract players.
- *Contract:* Renewal of contract by mutual agreement.

The new transfer system significantly strengthened the position of players as the unilateral option for clubs to renew the contracts was abolished. Employment contracts therefore, could be terminated for the first time by the sole decision of the player. In case of an expiring contract, clubs could formally offer a new contract with not less favourable conditions as in the last contract year in order to secure transfer fees. Based on the refusal of the offer, the player was “free” to transfer by mutual agreement of both clubs. If no transfer took place, the club of affiliation had to re-offer a one-year contract.

#### 3.5.2 *Impact on the Economics of Football*

The transfer system was a compromise in bargaining for securing the clubs’ and players’ interests. In particular as smaller clubs were financially depending on transfer payments. Players sought on the contrary free movement. This transfer system had been a trade-off between a club’s necessities and the player’s rights.

<sup>44</sup> N. CHESTER, *Report of the Committee on Football*, Department of Education and Science, London, 1968.

<sup>45</sup> Commission on Industrial Relations, *Professional Football*, CIR, Report No. 87, London, 1974.

Taking this into consideration, the amendments were pareto-efficient as they did place one party in a better situation without the other party being worse off: out-of-contract players gained the right to move, whereas simultaneously clubs still had the prospect to earn a transfer sum.

### 3.5.3 *Impact on Contractual Stability*

In practice, the mobility of players remained restrained. Clubs retained considerable employment control as both out-of-contract and in-contract players required the permission of their current club to transfer. In case the transferee could not agree with the transferor on the compensation, the FA Tribunal would decide the outcome. This can be seen as a player's right to ensure that his mobility was not unreasonably restricted rather than an influence on contractual stability.

## 4. *Status Quo: Contractual Stability after Significant Amendments of the Transfer System*

Following the Bosman-judgement<sup>46</sup> of the European Court of Justice (ECJ) in 1995 and further investigations of the European Commission (EC) in 2001, the framework of the European Sports Model – including the international transfer system – was fundamentally modified.

### 4.1 *Regulatory Amendments due to the Bosman-Verdict*

The facts of the Bosman-case are well known inside and outside the Sports Law World.<sup>47</sup> The judgement influenced the principles of the football industry significantly as the ECJ considered clubs as undertakings based on their economic activity.<sup>48</sup> Regarding the obstacles imposed by the transfer system, the EC and ECJ explicitly stated that these could only be justified by elementary reasons of public interest.<sup>49</sup> The regulations had nevertheless to ensure that they did not go beyond what was necessary for the specific purpose. Based on the review of the Pre-Bosman transfer system and the nationality clause, two key findings included: Firstly, transfer fees for out-of-contract players illegally impaired the freedom of movement of

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<sup>46</sup> Case C-415/93, *ASBL & UEFA v. Jean-Marc Bosman*, 1995, ECR-4921.

<sup>47</sup> In short, Marc Bosman – a Belgian professional football player – rejected at the end of his contract with 'Royal Football Club de Liege' their offer to continue playing for the minimum salary. The targeted transfer failed as Liege demanded a transfer fee which no prospective transferee was willing to match. Facing the option of continuing to play at Liege or determining his career as professional footballer, Bosman claimed that the transfer system would prevent him – as a European citizen – from the right to "freedom of movement" within the European Union, essentially based on Article 48 of the Treaty of Rome (now Art. 39 of the EU Treaty).

<sup>48</sup> Case C-415/93, *ASBL & UEFA v. Jean-Marc Bosman*, 1995, para. 73 (additionally, *inter alia*, Opinion of Advocate General Lenz, para. 256f).

<sup>49</sup> Case C-415/93, *ASBL & UEFA v. Jean-Marc Bosman*, 1995, para. 46.

professional footballers between European Member States. Secondly, quota systems limiting the number of foreigners – who were EU citizens – were declared as discriminatory. Both restrictions were consequently incompatible with the EC Treaty. In consequence, the following amendments of the transfer regulations led to a strengthened position for players:

- *Movement:* Free movement of out of contract players.
- *Restrictions:* Quota systems against EU citizens are illegal, whereas the restrictions against Non-EU Players are still upheld. This indirect discrimination could be justified under EU law if it promotes domestic talents and the quality of academy systems.

#### 4.2 *Regulatory Amendments after the Intervention of the European Commission*

The modified international transfer system was further challenged by the EC in 2000. Mario Monti, the EU Commissioner for Competition Policy, even called for an end to “transfer systems based on arbitrarily calculated fees that bear no relation to training costs.”<sup>50</sup> Another point of criticism was the restriction of free movement for dissatisfied in-contract players between EU states who were seeking a transfer.<sup>51</sup> The underlying principle of the argumentation was that no court could force an employee to work involuntarily for an employer. Footballers should therefore have the opportunity to terminate their contracts unilaterally with clubs in order to leave with a term of notice. Negotiations between the EC, FIFA and UEFA resulted in a compromised settlement that still allowed negotiable – non-cost related – transfer fees, but granted players with the chance to appeal to an arbitration tribunal if they disapproved the clubs’ transfer fee request.<sup>52</sup>

The collective proceedings engendered further major amendments of the transfer system in 2001 – as well as further minor adjustments of the regulations in 2004 and 2009. The modified transfer system aims for a balance between contractual stability and the free movement of workers and is characterized by the following main pillars:

- *Transfer:* Movement of players are allowed in two transfer windows per season only.
- *Movement:* In-contract players are able to terminate their employment contract unilaterally by breach.
- *Stability:* Protection of contracts for the first 2/3 years by the

<sup>50</sup> Speech /00/152 of the European Commissioner for Competition Policy, Mario Monti, held at a EC-organized conference on sports in Brussels on April 17, 2000 (excerpts available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/00/152&format=HTML&aged=0&language=EN&guiLanguage=en> (August 2, 2011)).

<sup>51</sup> G. PEARSON, *University of Liverpool FIG Factsheet: The Bosman Case, EU Law and the Transfer System* (available at [www.liv.ac.uk/footballindustry/bosman.html](http://www.liv.ac.uk/footballindustry/bosman.html) (August 1, 2011)).

<sup>52</sup> M. TERVIÖ, *Transfer Fee Regulations and Player Development*, *JEEA*, vol. 5, 2006, 958f.

- threat of sporting sanctions for a contract-breaching player.<sup>53</sup>
- *Youth:* Training Compensation
  - *Transfer Minors:* Prohibition of the international transfer of minors
  - *Solidarity:* Solidarity Contribution
  - *Juridical:* An independent and objective disciplinary and arbitration system ought to be established. FIFA fully recognised CAS in 2002.

#### 4.3 *Economic Tendencies and their Impact on Contractual Stability*<sup>54</sup>

The current modified transfer system aims for stabilization, the redistribution of wealth from ‘big’ to ‘small’ clubs, securing investments in youth systems and ensuring the integrity and competitiveness of football. Within the given framework, clubs try to both operate efficient business and to build competitive teams, whereas players benefit from the freedom of movement provided for. The economic facts and tendencies within the European Football Market underline the importance of contractual stability, but also demonstrate imperfections which weaken the prospective contractual stability.

##### 4.3.1 *European Football Market*

The overall size of the European football market increased steadily to Euro 16.3 billion in 2009/10,<sup>55</sup> driven by the Top-5 European Football Leagues,<sup>56</sup> which amount up to approximately 52 % (Euro 8.4 billion)<sup>57</sup> of the overall market size. The top leagues in the remaining 48 UEFA federations comprise 22% of the European market. Simultaneously, the market concentration affirmed the individual club level: The 20 highest revenue generating clubs are all based in one of the five largest European football markets and generate combined revenues of more than 26% (Euro 4.3 billion) of total revenues.<sup>58,59</sup>

<sup>53</sup> Protected Period: Defined as three seasons/years, whichever comes first, after the commencement of the playing contract if the playing contract was concluded prior to the player’s 28th birthday or two seasons/years, whichever comes first, if the playing contract was concluded after the player’s 28th birthday.

<sup>54</sup> As the bulletin’s principal focus is the topic of contractual stability, this paragraph will not justify the transfer system on the basis of economic grounds in general. It rather focuses on economic tendencies which have a direct influence on contractual stability.

<sup>55</sup> Deloitte, *Annual Review of Football Finance*, Manchester, Deloitte, 2011, 8.

<sup>56</sup> Bundesliga (Germany), La Liga (Spain), Ligue 1 (France), Premier League (England) and Serie A (Italy).

<sup>57</sup> Taking the inferior divisions from the five countries into account, the concentration is even higher: 63% (Euro 10.3 billion) (cf. Deloitte, *Annual Review of Football Finance*, Manchester, Deloitte, 2011, 19).

<sup>58</sup> Deloitte, *Football Money League 2011*, Manchester, Deloitte, 2011, 19. For additional information see also: Deloitte, *Annual Review of Football Finance*, Manchester, Deloitte, 2011.

<sup>59</sup> Considering the currently difficult economic environment, the decreased annual growth rate –

The highly polarised European football market defines the economic background. Market size, market growth and concentration influence economic tendencies, such as transfer volumes, player migration patterns and clubs' financials. All these indicators affect contractual stability.

#### 4.3.2 Club Financials

Individual club finances are high profile, particularly since the UEFA approved the financial fair play concept. The status quo is that 61% of European top division clubs reported net operating losses in 2009, which implies a negative trend from 54% in 2008 and 51% in 2007.<sup>60</sup> In accordance with the UEFA Licensing Benchmarking Report 2009, 63% of smaller clubs (below Euro 5 million revenues), 63% of clubs with revenues between Euro 5 million and Euro 50 million, as well as 40% of the top clubs (exceeding Euro 50 million revenues) stated operating losses.

Analysing the Top-5 leagues, the key components of collective revenues (Euro 8.4 billion) are broadcasting, sponsorship and matchdays.<sup>61</sup> Although steadily growing for the last decade, future challenges, such as the October 3, 2011 decision regarding the lawfulness of territorial exclusivity of broadcasting rights, can influence the revenue stream significantly.

The key challenge, however, is the cost control. The main cost driver – wage costs – increased significantly since 1995. Experts and academics could, however, not find consent on whether or not this is a direct result of the Bosman-ruling. Even though the created legal framework shifted power towards players – especially in case of free agents – the technological progress and increased broadcasting revenues had a bearing on the rising wage costs. Status quo is, that total wage costs sum up to Euro 5.5 billion that is an increase of 8% (Euro 400 million) in the season 2009/10. Thus, the revenue growth has widely been matched by the comparable increase in wages.<sup>62</sup> This trend is reflected in the increased wage-revenue ratio, standing at 66%.

Other leading European leagues show similar trends:<sup>63</sup> Generalised, increasing revenues, costs and revenue to wage ratios. By contrast, the main income sources are commercial revenues based on comparatively small broadcasting markets. The revenue to wage ratio is between 55% and 92%.<sup>64</sup>

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from outstanding 10% for the last decade to averaged 5% in the 2009/10 season – is still reasonable.

<sup>60</sup> UEFA, *Club Licensing Benchmarking Report Financial Year 2009*, Nyon, UEFA, 2010, 82 (available at [www.uefa.com/uefa/footballfirst/protectingthegame/clublicensing/index.html](http://www.uefa.com/uefa/footballfirst/protectingthegame/clublicensing/index.html) (August 13, 2011)).

<sup>61</sup> Deloitte, *Annual Review of Football Finance*, Manchester, Deloitte, 2011, 14.

<sup>62</sup> Deloitte, *Annual Review of Football Finance*, Manchester, Deloitte, 2011, 21f.

<sup>63</sup> Major non Top-5 European leagues: Netherlands (revenue Euro 420m), Turkey (Euro 378m), Russia (Euro 368m), Portugal (Euro 238m), Belgium (Euro 234m), Scotland (Euro 208m), Greece (Euro 173m), Denmark (Euro 173m), Norway (Euro 160m), Austria (Euro 154m) (cf. Deloitte, *Annual Review of Football Finance*, Manchester, Deloitte, 2011).

<sup>64</sup> Deloitte, *Annual Review of Football Finance*, Manchester, Deloitte, 2011, 22.

This serious financial threat weakens contractual stability as players could react by terminating their contract for just-cause, established by the competent body based on persisting or cumulative violation of the contract, *inter alia*, through non-payment of the club. The players' strike actions within the Spanish La Liga and Italian Seria A markedly highlight the prospective threat for contractual stability. Further leagues could follow, as only four of the thirty largest European division reported at least break-even which resulted in an aggregated net record loss of Euro 1.179 billion for European's Top-30 football divisions.<sup>65</sup> The successful implementation of the UEFA Licensing System – extended through National licensing systems – is thus significant in order to ensure contractual stability through forcing the clubs to operate more rationally and profitably.<sup>66</sup>

#### 4.3.3 Transfer Volume

The transfer activities slowed down during the last two seasons, based on the economic crisis, the decreased annual growth rate of revenues and the individual (often deficient) financial performances of clubs.

Teams from the Top-5 leagues spent an estimated Euro 135 million less in the season 2009/10 compared to the previous season, following the decrease of estimated Euro 180 million from the 2007/08 season.<sup>67</sup> The adjustment of transfer payments was a direct consequence of clubs applying budget restraints in order to react to financial difficulties, and reflect the fact that the reduction of other major cost factors – such as player wages – are less flexible.

By taking the market polarisation into account, reduced transfer expenses affected particularly the medium sized markets due to a reduction in transfer profits by at least 5%.<sup>68</sup> These markets – such as NED, POR and SCO – are frequent trade partners of the Top-5 leagues and balance their relatively high salaries with transfer profits.

The impact of transfer fees on reported financial results diverges between the leagues and markets.<sup>69</sup> In fact, the importance of transfer fees as an income

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<sup>65</sup> UEFA, *Club Licensing Benchmarking Report Financial Year 2009*, Nyon, UEFA, 2010, 86.

<sup>66</sup> Key point – with impact on the transfer market – will be the break-even requirement as the current structure of relevant revenues and relevant expenses for clubs are often deficient. In order to compete within an UEFA competition clubs have to demonstrate a positive aggregated break-even result. Fifty-five sportingly qualified clubs from twenty-seven countries – including England and Spain – refused access to European club competitions for not meeting the minimum licensing criteria in the last two seasons. Simultaneously, a break-even analysis of group stage participants in UEFA competitions 2010/11 showed that 52% of the clubs generated a break-even surplus, whereas 17% had a deficit of Euro 5 million and 19% even a deficit between Euro 5 million and Euro 45 million.

<sup>67</sup> UEFA, *Club Licensing Benchmarking Report Financial Year 2009*, Nyon, UEFA, 2010, 82.

<sup>68</sup> UEFA, *Club Licensing Benchmarking Report Financial Year 2009*, Nyon, UEFA, 2010, 83.

<sup>69</sup> In tendency, Eastern European leagues – i.e. CZE, CRO, BUL, SRB, GEO, etc. – seem to be highly dependent on transfer fees as ratios of more than 25% indicate (cf. UEFA, *Club Licensing Benchmarking Report Financial Year 2009*, Nyon, UEFA, 2010, 83).

source is undisputable considering that in almost 40% of the markets the impact of transfer fees is more than 10% on the financial results, and even in 21% with an impact of more than 25%.<sup>70</sup> The transfer system serves an important allocation purpose by redistributing wealth from “big to small”.<sup>71</sup> The top clubs within the European market are net-importers of players and therefore reallocate resources both on a national and international level.<sup>72</sup> For example, the total transfer spending of Premier League clubs during the 2009/10 season was estimated to be GBP 559 million with the distribution as follows: 41% to Non-English clubs, 33% within the Premier League and 15% to English lower league clubs.<sup>73</sup> This reallocation cannot occur in the situation where contracts are unstable as transfer payments become obsolete.

Consequently, the maintenance of contractual stability is essential in order to secure transfer fees as an important revenue stream for clubs. Non-compliance with contractual stability would result in a situation where clubs could not act strategically, i.e. by focusing on the acquisition of young players in order to develop and sell them. This is closely related to youth development activities and migration patterns. In order to ensure a reward for educational and transfer investments, the concept of contractual stability is of significant importance.

#### 4.3.4 *Player Mobility and Migration*

Migration tendencies are based on institutional, economic and cultural determinants.<sup>74</sup> The liberalization of the European transfer market created the necessary legislative framework for the increased mobility within Europe and granted further the possibility of hiring more expatriates.<sup>75</sup> Concomitantly, the economic growth and size of the European Football Market attracts players. The increased number of expatriates within the Top-5 European Leagues – by 115.6%, from 463 to 998 expatriates within ten years from the Bosman verdict – are an indicator of this.<sup>76</sup>

As illustrated in Table 2, the mobility rate of players increased moderately but steadily between the seasons 2005/06 to 2008/09.<sup>77</sup> Additionally, international

<sup>70</sup> 18 out of 45 considered markets indicate an impact of transfer fees on financial results of more than 10% (cf. UEFA, *Club Licensing Benchmarking Report Financial Year 2009*, Nyon, UEFA, 2010, 81).

<sup>71</sup> M. TERVIÖ, *Transfer Fee Regulations and Player Development*, *JEEA*, vol. 5, 2006, 980.

<sup>72</sup> Deloitte, *Annual Review of Football Finance*, Manchester, Deloitte, 2011, 48ff.

<sup>73</sup> GBP 67 million (11%) were paid to agents (cf. Deloitte, *Annual Review of Football Finance*, Manchester, Deloitte, 2011, 48).

<sup>74</sup> P. LANFRANCHI & M. TAYLOR, *Moving with the Ball: The Migration of Professional Footballers*, Oxford, Berg, 2001.

<sup>75</sup> B. FRICK, *Globalization and Factor Mobility – The Impact of the “Bosman-Ruling” on Player Migration in Professional Soccer*, *JSE*, vol. 10, 2009, 89f.

<sup>76</sup> D. COMPAIRE, G. PLANAS & S. WILDEMANN, *Contractual Stability in Professional Football*, Master thesis for the FIFA International MA (available at [www.uefa.com/uefa/footballfirst/protectingthegame/clublicensing/index.html](http://www.uefa.com/uefa/footballfirst/protectingthegame/clublicensing/index.html) (August 13, 2011)).

<sup>77</sup> Older ratios are unfortunately not available as the PFPO was established in 2005.

mobility indicated by the club's recruitment policies shows ten players on average are signed at the start or during a season, whereas 37.84% of the signings were international players in the season 2008/09.<sup>78</sup>

**Table 2. Mobility of professional footballers in the Top-5 European Leagues**

<i>Players Career</i>	<i>2005/06</i>	<i>2006/07</i>	<i>2007/08</i>	<i>2008/09</i>
š <i>Mobility Rate</i>	3.28	3.40	3.44	3.48
š <i>Age of first intl migration</i>	21.49	22.54	21.33	21.23
<i>Clubs Recruitment Policy</i>	<i>2005/06</i>	<i>2006/07</i>	<i>2007/08</i>	<i>2008/09</i>
š <i>Signings</i>	10.47	10.40	10.78	9.43
š <i>signings from abroad (%)</i>				37.84
š <i>Intl players in squad (%)</i>	10.14	10.24	11.20	11.28

Source: Professional Football Players Observatory (PFPO)<sup>79</sup>

As the mobility rate is – according to the definition of the Professional Football Players Observatory – the ratio of the number of teams for which a footballer has played and the number of season played in professional clubs, the increase indicates a higher frequency in transfers of players. Taking the tendency of extended contract durations<sup>80</sup> into account, an increased mobility weakens contractual stability.

Nevertheless, mobility trends also emphasize the requirement of contractual stability as the age of the first migration of players is progressively decreasing – i.e. the average age of players is approximately 21 for the first international transfer to a Top-5 league. It has tended to be the case that clubs acquire players at a young age – *inter alia*, because of financial constraints – and invest in their development. As a result, extended contracts and contractual stability build the framework for generating a positive return on investment by a premature sale.

## 5. Conclusion

Economic theory and tendencies confirm the importance and interdependence of contractual stability and transfer systems: the transfer system creates the framework which is respectively a mechanism for stabilization and the redistribution

<sup>78</sup> For additional information in regard to migration patterns see: R. BESSON, R. POLI & L. RAVENEL, *Demographic Study of Footballers in Europe*, Lausanne, PFPO, 2011.

<sup>79</sup> Professional Football Players Observation, integrated in the CIES Observatory Project (Database available at [www.eurofootballers.org/](http://www.eurofootballers.org/) (August 10, 2011)).

<sup>80</sup> B. FRICK, *Globalization and Factor Mobility – The Impact of the “Bosman-Ruling” on Player Migration in Professional Soccer*, *JSE*, vol. 10, 2009, 90.

of wealth top down. Contractual stability further secures the integrity of football, investments in youth and training as well as the important income stream of transfer revenues.

Former transfer systems guaranteed contractual stability through the extensive restriction of players' rights – i.e. through the constraint of movement and resulting market monopsony – or the reduction of incentives – i.e. through the maximum wage restriction. Further external factors, such as limited mobility and migration, strengthened contractual stability. Consequently, clubs had considerable employment control.

The liberalization of the transfer market based on the ECJ decision of the Bosman-Case in 1995 as well as further investigations of the EC in 2000 shifted the market power. FIFA Regulations and competent juridical bodies have thus key functions to secure contractual stability through legislative regulation and the consequent juridical implementation.

When considering the current economic tendencies of young migration, a reduced transfer volume and the importance of transfer revenues for minor clubs, stakeholders will have to address the topic of deficient clubs' financials in order to maintain contractual stability.

**MAINTENANCE OF CONTRACTUAL STABILITY IN  
PROFESSIONAL FOOTBALL  
GENERAL CONSIDERATIONS AND RECOMMENDATIONS**

by *Juan de Dios Crespo*\*

SUMMARY: 1. Introduction – 2. Can we create a universally applicable system to improve contractual stability? – 3. What mechanisms could we introduce to improve the contractual stability? – 3.1 The possible inclusion of a termination/ rescission/ indemnification/ buy-out clause – 4. How could said termination clause help to improve contractual stability? – 5. Is there a difference between a termination clause and a buy-out or transfer clause? – 6. How can the parties effectively determine an adequate level of compensation for early unilateral termination of a contract? – 7. What alternatives to the introduction of termination clauses into contracts do we have in case such clauses are illegal in a particular jurisdiction? – 7.1 Renegotiation of the Contract or inclusion of unilateral options – 8. Is it possible to include a unilateral renewal clause, which gives one party the right to maintain contractual relations with the other? – 8.1 General stability – 8.1.1 In order to make these contractual changes workable, who must be approached? – 8.2 Additional options to maintain contractual stability

*1. Introduction*

The maintenance of contractual stability between professionals and clubs in football has been one of the main principles of FIFA ever since the adoption of the new FIFA Regulations on the Status and Transfer of Players (RSTP) in July 2001.

This principle is dealt with in Chapter IV (Articles 13-18) of the current edition of the FIFA RSTP.

Throughout the years, some major cases in the area of the maintenance of contractual stability have been decided upon by the Court of Arbitration for

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Sport (CAS); the *Webster*<sup>1</sup> case, the *Matuzalem*<sup>2</sup> case and the *De Sanctis*<sup>3</sup> case to name a few of them. These high profile cases have shown that a principle such as the maintenance of contractual stability must be reviewed and refined in order to improve the manner in which it is policed and governed.

We must recall that the principle intention of Chapter IV of the FIFA RSTP is the *stability* of contracts. This is called the “Respect of contract” in Article 13 of the FIFA RSTP. Article 17 is an exception to that stability and deals with the *consequences* of terminating an employment contract without just cause rather than providing the players with a *right* to terminate their employment contract.<sup>4</sup>

The question is, if contractual stability is sufficiently protected by the FIFA RSTP at the moment? The European Professional Football Leagues (EPFL) considers that Article 17 in isolation may be insufficient to provide clubs with adequate protection. It is our belief that a series of recommendations and proposals must be submitted to the relevant bodies in order to help the interested parties to draft their own stable contracts which only require intervention from the courts and dispute resolution bodies when absolutely necessary.

## 2. *Can we create a universally applicable system to improve contractual stability?*

It is evident from the results of the Contractual Stability Survey carried out by the EPFL that any recommendations for EPFL may not necessarily be universally applicable to all clubs/players, given the possible impact of national law, domestic football regulations and/or domestic collective bargaining agreements (the ‘Domestic Rules’). However, we should not ignore the possibility to create a universally applicable system. Clubs and Players should therefore consider the recommendations set out below and take their own legal advice on their applicability and the possibility of their implication.

The comments below are also to be considered in light of the outcome of the negotiations between the EPFL, ECA, FIFPro and UEFA in respect of an Autonomous Agreement dealing with the European Professional Football Player Contract Minimum Requirements (with particular regard to the provisions in respect of the “*rights of Club and Player to extend and/or terminate the agreement earlier*”), within the framework of the European Social Dialogue, which shall provide an additional layer of regulation.

<sup>1</sup> CAS 2007/A/1298, 1299 & 1300 *Webster & Wigan Athletic FC v. Heart of Midlothian*.

<sup>2</sup> CAS 2008/A/1519 & 1520 *FC Shakhtar Donetsk v. Matuzalem Francelino da Silva & Real Zaragoza SAD & FIFA*.

<sup>3</sup> CAS 2010/A/2145, 2146 & 2147 *Sevilla FC SAD & Morgan De Sanctis v. Udinese Calcio S.p.A.*

<sup>4</sup> Compare paragraph 63 of the *Matuzalem* award, in which the CAS Panel stated that the termination of a contract without just cause “*remains a serious violation of the obligation to respect an existing contract. In other words, Article 17 FIFA Regulations does not give to a party, neither a club nor a player, a free pass to unilaterally breach an existing agreement*”.

3. *What mechanisms could we introduce to improve the contractual stability?*

3.1 *The possible inclusion of a termination/ rescission/ indemnification/ buy-out clause*

It is notable that Article 17(1) of the FIFA RSTP expressly stipulates that “*unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport and any other objective criteria*” (emphasis added). As such, it is open to the contracting parties of a playing contract to provide for the consequences of its breach in that playing contract.

If Leagues/Collective Bargaining Agreements/Players Union/FA have implemented a standard professional playing contract (the ‘Contract’), they may wish to give consideration to the *mandatory* inclusion of a clause in the Contract, subject to compliance with the Domestic Rules, which provides for the consequences of a player’s breach of contract under Article 17 of the FIFA RSTP.

Alternatively, some Leagues may consider advising their affiliated clubs of the *possibility* of including such a provision in their playing contracts, the details of which may be subject to negotiation on a case-by-case basis.

In some States the inclusion of such a termination clause may be contradictory to national law.<sup>5</sup> The “illegality” of such clauses within the state itself could be avoided by referring to the FIFA RSTP in said clause (“*in case of breach of contract according to the FIFA Regulations on the Status and Transfer of Players*”).

4. *How could said termination clause help to improve contractual stability?*

In case the Club and the Player have negotiated and contractually agreed upon such a termination clause, this includes the *right* for the player, approved by the club, to unilaterally and prematurely terminate the contract, provided that another club (or the player himself) pays the contractually stipulated amount of compensation.

The Leagues and their clubs may consider that the inclusion of such a ‘termination clause’ could reduce the litigation risk that the determination of compensation is left to the discretion of the FIFA Dispute Resolution Chamber (‘DRC’) and/or the Court of Arbitration for Sport (‘CAS’) and their interpretation of the FIFA Regulations and Domestic Rules.

Moreover, it could reduce the risk of litigation as such because a clause which contractually states the liability of the party in breach may discourage

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<sup>5</sup> In some countries - like the United Kingdom - the inclusion of such a termination clause may be contradictory to national law.

“anti-contractual” behaviour.

5. *Is there a difference between a termination clause and a buy-out or transfer clause?*

It is necessary to distinguish between a *buy-out* clause, which deals with compensation for the mutual termination of the playing contract agreed upon in advance between club and player, and a *termination* clause, which deals with the consequences of the unilateral termination of the playing contract by one party.

The difference between these clauses is illustrated in the *Matuzalem* case, in which the CAS Panel rejected Shakhtar Donetsk’s argument that the *transfer* clause contained in the Shakhtar Donetsk playing contract<sup>6</sup> could be considered as a valid clause for assessing damages. The Panel placed particular reliance on the fact that the clause made no explicit reference to a possible unilateral premature termination in terms of Article 17 of the FIFA RSTP, but rather referred to a possible mutually agreed transfer, provided that a minimum transfer fee was paid, and, thus, the Panel rejected the relevance of this *buy-out* clause.

In accordance with Article 17.3 of the FIFA RSTP, in the event of the player terminating the Contract prematurely, clubs may wish to consider whether the Contract should provide for:

- a) a reasonable and structured *indemnity* clause with variable criteria to provide for a tiered indemnification depending on the moment of the unilateral termination; or
- b) a so called *liquidated damages* clause to provide for a genuine pre-estimate of loss; or
- c) a mechanism by which compensation may be payable, e.g. by reference to an independent expert for final determination of the compensation payable; and/or
- d) additional criteria to that set out in Article 17(1) of the FIFA Regulations for consideration by the FIFA DRC in determining the sum of compensation due to the club.

6. *How can the parties effectively determine an adequate level of compensation for early unilateral termination of a contract?*

Given the difficulty at calculating, with certainty, the financial consequences of a unilateral termination of Contract at the outset of the Contract, perhaps, a number of years later, Members may wish to consider the inclusion of criteria to help assess the damages due to a club in the event of the unilateral termination of the Contract by a player. In this case, such criteria may include:

- The total duration of the contract;

<sup>6</sup> This clause stipulated that if Shakhtar Donetsk received a transfer offer of EUR 25,000,000 or more for the Player, then they would be obliged to accept such an offer.

- The number of years left under the contract at the moment of termination;
- The remuneration and other benefits that the player earns;
- Whether the termination occurs within the protected period;
- The fees and expenses paid or incurred by the club (amortized over the term of the contract);

In the alternative, we could have a situation where the “objective” value of the services of the Player, would be determined by an Arbitration Body of the FA or Professional League of the country concerned.

7. *What alternatives to the introduction of termination clauses into contracts do we have in case such clauses are illegal in a particular jurisdiction?*

#### 7.1 *Renegotiation of the Contract or inclusion of unilateral options*

As was already mentioned above, a reference to the FIFA RSTP could help to avoid the illegality of a termination clause in a given jurisdiction.

Another option that clubs may consider is the renewal of contracts with players to trigger the commencement of a new protected period.<sup>7</sup> The risk of the imposition of sporting sanctions on the player who terminates his contract unilaterally during the protected period may be a significant deterrent for a player who is contemplating the termination of his contract during the protected period. This sporting sanction is a strict liability sanction of a 4 month playing ban, rising to 6 months in the case of *aggravating circumstances*.

Furthermore, offers of new contracts made to the player by the club (particularly where remuneration is significantly increased) may be evidence that the club can adduce in support of a future damages claim. Evidently, there are commercial considerations to take into account and a player’s increased wage demands may render such an approach untenable.

8. *Is it possible to include a unilateral renewal clause, which gives one party the right to maintain contractual relations with the other?*

An alternative approach, subject to the Domestic Laws, could be the inclusion of *unilateral options* to extend the term of the Contract, exercisable by the club or the player. It could be arguable that this would also have the effect of renewing the protected period and, thus, deter the player from terminating his contract unilaterally. Such unilateral options must however be carefully drafted to avoid the risk that the DRC and/or the CAS determine the options unenforceable (e.g., if

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<sup>7</sup> The period of three entire seasons or three years, whichever comes first, following the entry into force of the contract where the contract is concluded prior to the player’s 28<sup>th</sup> birthday and two entire seasons or two years, whichever comes first, following the entry into force of the contract if the contract is concluded after the player’s 28<sup>th</sup> birthday.

they may be considered so heavily weighted in favour of the club so as to be unfair to the player).

In this regard, clubs/players may wish to consider the Portmann Report, which was commissioned by FIFA in 2006 and which concluded that unilateral options do not violate Swiss or international public policy, provided that they “*take a form that does not excessively bind the employee*”.

Each party would have to provide sufficient consideration to the other party in order to have the right to renew said contract. For example, the club would have to increase the player’s wage by “X”% or match any offers made by all other parties; or the player would have to make “X” amount of first team appearances during the season in order to give him the right to renew his contract with the club. This possibility of having unilaterally renewal options already exists in some jurisdictions.<sup>8</sup>

## 8.1 General stability

### 8.1.1 In order to make these contractual changes workable, who must be approached?

1. The Player’s Union: it is notable that any significant amendment to the Contract may entail the consent of the relevant domestic player’s union and as such may be subject to negotiation and/or compromise.
2. Independent legal representatives of the parties: in the event that clubs elect to include a *termination clause* or a *unilateral option* in the Contract, it may be advisable to offer players the opportunity to take independent legal advice prior to entering into the Contract. In accordance with the recommendations of the *Portmann Report*, it may also be advisable to provide players with consideration in respect of the grant of a unilateral option. This may serve to increase the chances of enforceability of such clauses, if it can be proven that there has been a genuine “meeting of minds” and that consideration has passed between the parties.

Moreover, Clubs and Players should endeavour to make the levels of compensation for unilateral breach of contract reasonable, and should not impose punitive sums against those who breach their contract. This will allow these clauses to maintain their enforceability and negate the need for the intervention of the

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<sup>8</sup> Moreover, within FIFA Jurisprudence lies a five-tier test, based on the Portmann Report, which indicates when a unilateral option clause could be considered valid by FIFA. The five criteria are the following: the potential maximum duration of the labour relationship shall not be excessive; the option shall be exercised within an acceptable deadline before the expiry of the current contract; the salary derived from the option right has to be defined in the original contract; one party shall not be at the mercy of the other party with regard to the contents of the employment contract, for which a substantial increase of salary is the most important indication; and the option shall be clearly established and emphasized in the original contract so that the player is conscious of it at the moment of signing the contract.

courts to mitigate said termination clauses.

## 8.2 *Additional options to maintain contractual stability*

Consideration may also be given to the inclusion of a *choice of law clause* in favour of the law of the country in which the Member is domiciled, if the relevant domestic law supports the application of the above recommendations. There is, however, no guarantee that the domestic law will be applied to an “Article 17 dispute”, given the comments of the CAS Panel in the *Webster* case, that due to the international nature of any such dispute, the governing law of the contract at the centre of the dispute may not be the governing law of the dispute itself.

Another option that clubs may consider is the inclusion of a *loyalty bonus system* in the Contract with the player. If the player is willing to stay a certain number of years with the club, he could receive a significant bonus payment. This may attract players to respect their contracts with the club instead of terminating them unilaterally.



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