

**REGULATING
EMPLOYMENT
RELATIONSHIPS
IN PROFESSIONAL FOOTBALL**

A COMPARATIVE ANALYSIS

Michele Colucci and Frank Hendrickx (eds.)



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INTRODUCTION

Sport performs several functions in society: an educational, a social, a cultural as well as a recreational function. Nevertheless sport is also a business: in economic terms, it is a rapidly growing area accounting for 3% of world trade and is one of the sectors most likely to generate new employment in the near future.

International and national sports associations regulate this business in an autonomous way and adopt private regulations or by-laws, including organisational, disciplinary rules as well as rules of play. However, the trend towards more professionalism in sport and its growing economic and relevance have prompted an increasing reliance on legal rules adopted by governments and international organizations such as the United Nations, the Council of Europe, and the European Union.

Sport is also considered as a “special sector” and could even be seen as a specific ‘labour market’. In a professional sport context, athletes and players can be considered as “special workers” and their clubs and teams as “special employers”. The specific nature of sports, leading to the question of how public regulation and private sport rules relate to each other, is also an issue where employment relationships are concerned. For example, how do employment law rules interrelate with questions of athlete selection, remuneration, discipline or contracting? How do laws and regulation support and implement players’ or athletes’ unionism or collective bargaining that may take place? To what extent are team members seen as regular employees, or individual players as self-employed persons?

In this book, we take stock of the rules and problems that exist when combining the law on employment relations and specific sport contexts, and particular sporting rules. The focus will be on professional football, a field of worldwide economic and social interest, where club-player relations are rather well established and structured through international sporting bodies and a large number of problems and issues have already occurred. Professional football is a field where the interaction between public employment regulation and private sports regulation is most relevant. The aim of this book is to examine the question of how the legal regulation of employment relations are applied or adapted in the context of professional football and to what extent could aspects of sport specificity be identified or established to justify a special legal regime.

The editors would like to thank Antonella Frattini for the editorial assistance and James Carey for the proof reading of the book.

Brussels, 31 October 2014

Michele Colucci *Frank Hendrickx*

EMPLOYMENT RELATIONSHIPS
AT NATIONAL LEVEL

EMPLOYMENT RELATIONSHIPS AT NATIONAL LEVEL: ARGENTINA

by *Javier H. Delfino**

SUMMARY: Introduction – 1. Employment regulation and football structures – 2. Sources of Law and approaches – 3. Individual employment relationship in professional football – 4. Medical and doping issues – 5. Player Transfer – 6. Social security principles (unemployment and pensions) – 7. Labour dispute settlement – Conclusion

Introduction

Argentina applies federal law to labour regulations - both individual and collective ones, as well as to social security protection.

The current professional football player legal employment status is embodied in mandatory rules derived from the State and collective bargaining agreements signed by labour unions and employers. In contrast, amateurism prevents the employment principle. The relationship between sports entities and athletes who play football as a professional activity is governed by a specific law and assisted by general employment law in those aspects that have not been regulated. In addition, collective bargaining agreements are a key factor. Moreover, there are a variety of rules set by the State, the *Asociación del Fútbol Argentino* and FIFA.

As with many other countries, sources of sport law in Argentina are both public and private. Athletes can have amateur or professional status according to the sport discipline. Amateurism is the main rule regarding sport practice in this country and professionalism is the exception.

Despite the increase of economic profits in some sport practices, the legal entity remains as a non-profit organization. Sport governing bodies play a significant role in the thriving business of sports, and their role goes far beyond the adoption of playing rules, yet they are still not commercial entities.

The *Asociación del Fútbol Argentino* (AFA) is the main entity that controls

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the organization and practice of football, including members of all the local clubs. Argentina has five well known clubs: Boca Juniors, River Plate, San Lorenzo, Independiente and Racing, but all the teams around the country have produced world class football talents. Any top club with an international scouting system will seriously consider football players from this country.

1. *Employment regulation and football structures*

1.1 *Employment regulation*

There is no federal code of laws regarding employment such as there is in civil, commercial or penal law. However, there are many laws in force, enacted by the federal government and effective nation-wide. Employment relationships, in their most general perspective, are governed by Law 20744 (LCT) enacted by the Federal Congress in 1974, and its terms have been amended several times throughout the years.

LCT governs employment relationships, from hiring to termination, with mandatory rules. A vast majority of concerns regarding the rights and duties of employees and employers have been covered by this statute.

The statutory coverage includes every person in the lawful service of another who has the right to manage the work produced, where there is a payment in compensation for it, and under any form of employment contract, be it express or implied. This employment relationship is defined as salaried work (in contrast with an independent contractor) and will be regulated by the LCT and the corresponding collective bargaining agreement. There are some activities that are excluded and some others that have particular statutes.

There is an *iuris tantum* presumption in favour of the existence of salaried work in the case of services provided to a third party. Therefore, anyone wishing to maintain the contrary will have to produce evidence to support such position.

The following matters are to be considered when determining whether the employee is a salaried worker or an independent contractor: i) the extent of control over or management of the work; ii) the power to discipline; and iii) the extent of the economic position. Nevertheless, there is no agreement between scholars or courts about which of these is the controlling factor.

LCT provides four alternatives for hiring employees: (a) permanent contract, (b) part-time scheme, (c) fixed term contract or (d) contract for a specific activity.

- (a) *A permanent contract* is presumed to be on full time basis and has an indefinite term, no written contract is required and the first 3 months are defined as a trial period.
- (b) *A part-time contract* is when the daily activity is less than 2/3 of the customary working hours within the corresponding activity. In such instances the compensation may not be lower than the proportional compensation for an employee performing services on a full-time basis. The cap for the number of

part-time employees to be hired must be determined by the CBA. Also, no written contract is required.

- (c) *A fixed term contract* requires a written contract specifying the fixed term. It also requires an extraordinary reason to justify such a hiring alternative. The maximum cumulative term is 5 years per employee and there is no trial period. If an unfair dismissal occurs before the agreed term is reached, the employee is entitled to the corresponding severance plus a special compensation that is usually determined by calculating the pending wages until the agreed date of termination.
- (d) *A contract for a specific activity* may be used when extraordinary and transitory production demands or requirements are foreseeable, although a specific term for the contract termination cannot be foreseen. This kind of contract will end with the execution of the job for which the employee was hired, and so there is no trial period. A written contract is required with the clear specification of the causes that have led to this kind of hiring. There is no obligation to give notice of termination and no severance payment or compensation is owed when the contract is terminated.

The employment regulation considers fixed severance for dismissal without cause as being equal to the best salary from the previous year multiplied by the years worked under such employment, unless it is determined that no severance is due. The best salary has a cap in accordance to the relevant CBA.

In order to have a full understanding of the legal framework it is important to study the corresponding Collective Bargaining Agreement, as its terms are mandatory for the activity.

Collective Labour Law, foreseen in the Magna Carta and several specific laws; regulates relationships, rights and duties among the collective labour parties: unions, and the employer or a group of them.

This law provides that, despite the terms of the CBA, its provisions remain applicable by ultra-activity until another CBA is signed to replace it. For their enforcement, the CBA needs to be recognized by the National Ministry of Labour Affairs.

According to Section 2 of the LCT; Public Office employees, agricultural labourers, and domestic service are excluded from its ruling. On the other hand, there are several activities that are not excluded by the LCT but have a separate statute that governs such activities: construction workers (Law 22250), travelling salesmen (Law 14546), professional journalists (Law 12908), press companies administrative employees (Law 12921), professional musicians (Law 14597), professional football players (Law 20160) and hairdressers (Law 23947), among many others.

1.2 Football structure

From the historical perspective, the AFA was the first football association to appear

in South America, coming into being in 1912; and also became the first one in America to be affiliated to FIFA.¹

AFA is a private entity formed by local football clubs, subject to the governance of the Civil Code for associations. It is an upper level association or, in other words, it constitutes a federation.

Under Section 2 of its bylaws, the AFA promotes the practice of football in Argentina by coordinating the actions of all the affiliated entities in accordance with FIFA's provisions.

Furthermore, Section 3 allows the AFA to achieve its goals by federating with other sports entities in its country or abroad. The AFA is the exclusive representative of Argentinean football at international level and especially within FIFA as an active member.

As a consequence of its federation status, the AFA has a dual role:

- From the private governance view, the AFA is the governing body of football in Argentina, and therefore affiliated clubs recognize and delegate to AFA the necessary power to achieve such purposes.
- From the public governance view, sports federations are empowered by the government to pursue certain activities which have a public nature. This is a consequence of the government's increasing interest in the sporting phenomenon, which at first was purely governed by private regulations.²

It is possible to summarize the AFA's domestic functions as the following: (i) to organize Argentinean football leagues; (ii) to cooperate with the State; (iii) to exercise disciplinary authority in such sport; (iv) to exercise the governing authority over football in the provinces (through the *Consejo Federal de Fútbol* - CFF); (v) to appoint members of the national teams; and (vi) to appoint clubs participating in international tournaments. At an international scale, the AFA has (i) exclusive representation of the discipline, and (ii) collaborates in the organization of international competitions that take place in its country.

The non-profitable character as a distinctive trait of the civil organizations is to be understood not as a prohibition from obtaining economic results, but as the impossibility of distributing profits among its members.³ This applies not only to the AFA but also to clubs, as they are non-profitable organizations as well.

Consequently, the main issue would not be the form of the mentioned activity but, fundamentally, the destination of its profits or earnings. In this sense, there is no distribution of profits or earnings among people with merely private interests, but as a matter of fact, these profits are maintained in the institutional private property in order to increase the chances of achieving purposes of general

¹ AFA origins, (last seen 25/08/2014). www.afa.org.ar/index.php?option=com_content&view=article&id=8655&Itemid=243.

² Cazorla Prieto Luis M., *Deporte y estado*, 1979, Labor-Politeia; cited by Schmoisman Mario A., Dolabjian Diego A., *Estudios sobre derecho y deporte*, T. I, Córdoba, Argentina, 2009, Lesner Editora, 383.

³ Schmoisman Mario A., Dolabjian Diego A., *Estudios sobre derecho y deporte*, T. I, Córdoba, Argentina, 2009, Lesner Editora, 237.

welfare. This means that there is no lucrative intention that ought to be considered forbidden to civil associations.⁴

According to Section 33 of the Civil Code, private associations are those with general welfare as their main objective. That wording leaves no room to infer that a non-profit association cannot own assets in a corporation. Although the main goal of the association is to promote general welfare, this does not mean that it cannot carry out profitable activities in order to be able to afford costs. In other words, being non-profitable means that the association cannot distribute profits among its members but it is not a barrier that could prevent funding through other lawful activities.⁵

The Argentinean football leagues are classified in two large categories - professional and amateur - and subdivided into different levels. In accordance with the last AFA decision on this regard,⁶ professional football leagues are: Primera A, Nacional B, Torneo Argentino A, Primera B, and Primera C. Amateur football leagues are: Torneo Argentino B, and Primera D, and the rest of the ordinary leagues.

2. *Sources of Law and approaches*

The sources of law regarding sports depend on the regulated matter. For instance, the organization of the leagues, clubs and structure itself are governed by private law as the Civil Code provides a lot of room in that sense and there are few mandatory rules. However, issues regarding relationships between athletes and clubs and social security taxes are governed by mandatory law issued by the national government.

2.1 *Specific laws on sport and football*

The core of public regulation on sports is incorporated in Law No. 20655 (sports regulation), Law No. 24819 (fair play in sports and drug-free sport) Law No. 24192 (prevention and punishment of violence in sporting events) and Law No. 25284 (special system for the administration of entities with economic problems and administration of trust under judicial control). In addition, the recent Law No. 26573 was enacted to promote economic support and training for performance athletes of a high level.

Since 1969, Courts have ruled that the relationship between football players and clubs is governed by employment law.⁷ However, there is no parallel with

⁴ Cahián Adolfo, *Las asociaciones civiles en la República Argentina*, 1998, La Rocca, 56, quoted by Schmoisman Mario A., Dolabjian Diego A., *Estudios sobre derecho y deporte*, T. I, Córdoba, Argentina, 2009, Lesner Editora, 265-266.

⁵ Clariá José Octavio, *Nota a la Resolución de la Inspección General de Justicia en el expediente Boca Crece S.A.*, 2005, elDial.com, DC71F.

⁶ In accordance with AFA Executive Committee's decision published on Bulletin 4836/2013.

⁷ "*Ruiz S. c/ C. A. Platense s/ Despido*", decided by the CNAT as a whole under *Plenario* No. 125, in October 1969.

other sports activities such as volleyball, handball or basketball. In these sports, courts have ruled that the practice is mainly amateur and therefore the philanthropic interest of the players for their own improvement as persons is the motive and prevents the application of employment law.

Later, a specific statute was enacted for those athletes who play football as a professional activity in order to regulate its particular employment relationship. This is ruled by Law No. 20160, but also by the general Employment Law No. 20744, and the Workers Compensation Law No. 24557.

In 2009 the latest CBA No 557/09 was approved, amending the previous one - No 430/75, signed by AFA and the Union of Amateur and Professional Football Players (Futbolistas Argentinos Agremiados – FAA). This contains a lot of specific and mandatory regulations relevant to the object of this study.

2.2 *Amateurs*

As mentioned before, amateur players are those who are not hired by a club through a contract and do not perform in leagues considered as professional. In the majority of sports disciplines, athletes have an amateur status with no labour law protection. Such status is governed by private law.

2.3 *Semi-professionals*

No semi-professional category is recognized. There are only two alternatives: amateur and professional players. These categories, therefore, determine the applicable law and regulations.

2.4 *Self-employment*

According to legal regulation on professional football, it is not possible for players to be self-employed. Provisions imposing the employment relationship are mandatory.

2.5 *Voluntary work*

Voluntary work is regulated by Law 25855 which covers the activity of those citizens that help entities without any compensation whatsoever. It is forbidden to render services as employee under such contracts, and violation of this commandment results in the enforcement of LCT provisions.

2.6 *Discrimination law and equal treatment*

The widest and most general anti-discrimination and equal treatment law is No 23592. It provides that whoever arbitrarily impedes, obstructs, restricts or otherwise impairs the full exercise of recognized rights and fundamental guarantees granted

by the Constitution shall be obliged, at the request of the victim, to repeal such discriminatory act or cease to perform it and to repair any moral and material damage caused.

For the purposes of this Law, certain discriminatory acts or omissions based on grounds such as race, religion, nationality, ideology, political or union opinion, sex, economic status, social status or physical characteristics are particularly considered.

In addition to such regulations, the LCT establishes, in accordance with Section 17, that any discrimination between workers on the basis of sex, race, nationality, religious, political, professional or age is forbidden. Furthermore, the employer must treat all workers equally in identical situations. Unequal treatment is forbidden when based on sex, religion or race, but not when this differential treatment comes from efficiency, due diligence or reduction of work, in accordance with Section 81 LCT.

3. *Individual employment relationship in professional football*

3.1 *Essential elements and legal qualification*

The employment contract of a professional footballer is a fixed-term contract with the possibility of renewal. This contract has the following characteristics: (i) the existence of dual disciplinary power over the worker, (ii) the limitation of the lifetime of the worker in such activity, (iii) notes of exclusivity, (iv) the compensation mode, and (v) a parallel to performing artists' situation.⁸ From the other perspective it is important to point out that there are a limited number of entities with which players may sign a contract, which implies a particular subordination in this industry, similar to how cartels function in a monopoly.

Law 20160 does not provide legal qualification for football players; it delegates this definition to the executive branch. However, there is no decree on such matters, but according to the relevant CBA, a professional football player is considered a person who binds himself to play football for a fixed term as a member of a sporting entity which participates in professional tournaments, in exchange for pecuniary compensation.⁹

Therefore, the legal qualification for the football player is the one provided by the CBA.

Finally, there is a restriction regarding the nationality of players. In this sense, foreign players may be part of a squad but they are limited to up to 4 athletes per club.¹⁰ However, this cap is not applicable for those foreign players

⁸ Fefer Sergio, *Cap. VI Régimen de futbolistas profesionales*, en *Tratado de Derecho del Trabajo*, t. V, Ackerman (dir.), 2006, Rubinzal Culzoni, 396/7.

⁹ Delfino, Javier, *European Sports Law and Policy Bulletin – International and Comparative Sports Justice*, Michele Colucci and Karen L. Jones eds., 2003, 238.

¹⁰ This restriction based on the nationality might be attacked at Court as it may arise constitutional issues (rights to work, to be treated equally). In such opinion, it is possible to cite: Confalonieri, Juan

who have been performing in at levels lower than the first team of the club for a period no less than four years before they reach the age of 21 years old.

3.2 *The employment contract*

The employment contract must be written and registered in the AFA and FAA. The agreement must clearly detail the compensation. According to the CBA, no professional footballer may take part in an official game if the contract has not been previously registered. The registration process is governed by Law 20160 as well as the CBA, and complied when submitted by any of parties involved.

Nevertheless, it is possible to prove the existence of such contract based on the actual services rendered as professional football player.

According to Section 40 of the LCT, the object of the contract shall be considered forbidden when legal regulations or procedures would restrict the employment of certain group of people performing certain tasks, for certain periods of time or under certain conditions. In any case, this prohibition is only addressed to the employer and will in no case affect employee rights.¹¹

The only parties legally authorized to sign a professional football player employment contract are: (i) an AFA affiliated club, and (ii) an athlete aged 16 years old up.

The term for a professional football player contract go from 1 to 5 years, with no extending option, as the CBA provides.

It is possible to execute a promotional professional contract for those athletes aged between 16 and 21 years old. This alternative provides the possibility of creating a one-year contract with the option for the club to extend it for two more years. However, for those athletes who have reached the age of 21 years, this promotional contract can only be extended once for a single year. In order to execute the extension clause, the club must provide a salary increase of at least 20%.

In the event of any contract with an extension clause signed by players who have reached the age of 22 years, it shall be considered null and void (even when AFA has registered it) and the player is to be declared free agent and able to sign contract with any other club.

Regarding the lowest professional football league (Primera C), clubs must have a minimum of 15 professional contracts in the squad.

As usually happens in this activity, player agents have an active role in the scouting and contracting process. In this case, the contract must contain a reference to the agent involved in the contract negotiation whether acting on behalf

A., *Jugador de fútbol profesional*, en *Tratado de derecho del trabajo*, Vazquez Vialard A. (dir.), 1985, Astrea, 246; and De La Riva, Amalia, *La relación de trabajo de los futbolistas profesionales*, en *Relación de Trabajo*, t. V, García, Héctor Omar (dir.), 2013, Ediar, 185.

¹¹ Delfino, Javier, *European Sports Law and Policy Bulletin – International and Comparative Sports Justice*, Michele Colucci and Karen L. Jones eds., 2003, 241.

of the club or player. The agent must comply with specific regulations and has to have the AFA's authorization.¹² Players under the age of 18 must have parental consent to engage in such a contract. There is an exemption for such authorization when the player's agent is a practicing lawyer in Argentina and has the relevant power.

3.3 Player rights and obligations

Players, as employees, are entitled to compensation plus a statutory annual bonus ("aguinaldo"), paid vacations, paid leave in case of illness, and other legal means to force the employer to fulfil all the obligations that arise from law, the CBA and the relevant employment contract. In addition, professional football players are entitled to social security benefits.

In relation to the performing aspect of the game (football career), it is granted that once the player has reached the age of 21 or has achieved the status of professional player, they have the right to perform in the top or second team of his club, but no lower than that.

In the case of a breach of contract based on salary or any sum of money being due to the athlete, it is possible to restrict the squad from any new hiring until a payment agreement is reached.

On the other hand, players have to comply with their duties regarding good faith as employees; in particular:

- to play football only for the contracting club or teams that represent the AFA, in accordance with the relevant rules;
- to maintain and improve the condition of his sporting abilities, and his physical and psychological well-being in order to perform efficiently. If these abilities and conditions diminish or are lost at the player's fault, he shall be responsible for gross negligence;
- to play efficiently and to the best of his abilities and strengths;
- to adapt his lifestyle to the demands of his contractual obligations;
- to attend any meeting requested by the club or the AFA authorities, and to play in all matches in the location indicated without regard to the date, time and place where the match takes place;
- to comply with all international sports rules that regulate football activity, and the sports regulations of the club and AFA, as long as they are not contrary to law;
- to train as determined by the person appointed by the AFA to such effect. This obligation shall subsist despite any disqualification of the player; also, the player cannot excuse himself from attending training sessions due to another job obligation unless expressly permitted by the club. The club shall be the only one to determine the date, time and place for training, according to practices

¹² AFA – Boletín 3606, Regulations Governing the Players' Agent Activity.

and customs, as well as any other change it deems necessary in exceptional circumstances, provided that these said changes do not damage the player's interests;

- to notify the club within 24 hours of any circumstance that alters his physical or psychological well-being; the player shall accept medical assistance from the club's physicians and follow any indication prescribed. In the case of disagreement, the player may request a three-medical-doctor-panel (Medical Examination Board) to be appointed: one designated by the AFA, one by the corresponding club and a third doctor appointed by the player himself.
- to travel, without bearing the cost, to every location where the club or the AFA is to take part in a sports event, be it within the country or abroad;
- to behave properly during matches, accept instructions given by the club, respect the audience, sports authorities, teammates and opponents;
- to pursue fair play: any sanction decided against him by a competent authority resulting in his inability to play shall be sufficient ground for suspension of his rights to receive payment for as long as the sanction lasts, irrespective of his obligation to continue training in order to keep his abilities and himself in the best physical and psychological condition.

3.4 *Club rights and obligations*

Clubs are in a unique position for employment based on two aspects: extensive regulation regarding player exclusivity and disciplinary power over an employee with a short and limited working life.

Moreover, clubs have to comply with their duties regarding good faith as employers; in particular:

- to pay all the amounts agreed by contract even if the club no longer requires a player's services;
- to grant players one day per week to rest and, annually, a leave of absence for 30 days with the right to be paid his monthly salary as established by contract. Unless otherwise specifically agreed, days of the leave shall be consecutive days;
- to provide full medical attention (including psychological and rehabilitation services) to guarantee a player's efficient sporting performance;
- to obtain insurance policies to cover for a player's compensation in case of generic or specific disability (full or partial) or player's death during competitions, preparation events or transportation (irrespective of the means used or the location where it took place) pursuant to what is established by Law No. 24557;
- to pay expenses for transportation, accommodation and food when a player travels in order to honour contractual obligations.
- to make a detailed report on a monthly basis to the AFA of the concepts included in the compensation paid to its players.

3.5 *Remuneration*

As stated before, the employment contract for football players must clearly detail compensation items. It is a mandatory combined package of: (i) monthly salary; (ii) bonus for points won in official matches; (iii) bonus for friendly matches won or tied; and (iv) bonus for qualification for national or international competitions or tournaments in which the contracting club plays or may play.

The CBA establishes the mandatory minimum amounts of such benefits classified by league division. In addition, it establishes the minimum benefits for winning points in the league.

The monthly salary must be paid by wire transfer within four business days after the end of the related month. Any benefits for points, games, goals, wins, or certain table position will be paid within the five subsequent business days after the respective event.

A special bonus is granted for those players who have actually performed in the tournament in which the club has become champion or achieved league promotion.

Besides that, the CBA establishes the obligation for parties to set bonus amounts for performing in non-official or international tournaments (like Copa Sudamericana or Copa Libertadores de America), or any other kind of international competition. However, the CBA does not determine a minimum amount or calculation method; it only refers to the free negotiation of the parties. If there is no agreement, the matter shall be submitted to arbitration by the Ministry of Labour Affairs whose decision will be final.

On the other hand, there are provisions made for the event of promotion or relegation. In that sense, if the club is relegated to a lower division, it is possible to reduce players' compensation by 20% for the period of time that the club remains in that division, although the compensation cannot go under the minimum legal wage. If the club moves to a higher division, the player's salary shall be increased by 25% as from January 1st of the year that the new season starts.

In the event of a conflict between the wage stated in the registered contract and the actual one, the one that is best for the player will prevail. The same principle applies when this conflict comes from different hierarchical regulations (Law, CBA, and Individual Contract).¹³

3.6 *Working time*

There are no particular provisions regarding working time for professional football players. Therefore, this is covered by general regulations. The legal working time is eight hours per day or forty-eight hours per week.

¹³ Delfino, Javier H., *Fuentes de Regulación*. C. VI, in *Remuneraciones*, Rodriguez Mancini, Jorge (dir.), 2013, La Ley, 97.

According to the CBA, a minimum rest of 12 hours between the end of a day and the beginning of the following one is to be granted to a player. In addition, a minimum resting period between matches of 48 hours has been established.

On the other hand, Law 20160 grants a weekly resting day, and a 30 days paid leave per year. Unless otherwise agreed by parties, leave days will be consecutive.

3.7 *The end of the employment relationship*

According to Law 20160, the employment relationship shall be terminated by: (i) agreement of the parties; (ii) expiration of the contract period; (iii) breach of contract.

The parties are able to terminate the contract by mutual agreement at any time, in which case the player will be free to sign with any other club. This agreement has to be executed by public notary or before the administrative authority for labour affairs, under penalty of considering it null and void.

In the event of contract term expiration, if the club does not execute the extension clause, the player will be free to sign for another club and no severance is due.

There is no mention of the alternative of resignation; thus, it shall be considered legal and in such event similar consequences to those of termination based on just cause shall be applied.

3.7.1 *A) Termination based on just cause*

Clubs may terminate the contract based on just cause when players fail to comply with their duties. This shall be applied under restrictive criteria. According to Law 20160 a disqualification sanction (unable to be given until December 31st of the following year) is applicable for major breach due to a player's fault; however, such provision is considered invalid.¹⁴ The CBA expressly makes any disqualification clause void on such grounds. In the event that such termination causes damages to the club, it may require a labour court to establish the appropriate economic compensation to be paid by the player.

On the other hand, players are entitled to construe a dismissal as being based on just cause when the employer is the one in breach of contract. In this case, clubs must pay full compensation for the contract plus severance. Another consequence of termination based on unjustified club breach of contract is that the player shall be freed from any contractual obligation. Therefore, the player has the right to sign a new contract with any other club within the country or apply for a certificate of international transfer.

¹⁴ In such opinion, it is possible to quote: Confalonieri, Juan A., *Jugador de fútbol profesional*, en Tratado de derecho del trabajo, Vazquez Vialard A. (dir.), 1985, Astrea; and De La Riva, Amalia, *La relación de trabajo de los futbolistas profesionales*, en Relación de Trabajo, t. V, Garcia, Héctor Omar (dir.), 2013, Ediar; and, Fefer Sergio, *Cap. VI Régimen de futbolistas profesionales*, en Tratado de Derecho del Trabajo, t. V, Ackerman (dir.), 2006, Rubinzal Culzoni.

3.7.2 B) Termination based on unjustified cause

Clubs may also terminate the employment contract without justified cause. Consequences are the same as in the construed dismissal.

3.8 *Disciplinary rules and sanctions*

The dual disciplinary power over the football player comes from the relevant club as employer and the AFA as competition authority. It is no longer possible for clubs to be legally able to impose fines on athletes, in accordance with the CBA.

Disciplinary rules are governed by the LCT. In order to consider sanctions as valid ones, they have to be based on justified cause, have a fixed term and be notified in writing to the employee. The maximum suspension for disciplinary reasons is 30 days in one year, counting from the first suspension. In case of violation of such limits, the employee is entitled to construe the dismissal as being without justified cause, or file the case to the courts. Clubs must have made all payments due to the player in order to be authorized to impose any suspension.

Players are liable for damages, but fines are forbidden in an employment relationship.

The AFA is empowered to sanction the activity of a football player as such, but not those aspects that concern the employment as it is a third party in such a relationship.¹⁵

The AFA's Disciplinary Tribunal is the competent body to apply disciplinary rules and determine sanctions in accordance with FIFA's Disciplinary Code, and its ruling shall be appealed to the Court of Appeals of the same association. As reality shows, those appeals against sanctions on players are usually filed by the relevant club, and it is therefore denied on grounds of lack of *locus standi* of the appellant.

4. *Medical and doping issues*

Regarding medical issues, there are two alternatives based on whether the accident or illness is work-related or not. Medical issues caused by work are covered by mandatory insurance according to Law 24557.

In any case, professional football players prevented from performing by any injury or illness (during practices, matches or while travelling to or from work, or even non-work related), are entitled to receive compensation until medical discharge is prescribed regardless of the contract expiration date.

In the event that a player gets medical discharge and at the time they become free agent, the transfer windows is closed; the AFA must grant a period of

¹⁵ Based on such clarification, there are opinions against the idea of dual disciplinary power. This dual power might be more fictional rather than actual. De La Riva, Amalia, *La relación de trabajo de los futbolistas profesionales*, en *Relación de Trabajo*, t. V, García, Héctor Omar (dir.), 2013, Ediar, 191.

an additional 20 working-days to help their incorporation into a club of their choice.

Regarding doping issues, the International Convention against Doping in Sports (which was adopted by UNESCO) is mandatory in Argentina in accordance to Law 26161. Furthermore, Law 24819 defines doping as the use of forbidden substances or methods by an athlete, regardless of the quantity applied, before, during or after a competition. The forbidden methods and substances are detailed and amended regularly by the *Comisión Nacional Antidóping*.

Any breach of regulations established by Law 24819 by any of the sports entities registered at the *Registro Nacional de Instituciones Deportivas* in accordance to Law No. 20655, and/or those recognized by the AOC and/or the *Confederación Argentina del Deporte*, shall imply the cessation of their participation in the *Fondo Nacional del Deporte* and in the *Registro Nacional de Instituciones Deportivas*.

Regarding the athlete's offences, the following disciplinary sanctions shall be imposed:

- ineligibility for a period of between three months and two years to carry out federative sports activity, effective from the date of the first offence;
- ineligibility for a minimum period of two years in the case of reoffending, as well as disqualification or forfeiture of points according to the nature of the sports competition;
- in order to determine reoffending, violations committed abroad by the athlete shall be taken into account, whenever the corresponding sanctions have been imposed by international sports federations and/or the national sports federations recognized by the corresponding international federation.
- should the athlete refuse to undergo this doping test, it shall be considered as positive according to FIFA's regulations.

On the other hand, it is within the jurisdiction of each federation to determine if athletes are to be punished by disqualification or forfeiture of points, taking into consideration whether the sport competition is practiced individually or in teams. If the athlete's sanction is based on narcotics, the sport's institution shall impose a safety measure for the health of the athlete, in addition to the sanction it considers appropriate, through the corresponding administrative body. Such measure shall consist of a detoxification and rehabilitation treatment for a period deemed necessary. The athlete shall resume sports practice afterwards.

In relation to football practice, the procedure is governed by the AFA's Anti-Doping Control Regulations, in accordance with FIFA's policy. According to this, at least two athletes per team who have actually performed in the relevant match are eligible for a doping test on a random basis.

After analyzing the retest, the case will be referred to the AFA's Disciplinary Court for its ruling, which shall be appealed to the Court of Appeals of the same association.

5. Player Transfer

5.1 Transfer rules

There is no restriction for transferring contracts, but in these cases players must be awarded with a percentage of the value involved in the transaction. As in many other countries, transfers have effect within a transfer-window term. This only applies when signing players.

The transferring club must have the player's expressed consent to carry out the transaction. The minimum percentage that the player must receive is 10% of the total amount paid for the transfer of the contract. This 10% clause has been enforced on clubs and the AFA by courts.¹⁶

The percentage that is to be paid to the player has been increased by the new CBA to a minimum of 15% of the total amount of the transfer of the contract.

Later, the player must arrive at a new employment agreement with the new club.

On the other hand, the temporary assignation of the contract to another club for a maximum period of one year is also allowed. The temporary assignation shall not affect the payments established in the original contract, and the assigning club shall be jointly bound to the fulfilment of the economic obligations of the assignee, until the original contract is fully performed.

The player's consent is only required to transfer federative rights. Economic rights are exclusively on the club's side.¹⁷

According to Section 8 of the CBA, it is forbidden to transfer the football player's federative rights in favour of any person or entity that does not participate in any of the tournaments organized by the AFA.¹⁸

¹⁶ "*Calderon Jorge Adrian c/ Asociacion del Futbol Argentino y otro*", decided by the National Court of Appeal on Labour, No. IV, on October 31, 1979, D. T. XL-1980-353; and other cases now omitted, cited by Confalonieri Juan Angel, *Futbolistas profesionales*, Revista de Derecho Laboral N° 2003-2, Rubinzal-Culzoni, 205.

¹⁷ The Supreme Court of Buenos Aires has validated the transfer of economic rights in a football player transfer. It has been settled that is not necessary to include the player's consent, as economic rights (referring to utilities derived from future transfers) are part of the sport clubs' assets, and its transfer shall not be considered as a contract on third parties, for it only implies the football player as a producer of economic results in benefit of the sporting entity. This concept structure is opposed to the one regarding the transfer of federative rights, where player consent is key in order to take effect. (case: "*Simón, Juan E. c/Club de Gimnasia y Esgrima de la Plata s/Cobro Ordinario*", 12/23/2013, published on www.ijeditores.com.ar).

¹⁸ An interesting case arose regarding the valid transfer of economic rights although the contract's provisions contain federative and economic right when the transferring party was not a club. In that sense, Chamber C of the National Commence Courts of Appeal has validated a contract where a club was transferring 50% of a player's economic rights to a company. Although contract clauses literally mentioned the transfer of federative rights, the contract shall be interpreted as a whole and the actual will of the parties must be taken into account, as parr. c of Section 86 of the AFA Statute says that transfers of federative rights can only take effect when the receiver is a federated club or some organized football association, and the value transferred in the contract is the credit derived

5.2 *Work permit for foreigners*

Foreign citizens must have a work permit to work in Argentina. Artists and athletes have similar requirements. An entrance permit has 30 days of validity and, after this, a visa is necessary. A letter of intent or contract must be submitted prior to arrival.

5.3 *Training compensation systems*

There is no training compensation system other than the one derived from the employment relationship.

5.4 *Player agents (including some examples of private regulations, e.g. football)*

Player agent must be duly authorized to practice and are subject to particular control from the AFA. Agents can represent players or clubs, but they cannot have an official position in the AFA, FIFA or similar institutions. Practicing lawyers in Argentina are not subject to this referred authorization when they represent player interests.

Applicants for player agent have to be individuals; hold Argentinean nationality, with legal address in the country; or in the case of foreigners to have been residing in the country for a minimum of 2 years. They are also required to prove that they are fit and proper persons who have not previously engaged in inappropriate behaviour.

As stated before, only individuals may apply for a license. Thus, the admission of applications from companies, associations or clubs is forbidden. In addition, an insurance policy for damages is required.

The relationship between players and agents must be registered in writing. Contracts have to meet the AFA's rules specifying the agent's compensation and due date. Both the AFA and FIFA provide the list of authorized agents.

All player agents who fail to comply with their obligations in accordance with AFA and FIFA regulations are subject to sanctions from the AFA Committee on this matter, which may impose: (i) A warning or reprimand, (ii) a fine, (iii) a suspension of license, or (iv) the withdrawal of a license.

These sanctions shall be cumulative and imposed by the Committee or FIFA itself, and are considered final and non-appealable.

from the valuation of federative rights on a future transfer of that player to another club" (Case: "Haz Sport Agency SA c/Asociación Atlético Argentinos Juniors s/Ordinario" 3/11/2014, published on www.ijeditores.com.ar).

6. *Social security principles (unemployment and pensions)*

6.1 *Injury, illness, and disability*

This topic is based on previous reference to “Medical issues” in Section V.

Health care for players is mandatory and must be provided by employers wherever it is needed due to illness or accident incurred during working duty, as provided by Laws 23660, 23661 and 24557.

In the event of disability caused by a work related accident, compulsory insurance will grant a fixed financial support, plus rehabilitation treatment and medical attention, as set by Law 24557.

In addition to the public health system, football players have right to have medical insurance in accordance with Law 23660 and 23661.

6.2 *Unemployment benefits*

As consequence of their status as dependent employees, professional football players are insured against unemployment. This is only during a transitory and limited period of time and grants a monthly sum of money and free medical insurance. However, it is necessary to point out that the benefit is not proportional to the football player’s income, it being therefore generally of little help.

6.3 *Pension schemes*

The pension system in Argentina is based on a social insurance program for workers and self-employed people. It is funded by employers, employees and the government, which is also in charge of its administration. Retirement age benefit is granted at 60 years of age for women and 65 for men with 30 years’ of contributions. However, there are specific exceptions considered to this, for example, full disability.

There is a subtle difference in pension benefits depending on the worker’s status (employee or self-employed). Self-employed people are only able to apply for a lower benefit amount, whereas employees are granted a full pension scheme in regard to their salary.

In the case of football players, despite their employee status, it has been established that they contribute as self-employed workers. According to Decree 1212/2013, football players are subject to particular a contribution to the pension system, which is based on a reference salary and not on the actual one; and also funded through a percentage of the money involved in transfers and broadcasting. Therefore, retirement benefits for football players become similar to the ones granted to self-employed workers.

6.5 *Club insolvency and player protection*

According to Law 24522 any person or legal entity involved in a bankruptcy procedure must meet stipulated requirements and regulations. In the case of employer insolvency, the majority of worker claims are protected by statutory creditor privilege, even over state and Social Security claims, except for those assets protected by mortgage or similar privilege.

In the case of club insolvency, Law 25284 was enacted in 2000, addressing a special system to prevent sport entity bankruptcies (only for first degree associations such as clubs), in which an Administration Trust is to be created under judicial control.

Under this procedure, clubs with a pending or declared state of bankruptcy but with enough assets to proceed with their activities are eligible for such alternative.

The trust shall be terminated if it is impossible to create enough new income to satisfy the amounts needed for the usual course of business of the entity, or if it is impossible to determine the entire list of beneficiaries in the bankruptcy procedure.

7. *Labour dispute settlement*

From a labour law point of view, disputes between employees and employers are heard and decided by courts. There is no specific institution with competency for sport in such matters. Most of the provinces, as well as the nation, have established a specialized jurisdiction in ordinary justice to deal with individual labour disputes.

The Supreme Court does not usually have jurisdiction in labour disputes. It can, however, hear complaints when a law or decree is challenged on constitutional grounds.

The rules of procedure may vary depending upon the jurisdiction. For instance, in the city of Buenos Aires complaints are mainly in writing, while they are oral in some provincial jurisdictions.

In those disputes held within the jurisdiction of the City of Buenos Aires, there is a mandatory mediation procedure that is to be complied before a claim can be submitted to ordinary justice. Besides that, voluntary arbitration is also available to parties.

Those disputes that arise from the game of football are subject to the Sport Discipline Court at AFA.¹⁹

Conclusion

A better understanding of the football business and the interaction between clubs and athletes is crucial to promoting a proper law-making process as well as the

¹⁹ Delfino, Javier H., *European Sports Law and Policy Bulletin – International and Comparative Sports Justice*, Michele Colucci and Karen L. Jones eds., 2003, 250.

creation of a Court of Sports able to solve disputes regarding transfers, sanctions, and eligibility for the national football team.

Time is critical in this activity, bearing in mind that football players have a short working life, at least at the current idea of a competitive level (a sporting career does not usually go past the age of 40, except for a few cases).

The restriction on nationality should be amended in order to comply with fundamental rights granted by the Federal Constitution.

Social security benefits must be reviewed in order to comply with constitutional principles of universal coverage, based on an equality principle when it comes to contributions.

The proper approach to analyze every aspect of the relationship between professional football players and the relevant club must be from the labour perspective. It must be highlighted that mandatory regulation (as well as those of employment) is also a key factor.

Despite this obvious statement, it should always be kept in mind that football players are employees after all, and they should therefore receive effective protection by the Government.

EMPLOYMENT RELATIONSHIPS AT NATIONAL LEVEL: BELGIUM

by *Frank Hendrickx**

SUMMARY: Introduction – 1. Employment regulation and football structures – 2. Individual employment relations in professional football – 3. Medical and doping issues – 4. Transfer of players – 5. Social security – 6. Labour dispute settlement

Introduction

In Belgium, football is one of the major sports in the country. Not only from the broad public, but also from the perspective of the legal system, football attracts a lot of attention. The famous *Bosman*-case originates from a Belgian legal dispute, like other European sports cases.

Football is practiced at amateur level as well as at professional level. The law follows this distinction to a certain extent. While labour law applies to the employment relationship between club and player in a professional context, there is specific sport legislation, such as the Act of 24 February 1978 concerning the employment contract for sports professionals (the Sports Professionals Act). In the federal system of Belgium, the regions (Communities) are competent for sports. In the Flemish Community, there is a Decree of 24 July 1996 with regard to the status of the non-professional athlete. It applies to athletes who do not qualify as professionals under the Sports Professionals Act. It includes amateur-level football players, even those who obtain remuneration, to the extent that the annual gross remuneration is lower than the threshold referred to in the Sports Professionals Act and which will be discussed below.

1. Employment regulation and football structures

Employment in professional football in Belgium is mainly undertaken in the framework of an employment contract. It means that football contracts are largely dominated by provisions of employment law. A central piece of legislation is the Act of 3 July 1978 on employment contracts (the Employment Contracts Act).

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Furthermore, as has been mentioned above, there is the Act of 24 February 1978 concerning the employment contract for sports professionals (the Sports Professionals Act). By sports professionals is meant those persons who undertake to prepare themselves for, or take part in, a competition or sports spectator event under the authority of another person in return for remuneration exceeding a certain level or threshold.¹ The Sports Professionals Act applies to professional football players whose annual gross remuneration is higher than a certain threshold, as determined by Royal Decree on a yearly basis. With the Royal Decree of 27 May 2014 this threshold is set at a remuneration of 9.400 Euro gross per year for the period of 1 July 2014 until and including 30 June 2015.²

Next to this legislation, there is a practice of concluding collective agreements on football employment in the sectorial Joint Labour Committee n° 223 competent for sports.³ At the time of writing, the collective agreement of 2 July 2013 governs the contract of professional football players and their clubs to the extent that they are regulated by the Sports Professionals Act. This ‘football collective agreement’ is concluded for a limited duration of time and expires after 30 June 2015. It succeeds and replaces previous football collective agreements which are usually concluded for a fixed-term. Since the football agreement is concluded in a Joint Committee which has a national competence in the sports sector, it is applicable in the whole country.

Finally, specific regulations within the football associations apply concerning the status of players and clubs. Professional (but also amateur) football in Belgium is organised by the Royal Belgian Football Association (the RBFA), who was founded in 1895. By adhering to the Royal Belgian Football Association, clubs and players agree to respect the RBFA regulations.⁴ Furthermore, international football regulations, such as the FIFA Regulations, similarly intervene.

It is obvious that labour law provisions interfere with the various specific internal football rules and regulations concerning clubs and players to the extent that they affect the employment relationship or employment rights. It makes the employment contract between club and player, often indicated as the ‘football contract’, a hybrid or double-layered construct. On the one hand, the contract is governed by employment law provisions, while on the other hand it is ruled by the football regulations of the respective national and international football organisation. The general rule, however, is that employment law provisions are of a mandatory nature and hierarchically of a higher rank. Therefore, football regulations governing the contract between club and player, can only apply in so far as they are in accordance with the applicable employment legislation or other mandatory legal provisions.

¹ Article 2 Sports Professionals Act.

² Royal Decree 27 May 2014, *Off. Gaz.* 20 June 2014.

³ This Joint Labour Committee was established by the Royal Decree of 10 August 1978, *Off. Gaz.* 17 October 1978.

⁴ Article 504.1 Regulations Royal Belgian Football Association, http://extranet.e-kickoff.com/project/publiek/reglement/reglement_nl.pdf, consulted on 19 October 2011.

2. *Individual employment relations in professional football*

A. *The employment contract*

1) *Definition*

Under Belgian labour law, an employment contract is defined as a contract whereby a party, the employee, undertakes the obligation to perform remunerated work, under the authority of another party, the employer. This definition can be found in the Employment Contracts Act of 3 July 1978 which gives a definition of the contract of employment. The view is, therefore, that an employment contract is present if the elements ‘work, remuneration and subordination’ are present. It is the latter characteristic, working under the authority and subordination of another party, that distinguishes the employee worker from the self-employed worker, and which will be important in order to determine whether parties are bound by an employment contract or not.

Subordination is a legal concept. It is established by the case law that the mere ‘legal possibility of authority’ of one party over another is sufficient in order for subordination to be present in a given case. It is not necessary that authority should actually be exercised. It is also accepted that a large degree of autonomy of a worker in the performance of his obligations can be reconciled with the existence subordination, if the authority is exercised with regard to the material organisation of the work.

The determination of the presence of subordination is a question of fact and is subject to an extensive amount of case law. The case law has developed over the years and, traditionally, labour courts take a number of objective factors into account. These factors include: the exercise of control and supervision, a reporting obligation, organisation of the economic activity by one of the parties, control over working hours, a requirement to justify presence or absence, or an exclusivity obligation. It is accepted that usually a number of elements indicating towards subordination should be demonstrated for an employment relationship to be present.

Since the seventies, the question has been raised how relevant the qualification of the parties of their agreement should be in the determination of the existence of subordination. This refers to the question whether a court is bound by the qualification of a contract as a civil law based ‘service agreement’, although there are elements that point in the direction of a subordinate relationship. The traditional view is that a court is not bound by the parties’ qualification if, in the execution of the contract, the facts demonstrated elements that referred to an employment contract. This gives the court the possibility of re-qualification of the contract.⁵

⁵ Cf. W. Rauws, ‘*De kwalificatie van de (arbeids)overeenkomst*’, *J.T.T.* 2006, 93.

The court's possibility of requalifying an agreement into an employment contract, has been made more difficult since a judgment of the Supreme Court (*Cour de Cassation*) of 23 December 2002.⁶ In this judgment, the Supreme Court states "that, in case the parties have given a qualification to their agreement, the judge deciding on the facts, cannot substitute this by another qualification, if, on the basis of the factual elements presented to him, it is not possible to exclude the qualification given by the parties".⁷ The Supreme Court has repeated its case law several times.

A recent Programme Act⁸ of 27 December 2006⁹ contains a chapter on the 'regulation of the employment relationship'. It contains measures against so-called 'fake self-employment', i.e. situations whereby persons qualify their employment relationship as a service contract while in reality they are working in a subordinate relationship. The 2006 Act codifies the case law of the Supreme Court. The Act also enumerates the fundamental criteria allowing an employment contract to be distinguished from a self-employed relationship. Finally, the Act provides for a 'ruling commission' to which parties can refer to for an administrative ruling on the nature of the employment relationship.

Article 333, §1 of the Programme Act of 27 December 2006 provides that the general criteria that make it possible to assess the presence or absence of a subordinate relationship are: the intent of the parties as it is expressed in the agreement; the freedom to organize working time; the freedom to organize the work; the possibility to exercise hierarchical control.

In practice, there is few doubt in Belgian labour law that professional football players are to be considered as employees and their clubs as employers.

2) *Fixed-term contract*

Belgian employment contract law knows two kinds of contracts according to their duration: contracts for an indefinite period and contracts for a fixed-term.¹⁰ Belgian employment law considers 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 a rule, in practice, contracts with professional football players are fixed-term contracts of employment.

In this context, the relationship between the Professional Sports Act and

⁶ Cass. 23 december 2002 (N° S010169F), *J.T.T.* 2003, 271; *Or.* 2003, afl. 4, 2.

⁷ "Attendu que lorsque les parties ont qualifié leur convention le juge du fond ne peut y substituer une qualification différente lorsque les éléments soumis à son appréciation ne permettent pas d'exclure la qualification qui avait été donnée par les parties".

⁸ This is an Act that contains a regulation of various subjects which do not necessarily show a connection.

⁹ *Off. Gaz.* 28 December 2006.

¹⁰ Article 7 Act of 3 July 1978 (Employment Contracts Act), *Off. Gaz.* 22 August 1978.

the Employment Contracts Act is at issue. The Professional Sports Act supports the use of a fixed-term contract, still leaving the possibility to conclude a contract for indefinite term in professional sports as well, but prohibits long-term fixed-term contracts. According to the Sports Professionals Act, if the contract is concluded for a fixed-term, the contract can only be concluded for a maximum period of five years, although is renewable.¹¹

The football collective agreement of 2 July 2013 applicable to professional football players, repeats the rule that contracts can only be concluded for a maximum duration of 5 years. It also adds a minimum duration for the contract. The minimum contract period should be a contract term which runs until the end of the season (30 June) during which the contract was signed.¹²

A fixed term contract of employment 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.¹³ However, it must be noted that some collective 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.

3) Contract in writing

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.¹⁴ 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.¹⁵ 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 Supreme Court, impossible to conclude a fixed-term contract for that work.¹⁶

The Sports Professionals Act repeats, at least to a certain extent, the general employment law provisions and 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 sports professional concerned. Failing a written contract meeting these requirements, or if one exists but no copy had been handed to the sports professional, the provisions of contracts concluded for indefinite period shall apply.¹⁷ It would appear from this provision that the Sports Professionals Act imposes less strict obligations to

¹¹ Article 4 Sports Professionals Act.

¹² Article 13 collective bargaining agreement of 2 July 2013.

¹³ Article 9 Employment Contracts Act.

¹⁴ Article 9 Employment Contracts Act.

¹⁵ Article 9 Employment Contracts Act.

¹⁶ Supreme Court 7 December 1992, *RW* 1992-93, 1375; Supreme Court 20 September 1993, *Soc. Kron.* 1994, 30.

¹⁷ Article 4 Sports Professionals Act.

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.

4) Flexibility

According to the 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.¹⁸ However, 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.¹⁹ It would thus seem that the Sports Professionals Act has a more flexible approach.²⁰

5) White and blue collar workers

According to the Act of 24 February 1978 (*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.²¹

The distinction between white-collar and blue-collar workers has historical origins. Although the distinction has become less relevant in Belgian employment termination law, it is still present in the current Employment Contracts Act of 3 July 1978. Also collective bargaining practices and institutions have been developed separately for blue-collar and white-collar workers. A white collar worker is defined as an employee who mainly performs manual work. A blue collar worker is defined as an employee who mainly performs intellectual work.²²

The distinction has raised many legal disputes and it is commonly accepted that it is not an objectively justified distinction anymore to distinguish employees with regard to employment protection. Since the distinction is partly based on or confirmed by the Employment Contracts Act, there has been a problem under the Constitution in view of the equality principle. One of the most important differences between the two categories of workers concerned the protection against dismissal.

The issue was referred to the Constitutional Court for the first time in the

¹⁸ Article 4 Sports Professionals Act.

¹⁹ Articles 10 and 10bis Employment Contracts Act.

²⁰ Cf. O. Vanachter, *De vrijheid van contracteren* in F. Hendrickx (ed.), *Fundamentele rechten van de sportbeoefenaar*, Leuven, Peeters, 1996, 36.

²¹ Article 3 Act of 24 February 1978 relating to contracts of employment for sports professionals, *Off. Gaz.* 9 March 1978.

²² Article 2 and 3 Employment Contracts Act.

early nineties. However, only in a landmark decision of 7 July 2011 the Constitutional Court²³ held that the legislative norms providing for different notice periods violate the constitutional equality principle. The Court nullified the relevant provisions of the Employment Contracts Act. The legislator interfered with the adoption of the Act of 26 December 2013 concerning the unified status between white collar and blue collar workers. There is still debate about the consequences of the decision of the Constitutional Court and the question whether the legislator has correctly and timely reacted to it.

The relevance of the discussion for football contracts is, however, limited. As will be explained further, the termination of the employment contract is subject to specific rules under the Sports Professionals Act. Nevertheless, also the provisions of the Sports Professionals Act are under discussion in light of the Constitution, as will be discussed further in this contribution.

6) Constitutionality of the Sports Professionals Act

In light of the constitutional discussion regarding white collar and blue collar workers, questions arise whether the legislator can still define (other) different categories of workers to which deviating legal regimes would be applicable. In light of this, a recent employment case has dominated the legal debate in the football world. The case is known as the so-called *Dahmane*-case. The case will be explained below.

B. Rights and obligations

The rights and obligations of the parties to the football contract is self-evidently a matter of negotiation of the parties. However, both the legislator as well as the Football Collective Agreement have provided for specific conditions that are applicable to the football employment contract. A few examples are discussed hereafter.

1) Protection of minors

According to the Sports Professionals Act, a professional (football) contract can only be concluded after the end of the age at which a child needs to go to school on a full-time basis. This means that a professional contract can only be concluded in principle as from the age of, depending on the school situation, 15 or 16.²⁴

²³ Constitutional Court 7 July 2011, *JTT* 2012, 1, annotated by JOASSART, P.

²⁴ The contracting age of 15 is dependent on the schoolpath that the child has followed. If the child did not yet pass his first two years of the secondary school, the contracting age is 16 (cv. Law on school obligation of 29 June 1983, *State Gaz.* 6 July 1983).

2) *Remuneration*

The collective bargaining agreement for professional football of 2013 provides that the salary of a professional football player is composed of the fixed monthly salary, match premiums, other contractual payments, as well as advantages in kind such as the private use of a car or a dwelling.²⁵

The collective bargaining agreement provides for various conditions with regard to pay.

3) *Non-compete clause*

Non-compete clauses in the employment contract with a sports professional are considered to be null and void. However, when the contract is terminated by the club for serious cause, or by the player without serious cause, the player will not be able to take part in a sport competition in the same series, category or division, during the current season.²⁶

4) *Option clause*

The option clause is a contractual provision that is specific to the football sector. The Football collective agreement provides that unilateral option clauses are not valid. However, according to this collective agreement, the option clause is not considered to be unilateral under certain conditions.²⁷

For example, the option clause must be agreed upon in writing and must be drafted for every employee individually at the latest on the moment of his entry into service, and it must form an integral part of the contract. The option clause must also provide for the duration, the maximum duration for using of the option, and the applicable salary increase, or refer to the applicable collective agreement for this.

The option clause, when used by the other party, must go along with a salary increase of at least 15% of the fixed remuneration and 5% of the match- or selection premium, or 20% of the fixed remuneration, whereby the increase does not need to exceed the amount of 20.000 Euro.

C. *Termination of a fixed-term professional football player contract*

1) *Introduction*

As is the case in common Belgian employment law, when an employment contract is concluded for a fixed term, the expiry of the term automatically terminates the

²⁵ Article 7, Collective Bargaining Agreement of 2 July 2013.

²⁶ Article 8, Sports Professionals Act.

²⁷ Article 15, Football collective agreement.

contract which means that there is no need to give prior notice before the expiry date. So, when the contract is ended because of the expiry of the contract, no compensation is due and the player is free to leave the club.

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.

The Sports Professionals Act provides that if a contract has been concluded for a fixed term, its termination before the date of expiry of the contract without serious grounds shall give the disadvantaged party the right to compensation.²⁸

2) Termination without cause

a) Compensation for breach: the principles

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, as determined by Royal Decree of 13 July 2004.²⁹

This Royal Decree of 2004 fixes the compensation at a certain number of months' remuneration depending on the yearly remuneration of the professional football player and on the moment on which the contract was terminated.³⁰ 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.

Month's remuneration when a contract concluded for indefinite term is terminated under the Sports Professionals Act:

Yearly remuneration (amounts applicable as from 1 May 2011)	Termination during the first 2 years of the contract	Termination after the first 2 years of the contract
< 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

²⁸ Article 4 Sports Professionals Act.

²⁹ Article 4 Sports Professionals Act.

³⁰ Article 1 Royal Decree of 13 July 2004 on the fixation of the amount of the compensation aimed in article 5, 2nd paragraph of the Act of 24 February 1978 relating to contracts of employment for sports professionals, *Off. Gaz.* 3 August 2004.

The amounts seem to be fixed at a rather high level. Nevertheless, there are various reasons why this legislation is not widely applied in football practice, although it plays a role in the negotiations when a player transfer is envisaged before the end of the contract. In the first place, there is a commitment of clubs and players not to use the Sports Professionals Act in order to force the premature termination of the contract. Article 13 of the collective bargaining agreement for professional football provides that the parties engage themselves to not cause any premature termination of the football contract, unless in cases of justified reasons. In the second place, football regulations of FIFA play a role. These regulations not only determine that compensation for breach of contract shall be calculated with due consideration for the law of the country concerned, but also provide for sporting sanctions. In so far as the FIFA regulations deviate from the Sports Professional Act or from the Employment Contracts Act, however, its provisions cannot be applied, at least not to the detriment of the player, due to the mandatory nature of these two Belgian acts. A third factor is that in practice, parties seek a negotiation when the player or the club wish to terminate the employment contract prematurely, certainly when a transfer is envisaged which is desired by player and/or club. The negotiated sum for damages for the club who sees the player leave in this case, is most of the time not connected (and much higher) than the amounts provided in the Sports Professional Act.

Notwithstanding these findings, a recent Belgian case, referred to as the *Dahmane*-case, has complicated the matter.

b) Compensation for breach: the Dahmane case

The *Dahmane*-case¹ has caused quite some debate in the football world and the public media in Belgium. It still remains to be seen what the exact consequences of the decision are with regard to the termination of football contracts and players transfer issues.

The case is concerned with Mr. Dahmane, a professional football player in Belgium employed by football club Racing Genk, which is playing in the first league. The employment contract was concluded for a fixed term for the period 1 July 2007 until 30 June 2011. Seen the remuneration and the nature of the contract, the employment relationship was covered by both the Employment Contracts Act as well as the Sports Professionals Act. On 28 January 2008, the football player terminated the contract unilaterally without just cause. The club subsequently, claimed an indemnity based on the provisions of the Sports Professionals Act and, more in particular, determined on the basis of the Royal Decree of 13 July 2004.

On 6 May 2004, the Labour Court of Antwerp, deciding in the case on appeal, concluded that the rules on dismissal for sports professionals are not in conformity with the Belgian Constitution and, therefore, cannot be applied.

³¹ Labour Court of Antwerp, Division Hasselt, 6 May 2014, A.R. 2009/AH/199.

The Labour Court of Antwerp reasons that the application of the Royal Decree of 13 July 2004 would mean that a player who terminates his contract prematurely, would need to pay the sum of 36 months of salary to his club as damages for breach of contract. The Court finds that in normal dismissal law for regular employees, an employee would in a similar situation only be liable to pay a sum of 12 months of salary to his employer as damages. The Court questions whether such difference between a professional football player and other employees on the labour market, can be reasonably justified in light of the equality principle laid down in the Constitution. The Court is of the opinion that there may be specific characteristics proper to the field of sports that may be different from the regular work environment or from regular employment relations. The Court also finds that the avoidance of unfair competition and contract stability are legitimate aims in the sportsector requiring specific measures. However, the Court finds that the provisions of the Royal Decree of 13 July 2013 are in no way proportionate to these aims.

As there is no official doctrine of precedence in Belgian case law, the *Dahame*-judgment remains limited to the particular case. Other courts may thus decide otherwise. The decision nevertheless represents an important mark in Belgian sports law.

3) *Termination for serious cause*

In general, an employment contract in Belgium can only be terminated by either party without notice or compensation in cases of serious fault and when strict procedural rules are respected. According to the Employment Contracts Act, a serious fault is a fault that makes the continued working relationship between the employer and the employee ‘immediately and definitely’ impossible.³² Since no further specific rules exist in the Sports Professionals Act, termination for serious fault as set out in the Employment Contracts Act is the only possibility to terminate the contract immediately without compensation.

Article 13, § 3 of the national football collective agreement of 2 July 2013 provides that the parties agree not to terminate 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...”. It is evident that the reconciliation commission cannot make a binding decision.

3. *Medical and doping issues*

Professional football is covered by the provisions of the anti-doping legislation in Belgium. Since sport is a regional competence, the matter is regulated by the various Communities in the country. It concerns: for the Flemish Community, the Anti-doping Decree of 25 May 2012;³³ for the French-speaking Community: the

³² Article 35 Employment Contracts Act.

³³ *Off. Gaz.* 12 July 2012.

Anti-Doping Decree of 20 October 2011;³⁴ for the German-speaking Community: Anti-Doping Decree of 16 January 2012;³⁵ For Brussels Capital, there is the Ordonnance of 21 June 2012 concernign the promotion of health in the context of sport activities, the prohibition and prevention of doping.³⁶

All the legal initiatives have the purpose of being in conformity of Wada's World Anti-Doping Code and the definition of doping as well as the system of sanctioning of the World Anti-Doping Code is followed.

4. *Transfer of players*

Three relevant legal sets of legislation need to be mentioned in the context of players' transfers, besides those mentioned above.

1) *Employment of foreign players*

First of all, the rules regarding employment of foreign players is relevant. Since Belgium is a member state of the European Union, the legal provisions and principles regarding the free movement of workers applies with regard to transfers, at least within the European Union territory and/or when they concern European Union citizens. The employment of football players in Belgium with the nationality of a member state of the European Union is indeed subject to the Treaty on the Functioning of the European Union (TFEU) and the rules on the freedom of movement.³⁷ Football players with EU citizenship will thus have access to the Belgian labour market and will be treated in the same way as Belgian citizens. Furthermore, the employment of foreign Football players from outside the EU might be able to fall back on an association agreement with the European Union. This may cover equal treatment rights with EU nationals, but would most likely exclude access to the labour market when entry is sought from outside the EU. This is then a matter of national legislation.

The relevant national legal provisions in Belgium for the employment of foreign football players from outside the EU relate to the Act of 30 April 1999 concerning the employment of foreign employees³⁸ and the Royal Decree of 9 June 1999.³⁹ This legislation provides for the need to obtain a work permit in order to be legally employed in Belgium. The general principle is that there is a labour market test before a work permit is being issued. It means that a work permit is only provided when it is not possible to find, within a reasonable period of time, employees on the labour market who are suitable to occupy the vacant position in

³⁴ *Off. Gaz.* 16 December 2011.

³⁵ *Off. Gaz.* 16 March 2012.

³⁶ *Off. Gaz.* 5 July 2012.

³⁷ Article 145 TFEU.

³⁸ *Off. Gaz.* 21 May 1999.

³⁹ *Off. Gaz.* 26 June 1999.

a satisfying manner.⁴⁰ However, for sports professionals, such as professional football players,⁴¹ an exceptional regime exists. A work permit can be issued for this category of workers in so far as their remuneration in Belgium is not lower than eight times the threshold remuneration provided for according to the Sports Professionals Act. Since this threshold remuneration of the Sports Professionals Act is set at 9.400 Euro gross per year (see above) for the period of 1 July 2014 until and including 30 June 2015,⁴² a non-EU foreign football player must earn at least a remuneration of 75.200 Euro gross per year.

2) *Players' agents*

In the second place, players' transfers involve players' agents. These agents, taking into account their activities, are qualified as labour market intermediaries and will be subject to regional legislation in Belgium. The three Belgian Communities with competence over this area have regulated various forms of employment intermediation in the past, such as temporary work, recruitment and outplacement. They had to be revised in the shadow of the Services Directive 2006/123/EG of 12 december 2006. Since only temporary agency work was excluded from the scope of the European Union Services Directive, the provisions regarding labour market intermediaries, such as players' agents, were adapted.

In Flanders, the matter is governed by a Decree of 10 december 2010 concerning private employment mediation.⁴³ This decree covers temporary work, as well as various forms of private employment intermediation services or employment finding services, i.e. private employment agencies understood in the broad sense. The Flemish regulation is only applicable in the Flemish Region, which excludes the Walloon and Brussels Region. The Decree of 10 december 2010 has been further implemented in a Decision of 10 december 2010.⁴⁴ There is no system of a license of permit, but various conditions need to be met, such as, not being in a state of bankruptcy or being subject of bankruptcy proceedings, as managers having the authority to commit or to represent the company, fulfilling all duties with regard to taxes and social security; no organising of employment contrary to public order or contrary to social or tax legislation; considering all employees in an objective, respectful and non-discriminatory manner.

For the Walloon Region, the rules are laid down in the Decree of 3 April 2009⁴⁵ and the Decision of the Walloon Executive of 30 April 2009⁴⁶ and of 10 December 2009.⁴⁷ The requirements are similar to those in the Flemish Region.

⁴⁰ Article 8 Royal Decree 9 June 1999.

⁴¹ At least when they fall under the Sports Professionals Act (cf. art. 1, 11% Royal Decree 9 June 1999).

⁴² Royal Decree 27 May 2014, *Off. Gaz.* 20 June 2014.

⁴³ *Off. Gaz.* 29 December 2010.

⁴⁴ *Off. Gaz.* 29 December 2010.

⁴⁵ *Off. Gaz.* 5 May 2009.

⁴⁶ *Off. Gaz.* 25 May 2009

⁴⁷ *Off. Gaz.* 21 december 2009.

For the Brussels Region, the rules are laid down in the Brussels Decree of 14 July 2011⁴⁸ and the Ministerial Decision of 12 July 2012.⁴⁹ The conditions are similar to those in the other regions.

3) *Hiring of football players*

A third relevant set of rules concerns the ‘hiring’ of football players. According to the Belgian Act of 24 July 1987 on temporary work and the putting of workers at the disposal of users,⁵⁰ it is, in principle, prohibited to hire employees to a third party (a ‘user’), whereby the latter uses the employees for performing professional activities to its benefit, while the third party is exercising any part of the so-called “employer’s authority”, meaning supervision and authority, over the employees that are hired in. If no employer’s authority is delegated or transferred, the principal prohibition of leasing of personnel will not apply.

The principal prohibition concerns *any* transfer of the employer’s authority over the employees concerned. So, the user (the employer who hired in the worker) cannot integrate the hired employee too much in its own activities, as this could imply the transfer of at least part of the supplying employer’s authority. These principles mean that, in practice, the hiring of staff without the possibility for the user to exercise authority may not be very useful in a professional football context.

Nevertheless, an important legal development has taken place. More flexibility in staff leasing operations has been created since a legal reform in the year 2000. The legislator has defined the notion of “employer’s authority” in the Act¹ in a rather strict way. The user (the employer who hired in the worker) will be deemed not to exercise authority over a hired worker if the instructions that are provided remain limited to what is needed for the execution of the agreement that has been signed with the real employer (i.e. the employer who hired out the worker) of the worker. However, it still implies that the user of the worker cannot exercise authority with regard to the worker’s salary, career planning, the application of disciplinary sanctions or termination of the employment contract.

If the leasing of personnel leads to a delegation of the employer’s authority to the user, strict formalities must be fulfilled. If these formalities are not met, there will be an illegal leasing of personnel which may amount to severe sanctions. However, exceptions have been made.

The hiring out of a worker is allowed, with a transfer of the employer’s authority to the user, if it concerns a hiring out for limited duration and if the conditions followed in article 32 of the Act of 24 July 1987 are followed. These conditions provide that there should be either prior approval of the competent social inspectorate in Belgium (which is only given if the trade union has also

⁴⁸ *Off. Gaz* 10 August 2011.

⁴⁹ *Off. Gaz.*, 1 October 2012.

⁵⁰ Article 31 §1, 1st section of the Act of 24 July 1987.

⁵¹ Article 31 § 1, 2nd section of the Act of 24 July 1987.

agreed with the hiring out), or a notification to the social inspectorate. Notification instead of approval can only be accepted if the hiring out takes place within the context of a co-operation between affiliated businesses of the same economic and financial group, or for the performance of a short specialised assignment requiring special professional skills. In the latter mentioned situations, the social inspectorate must be informed at least 24 hours in advance, and a written contract between the employer, the employee and the user must be signed. Even in the context of these legal exceptions, the question remains whether the hiring out of football players can be easily reconciled with these conditions of the Act of 24 July 1987.

The football collective agreement provides that hiring out should only be used according to the procedures provided in article 32 of the Act of 24 July 1987, with the following further conditions:⁵²

- the hiring out is only possible for the duration of one season;
- a three-party agreement must be drafted and signed;
- the agreement of the trade union is only valid when at least two of the three representative unions have given their agreement;
- there can be no hiring out during a period of suspension of the contract.

5. *Social security*

1) *Principles*

Social security in Belgium covers various sectors and rules with regard to sickness, invalidity, work accidents and occupation diseases, unemployment, pensions and family allowances. The Sports Professionals Act of 24 February 1978 was originally conceived to provide a full regulation of the social status of sports professionals, including social security. However, when the Act was adopted, only some aspects of the employment relationship were regulated. The Sports Professionals Act has left the matter of social security to the government who can make specific regulations through Royal Decree.⁵³

For the social security protection of the sports professional, the general social security legislation remains largely relevant, but with some specificities. The specific position of the professional football player in social security is the result of the (complex) interplay between various acts.

2) *Social security coverage*

To the extent that football players are employees, the general Social Security Act of 27 June 1969 for employees is applicable.⁵⁴ This is confirmed by the Act of 3 March 1977 concerning the application of social security legislation to professional

⁵² Article 25 of the Football Collective Agreement.

⁵³ Article 10, Sports Professionals Act.

⁵⁴ Art. 1, §1 Social Security Act, *State Gaz.* of 25 July 1969.

football players (the Football Player Social Security Act).⁵⁵ The Act explicitly provides that the general Social Security Act for employees is applicable to football players and clubs in so far as the employment relationship falls under the Sports Professionals Act.

As for other sports professionals in certain sectors, however, specific exemptions or specific rules have been created for football players in the Social Security Decree.⁵⁶ This specific regime is based on the Social Security Act and the Sports Professionals Act, which both allow for such specific social security rules with regard to sports professionals, such as professional football players. It is furthermore confirmed by the Football Player Social Security Act.

The principle is that sports professionals are subject to all sectors of social security protection, such as sickness, pensions and unemployment benefits. Article 6, section 2 of the Social Security Decree provides that the rules regarding annual holiday for employees is not applicable to sports professionals. This is perhaps a questionable provision, since it is not evident to see annual holiday as a (pure) social security issue, as it is governed by employment laws and regulations.

Sports professionals are also covered by the legislation on work accidents. The Act on Work Accidents of 10 April 1971 provides that it is applicable to employees who fall wholly or partly under the Social Security Act.⁵⁷ Nevertheless, a Royal Decree of 10 August 1987 provides for specific rules and deviations for sports professionals, with the exception of professional cyclists.⁵⁸ There are, for example, deviations with regard to the determination of the insurance premium.

3) *Social security contributions*

Social security contributions in Belgium are due to the federal social security administration and are in principle determined on the basis of the remuneration of the employee. There is normally an employee contribution of 13,07% and, in addition, an employer contribution of about 32% of the remuneration. It is the employer who bears the responsibility to deduct the contributions from the salary and provide for the payment to the social security administration.

There is, however, an exception for sports professionals. For this category of workers, the social security contributions are calculated on a lump sum basis.⁵⁹ The calculation of the contribution is not based on the real remuneration but on the national minimum wage. This has as a result that the contributions are low, but also that the social security benefits are at a minimum level.⁶⁰

⁵⁵ *Off. Gaz.* 17 March 1977.

⁵⁶ Royal Decree of 28 November 1969, *Off. Gaz.* 5 December 1969.

⁵⁷ Article 1 Work Accidents Act of 10 April 1971.

⁵⁸ Koninklijk besluit van 10 augustus 1987 houdende vaststelling van de bijzondere regelen in verband met de toepassing van de arbeidsongevallenwet van 10 april 1971 op de sportbeoefenaars (*Off. Gaz.* 26 August 1987).

⁵⁹ Article 2 Sports Professionals Act.

⁶⁰ An Act of 15 May 2007 has improved this slightly for the unemployment benefits of the sports

In light of this, it has to be noted that as for pensions is concerned, a specific pension insurance scheme for football players is set up. The scheme is financed by employers (clubs) contributions. The pension arrangement is supported by favourable legal conditions under the Act of 28 August 2003 on pension schemes, which provides that the football player can take up his pension at the age of 35, if he terminates his sports activities, in a low tax regime.⁶¹

6. *Labour dispute settlement*

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.⁶²

These legal provisions do not prevent the fact sports arbitration is not uncommon. The internal bodies of the football association, both nationally and internationally, are used for disputes regarding the status of players and clubs. However, access to the ordinary courts is also used. Since professional football players are considered to be employees, most employment disputes would arrive before the labour tribunals and the labour courts (in appeal).

professional; *State Gaz.* of 30 August 2007.

⁶¹ *Off. Gaz.* 15 May 2003.

⁶² Labour Court of Appeal Antwerp 7 September 1994, *Sportrechtspraak*, 6.2 nr. 21, Maeschalck, J. e.a.

**EMPLOYMENT RELATIONSHIPS AT NATIONAL LEVEL:
BRAZIL**

by *Leonardo Andreotti Paulo de Oliveira**

SUMMARY: Introduction – 1. Employment regulation and football structures – 2. The professional athlete and professional sport – 3. Individual employment relations in professional football – 4. Medical and doping issues – 5. Transfer of players – 6. Insurance – 7. Settlement of employment disputes – Conclusion

Introduction

Sports Law, as part of so-called “new rights”, quickly achieved a global dimension. Perhaps due to the very dynamic nature of sport itself, the standardization of its rules has become one of the most international of international activities. In this respect, Professor João Leal Amado has described the “*sportification of the planet*”, in highlighting the presence of this activity around the world, and asserted that “*its absence in contemporary life is simply unimaginable*”.¹

This internationalization was in some respects responsible for the growth of Sports Law globally, since each country regulates sport in its own way, in accordance with the laws and constitutional principles of the nation. The interesting thing about this phenomenon is that it has created an abundance of comparative allowing national legal systems to assist those of other countries, especially in the area of integration and interpretation of the rules, because sport is an activity that is largely equal in all corners of the world, regardless of location.

Considering the importance of comparative study, it is our task to explore and comment on the quirks and nuances of Sports Law and Sports Employment in

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¹ Melo Filho, Álvaro. *Nova Lei Pelé: avanços e impactos*. Rio de Janeiro: Maquinária, 2011, 28.

Brazil, in order that, where appropriate, it may become an object of study and even a model for building an innovative system in territories where this branch of law is not present and to aid in the integration and interpretation of the rules where it is in the process of developing.

1. *Employment regulation and football structures*

Sport, with the passage of time, ceased to remain a leisure activity, and instead, was transformed into a “business”. Thanks to enormous popular interest in the sporting spectacle, the amateur and comparatively innocent practice of sport as a pastime has evolved, even to the point where the Olympic Movement, which for so long acted as a defender of “amateurism”, could not avoid imminent “professionalism”.

In discussing the Olympic Games of the modern era, Portuguese scholar, Alexandre Miguel Mestre (2008),² said “*there was long a discussion around the concept of amateur athletics, a quality required for an athlete to be considered eligible to participate in the Olympic Games.*” However, as Mestre goes on to state, the situation would clearly change some time later, but even back in 1976, it was heralded as a new era in sport, especially when pitted as Amateurism versus Professionalism.³

What is certain is that the interest in and popularity of sports activities led to the inevitable professionalization and with it, the prevalence of the business aspect over all other aspects of sport so that it “*progressively involved more variables related to business, so that 3% of world trade is now related to sport and it has become one of the most valued consumer products in the world, with state and international regulations increasingly focussed thereon*”.⁴

Thereafter national and international standards, respectively characterized as Normative Laws and Acts issued by the State, and private Statutes and Regulations issued by international sports bodies, represented mostly by the International Federations, were enacted, especially those aimed at the protection of performance artists and workers who take part in competition whilst at work and work whilst competing, rather than just taking part in activities socially.

Moreover, the protection of the right to employment and particularly the free movement of workers, initially within the framework of the European Union, was brought to the fore with the European Court of Justice’s decision in the case of the Belgian professional footballer Jean Marc Bosman, in 1995. The Bosman ruling, a famous decision which shook private sports clubs in Europe, drew attention to a

² Mestre, Alexandre Miguel. *Direito e Jogos Olímpicos*. Coimbra: Almedina, 2008, 117.

³ From 1976, the legislature began to be less restrictive in relation to the notion of “amateur athlete”. Indeed, even if Rule 26 of the International Olympic Committee Eligibility Rules continued to demand that the athlete could not receive any benefit or payment in kind, under threat of being ineligible, the legislature made an exception, annexing a list of situations in which the athlete could still be considered as an amateur, despite being paid.

⁴ Melo Filho, Álvaro. *Nova Lei Pelé: avanços e impactos*. Rio de Janeiro: Maquinária, 2011, 29.

new era in Professional Sport, and brought about significant changes in the Brazilian sports scene, notably with the demise of the “retain and transfer” system”,⁵ hitherto operating under Law 6354 of 1976, known as the “Pass Law”.

The well respected Brazilian jurist Alvaro Melo Filho (2011) argued in his work,⁶ the New Pelé Law, that the end of the “retain and transfer” system occurred with the entry into force of Law 9615 of 1998, known by many as the Abolitionist Law of Athletes, who previously had been the property of the clubs, thereafter were “trapped” at their own volition, bound by their own will to their representatives, since the agreements with agents/entrepreneurs meant, in general, simply an exchange of masters, where the ownership of athletes changed hands from clubs to another form of “paymaster”.

Melo Filho, sensitive to the problem experienced, cites the Portuguese expert, Leal Amado, for whom *“the player is a person, not a commodity; a subject, not an object; paid to play and to work, not to be subject to speculative business transactions.”*

The prestigious Pelé Law,⁷ besides innovating with the extinction of the retain and transfer system already discussed, introduced the new general rules on sport in Brazil. Special attention was given to Professional Sports, including a constitutional requirement of separation between amateur and professional, as required under Article 217 of the Constitution of the Federative Republic of Brazil.⁸

2. *The professional athlete and professional sport*

Before entering into the subject more fully and turning to the concepts of the Brazilian legislation, analysing the issues important to lawyers and technicians attached to the Ministry of Sport, we will briefly consider the relevant constitutional

⁵ Law 6.354/76 - Article 11, “This means that to transfer the sums due from an employer to another upon the transfer of the athlete during the term of the contract or after its termination, the relevant sporting rules must be observed”.

⁶ “The registration of professional footballers, which previously belonged to clubs, passed into the “ownership” of the agents who, in most cases, “appropriated” the athletes as if they were a “cash cow”, inducing them to become mercenaries and acting as true sports middlemen in this “Wild West” trade in athletes, operating without limit after the introduction of Pelé Law, where “money was passed around more than the ball”. This is no exaggeration, as can be seen from the daily sports media bulletins referring to the fees for which players are “loaned”, “sold” or “swapped”, or categorizing them as an “asset” or part of the “equity” of the club. Thus, where before the players were “slaves” of the clubs, today, the clubs have become “slaves” of agents and investors. i.e., with the “abolitionist” Pelé Law, athletes were “free” of post-contractual ties with the clubs, but instead, became “chained” to businessmen and sports agents ...”.

⁷ It is interesting to note that although Law 9.615/98 takes the name of the King of Soccer and Athlete of the Century, Edson Arantes do Nascimento, better known as “Pele”, the mention of his name was a mere tribute, since, at that time, the former athlete occupied the position of Extraordinary Minister of Sports, which does not mean he had any involvement in drafting the statute.

⁸ Article 217. It is the duty of the State to foster both formal and informal sporting activities, such as the right to each of the following: (...) III - Differential treatment for professional and non-professional sport; (...).

principles and the concepts of “professional sport” and “non-professional sport”.

Part of the doctrine seeks to contend that it is not possible to consider sport as professional or non-professional, since professionalism is directly connected to the practice or the player, and for obvious reasons, the playing of a sport, such as football, can be practiced in a professional manner or amateur, and therefore may never be considered, a priori, solely a professional sport.

The Secretary General of the Committee of Sports Law Studies at the Sports Ministry and former President of the Brazilian Institute for Sports Law, Luiz Felipe Santoro (2011), concurs with this assertion when dealing with professional sports under Brazilian law.⁹

It should be clarified that the legal concept of professionalism in sport is defined by the General Law on Brazilian Sport, i.e. Article 28,¹⁰ of Pelé Law. The professional practice of sport is considered to occur upon receipt, by the professional athlete, of the remuneration agreed under a Special Sports Employment Contract, which must be signed by him and a given sports entity, in other words, a football club. Therefore, only an athlete who enters into a Sports Employment Contract with a sports entity is considered a professional.

An interesting point regarding professionalism, which is of fundamental importance, is set out in Articles 43 and 44 of Pele Law. These Articles prohibit the participation of non-professional athletes over the age of twenty (20) years in professional sports competitions, and the professionalization of athletes under sixteen (16) years of age, which, therefore, gives a young athlete the option of turning professional from the age of 16.

Despite the clarity of the law, when considering whether athletes are professional or not, there is an important caveat, in that the Employment Tribunals, where appropriate, may recognize a professional employment relationship even in the absence of a Special Sports Employment Contract signed by the parties. This is due to the Employment Law principle allowing recognition of an implied contract in circumstances where the existence and presence of the necessary elements of the employment relationship can be demonstrated in practice. These requirements include elements such as subordination, the obligation to perform duties on a habitual basis and the requirement of personal provision of labour, and will be sufficient to signify an employment relationship between the parties, regardless of the existence of a written contract.

⁹ Santoro, Luiz Felipe Guimarães, *Professional Sport in the Brazilian Legal System*. Brazilian Journal of Sports Law. Sao Paulo: RT 2011. Volume 20., 116. “Whereas the sport of football can be practiced in a non-professional way, for example, in a game played by athletes in the under-15 category that does not allow participation of professional athletes, the football played would technically be non-professional. Thus, one cannot say that a particular category is professional or non-professional because what defines this characteristic is the situation of the athletes that compete, not the sport itself”.

¹⁰ Art. 28 da Lei 9.615/98. “The activity of the professional athlete is characterised by the remuneration agreed in the special sports employment contract concluded with the sports club, and which must include ...”.

3. *Individual employment relations in professional football*

3.1 *The so-called Special Sports Employment Contract*

Although sport in general, and football in particular, have their specificities, the Special Sports Employment Contract of the professional athlete with a sports club, is an agreement like any other, regardless of the “special” title, inserted into the legislation to honour and highlight the importance of sport in the country. Sport has a power like no other to mobilize an entire nation, especially in international competition where nationalism is accentuated and economic and social boundaries disappear.

In the words of the great jurist, Alvaro Melo Filho, sport is “*an irreplaceable and necessary factor for the full development of human personality and for the progress of peoples who unite together and do not separate, and, when playing or racing, the sociocultural differences disappear because in the sports fields and arenas there is no distinction between the investment banker and the cashier, the aristocrat and the labourer*”.¹¹

The sporting relationship established between the contracting parties is, like its name, somewhat special. Therefore, it is asserted that its different treatment, in accordance with Law 9.615/98, as amended by Law 12.395/11, is appropriate, leaving the general and common standards of Employment and Social Security Law a mere subsidiary, only to be applied when consistent with the well-known and celebrated sport specific legislation.

We can see the first difference between sports contracts and common employment contracts in Article 28 of this Law. Although not expressly stated here, sports employment contracts must be in written form, whereas generally employment contracts are free to take different forms and can be inferred from actual performance where there is an informal agreement between the parties, freely entered into, and the basic requirements of an employment relationship, as discussed above, are present. The legislation provides that the activity of the professional athlete is characterized by the remuneration agreed between the parties and the written Employment Contract, an instrument which must include termination clauses, predetermined and established for the benefit of the athlete and the club respectively in the form of the Sports Severance Clause and the Sports Indemnity Clause, which allow for the termination of the relationship in the same way that dissolution of the contract upon termination or by mutual agreement is also provided for by the law.

3.2 *The end of the employment relationship*

The sports club, where it no longer wishes to have the athlete in its team, has the right to divorce itself from the relationship established voluntarily between the

¹¹ Melo Filho, Álvaro. *Lei Pelé: Comentários à Lei 9.615/98*. Brasília: Brasília Jurídica, 1998, 15.

parties, provided that it compensates the professional athlete for terminating the agreement early and pays him the sums due under the Sports Severance Clause.¹² The athlete is then free to explore alternative employment opportunities, as well as being entitled to receive, as a minimum, all sums he would have been entitled to up until the end of the contractual relationship had it run its course, as set out in Paragraph 3 of Article 28 of Law 9.615/98. Interestingly, the Act also established an upper limit on the level of such compensation, which shall not exceed four hundred (400) times the athlete's monthly salary at the point of termination.

As well as the situation where the club dismisses the player without just cause, the club may also bring about an indirect termination of the Employment Contract in two other ways as stipulated under employment legislation, that is, under the general rules contained in the Consolidation of Labour Laws (CLT), and by giving rise to termination due to a failure to pay the athlete's salary, in accordance with Article 31 of Pele Law.¹³

In circumstances where the club has repeatedly delayed the salary payments of an athlete, including other monies owed, not just the salary itself, for three months or more, this can amount to a breach and will give rise to an indirect termination of contract.

Returning to Article 28 of Pele Law, the athlete can also cause a breach of contract, in this case bearing the burden of the penalty or damages due to the club to which he was contracted under the Sports Indemnity Clause. The obligation to pay the sums due under this termination clause occurs in two situations, as provided by subsection I, subparagraphs (a) and (b) of the article under discussion. In the first scenario, upon the transfer of the athlete to another club, domestic or foreign, during the term of the employment contract, the contract with the first club is broken and the athlete and their new club are both responsible for the payment of the indemnity clause. The second scenario attempts to avoid any fraud or attempt to undermine the situation of the employer, and deals with liability under the clause when the professional athlete returns to play professionally at another club within thirty months, and therefore tries to avoid the possibility of the athlete's "fake" retirement, at which time nothing would be due to the original club in terms of

¹² Law 9.615/98 - "Article 28, The activity of the professional athlete is characterized by the remuneration agreed in the special sports employment contract, signed with the sports entity, which shall mandatorily include: (as amended by Law No. 12,395/2011). (...)

II – the sports severance clause, due by the sports entity to the athlete, in the circumstances described in sections III to V of s.5. (Included by Law No. 12,395, 2011). (...)

S.3 The value of sports severance clause referred to in item II of this Article will be freely agreed between the parties and formalized in the special sport employment contract, observing, as a maximum, 400 (four hundred) times the value of the monthly salary at the time of termination and as a minimum, the amount of monthly wages the athlete would be entitled to up until the end of the contract. (Amended by Law No. 12,395/2011). (...)"

¹³ Article 31, Where the sports entity is in arrears with payment of the athlete's salary, in whole or in part, for three months or more, the special sports employment contract shall be rescinded, leaving the athlete free to transfer to another sports entity, either national or international, of the same sport, and will activate the requirements of the sports compensation clause and all sums due thereunder.

compensatory payment. However, if the athlete returns to professional football within 30 months of retiring, both the athlete and his new club will be jointly and severally liable for payment under the indemnity clause in accordance with the terms of his contract with his old club.

Just as with the Severance Clause, but with somewhat different calculations and without the establishment of a minimum value, the Indemnity Clause is also subject to certain limits,¹⁴ as otherwise, the restrictions of the retain and transfer system would effectively be re-established because the clubs could, at their discretion, establish exorbitant and prohibitive clauses, re-creating the same problems as seen with Law 6.354/76.

The parties may freely agree upon the compensation amount due under the Sports Indemnity Clause, provided they adhere to the limit of two (2,000) thousand times the average value of the contractual wage for domestic transfers. Importantly, unlike the Severance Clause, which is based on the monthly salary at the time of termination, the calculation here is made based on the average of wages earned. Furthermore, the absence of a limit in international transfers clearly shows the protectionist intent of the internal market, prioritising national clubs over foreign clubs.

The fact that the parties are required to agree upon and include the terms of the two damages clauses analysed within the contract, is an important indication of the need for a written contract – previously known as a “formal contract”, according to the wording of Pele Law prior the last legislative amendment in 2011. Moreover, paragraph 5 of Article 28¹⁵ stipulates that the mutual sporting bond is formed through the registration of the employment contract with the respective sports federation in the territory where the contractor club is based. The obligation

¹⁴ Law 9.615/98 - “Article 28,

I – the sports indemnity clause, is due solely to the club to which the athlete is contracted, in the following scenarios: (Included by Law No. 12,395/2011).

a) transfer of the athlete to another club, domestic or foreign, for the duration of the special sports employment contract; or (Included by Law No. 12,395/2011).

b) when the professional athlete returns to play at another club within thirty (30) months; and (Included by Law No. 12,395/2011).

S.1, The value of sports indemnity clause referred to in item I of the head of this article, will be freely agreed upon by the parties and explicitly quantified in the contract: (as amended by Law No. 12,395/2011).

I - up to a maximum of two thousand (2,000) times the average of the contractual wage for domestic transfers; and (Included by Law No. 12,395/2011).

II - without limitation for international transfers. (Included by Law No. 12,395/2011).

S. 2, the athlete and his new club are jointly and severally liable for the payment under the sports severance clause mentioned in item I at the head of this article. (Amended by Law No. 12,395/2011).”

¹⁵ “The sporting relationship of the athlete with the club to which he is contracted is established with the registration of the special sports employment contract with administrative body of the sport, and is ancillary to their employment relationship, dissolving, for all legal purposes: I - with the expiration of the term of the contract or its termination; II – with a payment under the sports severance clause or sport indemnity clause; (...).”

upon the club to register the contract is more than enough to establish the necessity for a written agreement, though the Act does not expressly refer to this.

The sporting relationship created between the parties upon registration is ancillary to the employment contract. Once the employment relationship between the parties has legally ended, the sporting ties will also be extinguished, allowing the athlete to seek other job opportunities with a new club. It is exactly the opposite of what happened under the Pass Law, when, even after termination of the contract, the player remained tied to the club in sporting terms because the club retained his registration, in certain cases, up until his retirement. It is clear that the search for the desired balance in the contractual relationship for the sake of contractual stability, and therefore the stability of sports competitions, as well as equality of competition within the international football market, has led to the legal establishment of severance clauses for cases of non-compliance or breach of contract.

Importantly, it is the sporting link with the club that will give the athlete the right to play, not just the fact that he has signed a contract with a club. In order to play in competitions the contract must be registered with the relevant administrative body of the sport which “licences” the athlete to take part. In terms of the athlete, obviously his intention in signing the contract is always to get on the field and show what he can do. But whether the athlete is chosen to play in the team or not will depend on a technical assessment of his skills and abilities, and it is possible that a player will never get a game if the coach decides not to play him. However, the club has a duty to provide all of the necessary facilities so that, at any time, the player can take his place in the team and perform. For this to happen, besides the important physical, tactical and practical activities of coaching and training, as well as the health and fitness of the player, the club must register the CETD¹⁶ with the relevant governing body, as established in sections I, II and III of Article 34 of Law 9.615/98.¹⁷

On the other hand, the duties of professional athletes, as stipulated in Article 35 of the same Law,¹⁸ are: mandatory participation in games, training sessions

¹⁶ Contrato Especial de Trabalho Desportivo – CETD.

¹⁷ Law 9.615/98 - “Art. 34, The duties of the employer sports organization are, in particular: (as amended by Law No. 9.981/2000)

I - registering the special sports employment contract of the professional athlete with the administrative body of the respective sport; (amended by Law No. 12,395/2011).

II - to provide the conditions needed for professional athletes to participate in sporting competitions, including training and other preparatory or instrumental activities; (included by Law No. 9.981/2000)

III – to make provision for professional athletes to undergo medical and clinical examinations required to participate in sport. (Included by Law No. 9981/2000).”

¹⁸ Law 9.615/98, Article 35, The duties of the professional athlete are, in particular:

I – to participate in games, training sessions and camps and other preparatory sessions of competitions with the corresponding application and dedication to their psychophysical and technical requirements;

II – to preserve the physical fitness that allows them to participate in sporting competitions, submitting to medical examinations and treatments necessary;

III - to exercise his professional sporting activity in accordance with the rules of the respective sport and the rules governing discipline and sporting ethics.

and camps and other preparatory sessions for competitions, as well as the need to maintain their physical fitness, as the very nature of sports activity so requires. No less important, the professional athlete must also abide by the rules of the game and the regulations governing discipline and sport ethics.

Another point of great importance in the study of the Special Sports Employment Contract and a point of difference from general Employment Law is the duration of the contract.¹⁹ Unlike in general employment contracts where the length is indeterminate, in sport, the length of the contract is specifically defined, within the limits of a maximum term of five years and a minimum of three months. Indeed, stipulating a minimum of three months is without doubt the result of a legislative need to avoid situations where the athlete is hired only for a particular match or competition, such as the Clubs World Cup or a national championship final, which would be an affront to the stability of competition and ultimately, sporting ethics.

Unlike with Law 6.354/76, Pelé Law does not provide for situations of just cause for breach of the sporting ties between the parties. Thus, we must look to the Consolidation of Employment Laws (CLT), especially Articles 482 and 483,²⁰

¹⁹ Article 30, The employment contract of the professional athlete shall be for a defined term of no less than three months nor more than five years. (...).

²⁰ “Article 482 – the following constitute just cause for termination of the employment contract by the employer:

- a) dishonesty;
- b) misconduct or wrongdoing;
- c) regular trading on the employee’s own account or that of others without the permission of the employer, and when it may be in competition with the company for which the employee works or is harmful to his service;
- d) criminal conviction, without further chance of appeal, and where there was no suspension of sentence;
- e) negligence in the performance of duties;
- f) habitual drunkenness at work;
- g) passing on trade secrets;
- h) any act of indiscipline or insubordination;
- i) abandonment of employment;
- j) an act injurious to the reputation or good name of the employer practiced against any person, or the causing of physical harm, in the same circumstances, except in cases of legitimate defence of self or others;
- k) any act harmful to the honour or reputation of, or physical offences committed against the employer and superiors, except in cases of legitimate defence of self or others;
- l) habitual gambling. (...).”

“Article 483, The employee may consider the contract terminated and claim compensation due when:

- a) services are required that are beyond his powers, are against the law, contrary to accepted custom, or unrelated to the contract;
- b) he is treated by the employer or his superiors with excessive hardship;
- c) he is at risk of danger or considerable harm
- d) the employer does not fulfil the obligations of the contract;
- e) the employer or its agents, commit against him or members of his family, an act injurious to their honour and good reputation;

which has subsidiary application in such circumstances, and is compatible with the reality of the sports situation.

3.3 *The specificity of sport*

Returning to the general and common rules of Employment and Social Security law, according to jurist, Claudia Lima Marques, their subsidiary application to the activity of the professional athlete underlines the importance of the analysis of Paragraph 4 of Article 28 of Pelé Law in establishing a healthy and necessary pool of sources to draw on regarding the concomitant use and weight given to various legal and/or regulatory instruments, excepting and always respecting the peculiarities and specificities of sport and competition, especially those contained in the General Law on Brazilian sport, considered above.

The subsidiary application of employment and social security regulations to sports employment should be done in a reasonable and proportionate manner with clear regard for the specificity of sport because sporting activity has such unique characteristics and features not present in other events and social phenomena. Therefore, the provisions of paragraph 4 of Article 28 of Pele Law, as amended by Law 12.395/11, are particularly noteworthy.²¹

One of the most interesting nuances of sport is the “training camp”,²² whose purpose is clearly to keep the athlete at the disposal of his employer football club in order to prepare both physically and psychologically in advance of a match, whether a friendly or official competition fixture. In such an environment, the athlete is given the best opportunity to concentrate and be completely focussed on his professional duty, which is vital to the success of the team to which the player is contractually bound. Furthermore, many athletes agree on the necessity of training camps, because they can concentrate better on work outside the home environment, which is not always as peaceful and relaxing as the “luxury” hotels provided by football clubs.

The legislature established a limit on the length of a training camp, which

f) the employer or its agents harm him physically, except in cases of legitimate defence of self or others;

g) the employer reduces the employee’s workload, and this is per piece or per task, so as to substantially affect the amount of wages the employee can earn”.

²¹ S.4, The general rules of Employment and Social Security Law shall apply to the professional athlete, except for the following peculiarities contained in this Law: (Amended by Law No. 12, 395/2011)”.

²² I - where convenient to the sports entity, the training camp may not exceed three (3) consecutive days per week, provided that any match or equivalent, either friendly or part of the official competition schedule, where the athlete must be available to the employer to play in the competition out of the locality where the club has its registered office; (Amended by Law No. 12,395/2011).

II - the training camp may be extended, regardless of any additional payment when the athlete is representing the national governing body; (Amended by Law No. 12/395, 2011)

“III - compensatory increases due to periods of training, travel, pre-season and the athlete’s participation in a game, or equivalent, shall be in accordance with contractual provisions.

may not exceed three consecutive days a week. However, this period may be extended, regardless of any additional payment, when the athlete is at the disposal of the administrative body of the sport or, in other words, in the service of the Brazilian national football team.

Another important difference felt in the sports industry concerns the constitutional and employment law right to paid weekly rest,²³ also guaranteed under the Brazilian Sports Law, which provides for a rest period of twenty four hours straight, preferably immediately following the match day, when held over the weekend. That means the rest period for a footballer is usually a Monday, unlike in other professions where it would usually be expected to be taken over the weekend, and is justified by the need to adapt to the public's leisure time coinciding with the weekend.

The same paragraph also establishes the athlete's constitutional right to thirty days annual leave,²⁴ but coinciding with the close season of the particular sporting activity. Clearly, for the athlete to be able to take holidays during the sport's season would be a grave violation of the purpose of the contract itself.

In practice, sports employees could not always exercise this right fully, especially given packed competition schedules. However, in recent years players have gained access to this benefit, although in most cases, the number of days leave granted by employers is not in full accordance with the law.

Finally, the duration of the working day²⁵ set out in Article 7, XIII of the Constitution of the Federative Republic of Brazil,²⁶ also applies to sports activities, supported by the national Sports Law, which establishes a working week of a maximum of forty four hours. Even given the specific way that services are provided in sports, it would be rare that this limit is exceeded, thus generating no major problems.

4. Medical and doping issues

As discussed, an appropriate working environment is required, so the employer sports entity must provide its athletes with suitable materials, equipment and locations in which to practice sport. Medical examinations and treatment are also needed in order to guarantee the health of athletes, as stipulated in Article 82-A of Pelé Law.²⁷

²³ IV - paid weekly rest of 24 (twenty four) consecutive hours, preferably following the athlete's participation in the match day or equivalent test, when held over the weekend; (Amended by Law No. 12,395/2011).

²⁴ V - thirty (30) days annual paid leave plus a holiday bonus, coinciding with the recess of sporting activities; (Included by Law No. 12,395/2011).

²⁵ VI - normal working day in sport of 44 (forty-four) hours per week. (Included by Law No. 12,395/2011).

²⁶ Article 7 CF. XIII - normal working hours not exceeding eight hours a day and forty four hours a week, with set compensation schedules and a shorter working week by way of agreement or collective bargaining agreement.

²⁷ Article 82-A. Sports entities, of participation or performance, professional or non-professional,

Sports clubs should be aware of medical issues, especially those related to doping in Sport. This is a wide and varied area of law and sport which will not be gone into in detail here. However, it is important to note that the global fight against cheating in sport and the threat to the health of athletes, which makes the problem both a private and public concern, was the reason for the creation of the World Anti-Doping Agency (WADA), and the World Anti-Doping Code, implemented and adhered to by all participants of the Olympic movement and enacted nationally in the signatory countries of the UNESCO Convention, including Brazil.

The implementation of the WADA via national sports disciplinary systems can result in the suspension of an athlete with a positive test. At first, the suspension will only affect sporting matters, as the sports and employment relationships are, for such purposes, independent, characterised as ancillary and principal, respectively. Thus, although there is a suspension in relation to sports activities, the contract of employment remains valid, even in the face of the impossibility of performance of the athlete.

The effect on the employment relationship and whether there is possible cause for the dismissal of the professional athlete would have to be analysed in a non-sporting disciplinary context, that is, in the disciplinary context of the employment relationship itself, in line with the disciplinary powers of the employer. Proven deceit on the part of the athlete (and the principle of Strict Liability does not apply here), could allow the club to rely upon Article 482, paragraph (h) of the CLT,²⁸ to dispense with the services of the athlete for just cause.

Likewise, where responsibility for the adverse analytical finding lies with the club, for example, where the doctor did not complete the Therapeutic Use Exemption form,²⁹ the athlete could free himself of his contractual obligations towards the club by invoking the application of Article 483 of the same Law.

5. *Transfer of players*

The transfer of an athlete, whether domestic or international, is regulated by Pelé Law, particularly Articles 38, 39 and 40, notwithstanding the importance of the damages clauses already studied, and the international rules issued by FIFA, as well as the situation of the foreign athlete in Brazil.

The main assertion is that any transfer of an athlete, whether professional or non-professional, depends on his formal written consent, which guarantees respect for the principle of freedom of choice, and ensures the safety and dignity of the

shall promote mandatory periodic examinations to assess the health of athletes, in accordance with the regulations.

²⁸ Consolidation of Employment Laws.

²⁹ Puga, Alberto. *Doping do Atleta Profissional e seus reflexos no Contrato Especial de Trabalho Desportivo*. In Melo Filho, Álvaro; Sá Filho, Fábio Menezes de; Souza Neto, Fernando Tasso de; Ramos, Rafael Teixeira (coord.). *Direito do Trabalho Desportivo – Homenagem ao professor Albino Mendes Baptista – Atualizado com a Lei que alterou a Lei Pelé – Lei no 12.395 de 16 de março de 2011*. São Paulo: Quartier Latin, 2012. 46.

sports worker. It is important to note that, in case of temporary transfers, also known as a “loan”, the original employer maintains the employment contract with the athlete, which is suspended. As soon as the loan period ends, the athlete will return to his original employer-club and continue to meet his contractual obligations to that club. Loan periods are common in Brazil because many athletes that are not part of the plans of the coach can play for another team, bringing value and benefit to both the player and the original club, who can count on the return of an important and valuable asset thereafter.

The situation of the foreign professional athlete in Brazil is regulated by Article 46 of Pele Law and by Law 6.815/1980 in particular Article 13, which defines the legal status of foreigners in Brazil. In general, the professional athlete can be granted a work permit of up to five years, but the length of the visa should correspond with the length of the sports employment contract. In addition, the general legal requirements for entry into the country must also be observed.

The governing body of the sport will require the sports club to provide to it, proof of the foreign athlete’s work permit, which will be issued by the Ministry of Work and Employment, under penalty of cancellation of the athlete’s registration to play.

Pele Law also included important provisions with regard to the training of young athletes. A certain amount of protection is given to the club that has trained and developed a player from a young age, especially via the right to sign the athlete as a professional player once he reaches 16 years of age. The period of that first professional contract may not exceed five years, and for the club to attain this right and possible compensation stipulated in the law, it must be certified by the CBF³⁰ as a “Trainer Club”, by satisfying the requirements of Article 29 of Law 9.615/98.

The Act, as well as being concerned with the return on the investment

³⁰ Article 29, Paragraph 2, A club shall be considered to be training the athlete where it:

I - provides athlete training programs in the basic categories and complementary education;

II - cumulatively meets the following requirements:

- a) enrolls the athlete with the respective regional administrative body of the sport, as in training for at least one (1) year;
- b) provides confirmation that the athlete in training is included in official competitions;
- c) ensures the educational, psychological, medical and dental care as well as food, transportation and family life of the athlete;
- d) maintains adequate accommodation and sports facilities, particularly with regard to nutrition, hygiene, health and safety;
- e) maintains the physical fitness of the athlete for skilled technical sports training;
- f) “sets the time for the effective training activity of the athlete, not exceeding four (4) hours per day, as well as the hours of study of the school curriculum or vocational course, in addition to enrolling the athlete at school and ensuring he has the required attendance record and grades;
- g) provides the training free of charge to the athlete at the expense of the club;
- h) demonstrates that the athlete participates annually in competitions organized by the administrative body of the sport in at least two (2) categories of the respective sport; and
- i) ensures that the selection period does not coincide with school schedules.

S.3, The national administrative body of the sport shall certify as a trainer club, those that demonstrably fulfill the requirements established in this Law.

made by the club, also wanted to encourage the training of athletes; not only physical training, but their development as a person and as a citizen, hence the importance of the appropriateness of sports and competitive activities in the school calendar.

Finally, the Law also recognised the benefits of the FIFA solidarity payment system, and established, under Article 29a, a kind of domestic solidarity mechanism whereby 5% of the transfer fee of all domestic transfers of professional athletes, whether permanent or temporary, will be distributed among the clubs that contributed to the training and education of the player.

6. *Insurance*

Article 45 of Law 9.615/98 entitles employees to life and personal accident insurance to the value of one year's remuneration due under the contract of employment, as well as imposing a responsibility on the employer-club to cover any medical costs until such time as an insurance payment is received from the insurer.³¹

This type of insurance coverage seeks to provide security for the player where he is either injured for a long period, or forced to retire due to injury, and does not cover minor injuries that would keep him out for a couple of games as such short term injuries are very common in sport.

However, this obligation is frequently violated by clubs using the excuse that insurance companies in Brazil are not interested in covering the almost certain accidents and injuries that will occur given the inherent risk involved in sport. But, case law has held that such arguments provide no defence, since clubs can easily take out insurance policies with companies based outside Brazil.

7. *Settlement of employment disputes*

The resolution of employment disputes in Brazil is the subject of Article 114 of the 1988 Constitution,³² and, particularly following Constitutional Amendment 45/2004, the Specialist Employment Court has jurisdiction to act not only in disputes concerning employment relationships, but also in matters concerning general labour relations, including sports employment.

Although not widely used, and in some ways looked upon unfavourably in the workplace, Brazil provides a very favourable climate for Arbitration, especially

³¹ Article 45, Sports entities are required to take out life and personal accident insurance for their professional athletes in relation to their sporting activity, in order to cover the risks to which they are subjected. S.1, The insurance cover must provide the professional athlete, or a beneficiary designated by him in the contract, with the right to compensation corresponding to the minimum annual amount of the agreed remuneration. S.2, The sports entity is responsible for the cost of medical and hospital expenses and medication needed to aid the recovery of the athlete up until such time as the insurer pays the compensation referred to in s.1 of this article.

³² CF/1988. Article 114, the Employment Courts are competent to prosecute and judge:
I - actions arising from the employment relationship; (...).

under the provisions of the existing Law 9.307/96,³³ which ultimately led to the development of arbitration services and overcame some of the barriers set up by previous Laws, that, in some cases, discouraged the use of this form of alternative dispute resolution, in clear opposition to the reality that we live in, and more importantly, the reality of modern football.

In line with the opinion of Portuguese jurist Nuno Barbosa,³⁴ the specificity of sport requires different treatment of issues or disputes, be that in the speed at which resolutions must be arrived at, or in more careful analysis of the same, in order to meet the reality of the sports world.

In addition to arbitration offering a quicker form of dispute resolution, benefitting from the expertise of the arbitrator or arbitral panel, it is important to note that this alternative form of conflict resolution also offers the parties additional freedom to choose the arbitrators to deal with their case and to agree upon the form and procedures to be used, allowing for the expression of will or, in other words, the exercise of the private autonomy of the parties. Furthermore, it is often the case that where the parties have had the opportunity for effective participation in the development of the analysis and judgment of their disputes, a negotiated solution is more easily arrived at, since they know their issues were scrutinised under a fair and effective process which was agreed from the beginning.

Although some of the principles and jurisprudence of Employment Law is against the use of arbitration to resolve conflicts of an employment nature, largely due to the weakened bargaining position of the employee, the fact is that the General Brazilian Sports Law does not preclude it. In contrast, Article 90-C specifically provides the option of going to arbitration,³⁵ subject to an arbitration clause in a collective bargaining agreement. However, in practice, recourse to arbitration is difficult to achieve with the Employment Courts the only body expressly responsible for the assessment of sports employment disputes.

Conclusion

Sport provides the largest and clearest representation of an important social phenomenon. Characterised as a mass phenomenon, it includes all sectors of society, as well as a number of different protagonists, in a wide variety of sporting disciplines,

³³ The Brazilian Arbitration Law.

³⁴ Melo Filho, Álvaro. *Nova Lei Pelé: avanços e impactos*. Rio de Janeiro: Maquinária, 2011, 183, “resolution of disputes concerning sporting activity is one of those areas where it is most justifiable have recourse to arbitration, given the specificity of the sports phenomenon and the dynamics of competition”.

³⁵ Article 90-C. Interested parties may avail themselves of arbitration to resolve disputes relating to property rights, however, the consideration of matters related to discipline and competitive sport is prohibited.

Sole paragraph, Arbitration shall be provided for in the agreement or collective bargaining agreement and may only be established following the express consent of both parties, by way of an arbitration clause or arbitration agreement.

each with their own importance and method of performance, be it recreational, educational, therapeutic, or professional.

The subject is important and requires responsible and effective participation of sports lawyers around the world, in the legislative sphere, the executive branch, and especially within the judiciary in order to achieve the correct application of the law; not only of Acts, but also of the relevant regulations. For this to happen, comparative sports law needs to be studied in order to achieve that desirable harmony within the sports system, for there is no more ordered and internationalised activity than sport itself.

EMPLOYMENT RELATIONSHIPS AT NATIONAL LEVEL: CROATIA

by *Vanja Smokvina**

SUMMARY: 1. Introduction – 2. Employment regulation and football structures – 3. Individual employment relations in professional football – 4. Medical and doping issues – 5. Transfer of players – 6. Social security principles (unemployment and pensions) – 7. Labour dispute settlement – 8. Conclusion

Abstract:

This chapter attempts to provide an overview of the employment relationship in Croatian Football. Professional football players in Croatia are not defined as workers, but as self-employed persons. In such a way, players' rights are not protected at all, as will be described in this chapter. The organisation structure of Croatian football is set up in quite a good manner. With the CFF Arbitration tribunal as the main legal body, everything remains in the football sector, as players do not have a proper opportunity to seek the protection of their rights before ordinary courts. The players' position is not as comfortable as the clubs' one. With the implementation of the social dialogue in the Croatian football sector, things could change for the better.

*1. Introduction*¹

This paper gives a general overview of the status of football players in the Republic of Croatia. In contrast to many other EU Member States, since 2001 Croatia has not recognised the employment status of players because of the enormous debts of

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¹ Some of the discussion contained within draws and builds on the contribution made in V. Smokvina, *International and Comparative Sports Justice: Croatia*, (M. Colucci, K. L. Jones, Eds.), European Sports Law and Policy Bulletin, 1/2013, 289-307.

professional clubs.² As it will be demonstrated further in this paper, it is up to national sports federations to define the status of players. Of course, sports federations opted for a self-employed status and give the players the duty to pay their own mandatory contributions and taxes. The problem is that some players are not paid on time or are not paid at all; and their rights are not protected as they should be.³ This is one of the reasons why in Croatia there is movement towards changing the legal status of professional players into a labour law one and a working group is working on a new Sports Act draft.

On the other hand, when talking about football, the social dialogue will hopefully change things in a better and brighter way.⁴ The implementation of the *Autonomous Agreement regarding the Minimum Requirements for Standard Player's Contract (2012)*⁵ should change the legal status into a labour law one. But until then, as will be demonstrated in the paper, there is no labour law status in professional football in Croatia.

2. Employment regulation and football structures

2.1 Sources of law and approaches

Sport in Croatia is governed by the Sports Act, which since 1990 has been subject to four revisions.⁶ The latest 2006 Sports Act, currently in force, has been amended five times. Croatian Sports Act defines sports activities as activities of special interest to the Republic of Croatia.⁷

As was mentioned in the Introduction, the Croatian Sports Act confers the power to regulate the status of a professional sports person and his/her rights

² Four most famous Croatian football clubs (NK Dinamo Zagreb, HNK Hajduk Split, HNK Rijeka and NK Osijek) owed enormous debts to the Croatian pension and health insurance systems, along with the tax authorities. So, it was easier to change the law than to put them in order.

³ V. Smokvina, *Is There a Need for a Change in the Legal (Labour) Status of Professional Sportspeople in Croatia?*, 209-230, in R.C.R. Siekmann, R. Parrish, V. Smokvina, N. Bodiroga-Vukobrat, G. G. Sander, *Social Dialogue in Professional Sports*, Shaker Verlag, Aachen, 2013.

⁴ V. Smokvina, *Socijalni dijalog u profesionalnom sportu – nogomet model kao model za ostale kolektivne profesionalne sportove*, *Collected papers of the Law Faculty of the University of Split (Zbornik radova Pravnog fakulteta u Splitu)*, vol. 49, 2012, no. 4, 883-906.

⁵ For more details, see: http://ec.europa.eu/commission_2010-2014/andor/headlines/news/2012/04/20120419_en.htm (23-06-2014). The first social dialogue meeting organised by the Croatian Football Federation and UEFA on the implementation of the Autonomous Agreement in Croatia took place in Zagreb in October 2013. At the meeting were also ECA, EPFL and FIFPro Europe representatives along with Croatian social partners: Croatian Union "Football Trade Union" representing players and First CFL Association of professional clubs, representing first division clubs.

⁶ Sports Act (*Zakon o sportu*), Official Gazette (*Narodne novine*) No. 59/90. Sports Act (*Zakon o športu*), Official Gazette (*Narodne novine*) No. 60/92, 25/93, 11/94, 77/95. Sports Act (*Zakon o športu*), Official Gazette (*Narodne novine*) No. 111/97, 13/98, 24/01. Sports Act (*Zakon o sportu*), Official Gazette (*Narodne novine*) No. 71/06, 150/08, 124/10, 124/11, 86/12 and 94/13, (hereinafter: Sports Act).

⁷ Sports Act, *o.c.*, Art. 1(2).

and duties to the national sports federations, by means of their autonomous acts.⁸ Furthermore, the legal status of professional sportspeople in Croatia, due to the previously mentioned provisions and the manner in which the national federations define it, is governed by two acts: the Obligations Act⁹ or the Labour Act.¹⁰

2.2 Specific laws on sport and football

In addition to the Sports Act in force, the legal relationship between professional sportsmen or sportswomen on the one hand, and the professional sports club on the other, is regulated in Croatia by civil law acts – primarily by the law of obligations. The Obligations Act is applied in a relationship between a club and a self-employed professional sportsman or sportswoman. Self-employed professional sportsmen or sportswomen represent nearly all the professional players in individual or team sports.

According to Art. 6(2) of the Sports Act “*An athlete who, in accordance with the provision of Paragraph 1, Subparagraph 1, of this Article, participates in sporting competitions as a member of a legal person can have the status of a professional athlete or amateur*”. “*Participation in sporting competitions shall be considered professional if the athlete participating in such sporting competitions has signed a professional contract or an employment contract with his or her sports club or if the athlete performs the independent sporting activity of participating in sporting competitions. An athlete who participates professionally in sporting competitions according to Paragraph 1 of this Article is a person for whom sporting activity is the basic profession and who is paid the contribution for obligatory insurance on the said basis in accordance with special regulations*”.¹¹

2.3 Football structures

In Croatian football the autonomous acts of the *Croatian Football Federation (hereinafter: CFF)*¹² regulate the legal status of football players. The CFF derives its existence from the Croatian sports federation in Zagreb founded in 1912 as the only national sports federation with the aim of encouraging, supporting and protecting Croatian football and its national teams, and representing Croatian football

⁸ Sports Act, *o.c.*, Art. 8(3).

⁹ Obligations Act (*Zakon o obveznim odnosima*), Official Gazette (*Narodne novine*) No. 35/05, 41/08.

¹⁰ Labour Act (*Zakon o radu*), Official Gazette (*Narodne novine*) No. 149/09, 61/11, 82/12 and 73/13. To have a proper idea of the labour law system in Croatia, see: Ž. Potočnjak Ed., *Radni odnosi u Republici Hrvatskoj*, Zagreb, Organizator, Pravni fakultet, 2007; A. Ravnić, *Osnove radnog prava – domaćeg usporednog i međunarodnog*, Zagreb, Pravni fakultet, 2004.

¹¹ Sports Act, *o.c.*, Art. 8(2).

¹² Croatian Football Federation (*Hrvatski nogometni savez*), official site: www.hns-cff.hr/?ln=en, (10-06-2014).

internationally.¹³ The CFF is a non-profit entity and is entered in the Register of Associations kept by the government agency responsible for general administration and in the Register of Sports Activities kept by the government administration office in the City of Zagreb.¹⁴

“The CFF...[is]affiliated to the Fédération Internationale de Football Association (FIFA) and the Union of European Football Associations (UEFA). Its bodies and official persons, members of the Federation, leagues, clubs, players, coaches, referees, official persons, licensed match agents, licensed players’ agents and other football members undertake to:

- a) comply with the Laws of the Game as laid down by the International Football Association BOARD (IFAB);*
- b) to observe the principles of loyalty, integrity and sportsmanship as an expression of fair play;*
- c) respect at all times the Statutes, regulations and decisions of FIFA and UEFA;*
- d) recognize the jurisdiction of the Court of Arbitration for Sport (CAS) in Lausanne (Switzerland), as specified in the relevant provisions of the FIFA and UEFA Statutes;*
- e) refer in the last instance any dispute of national dimension arising from or related to the application of the CFF’s Statutes or regulations only to an independent and impartial Court of Arbitration, which will settle all disputes to the exclusion of any ordinary court, unless expressly prohibited by the legislation in force in the Republic of Croatia. The Federation shall ensure that these obligations are recognized and accepted”.*¹⁵

Regarding its objectives and activities, it should be highlighted that: *“The activities through which the Federation accomplishes its objectives are:*

- a) organizing and implementing competitions’ system;*
- b) making arrangements concerning the registration of players and clubs, status of football players and other official persons, disciplinary accountability of players and other football officials;*
- c) making arrangements concerning the determination of conditions which football clubs should fulfil for conducting football activities;*
- d) provision of professional work and training of professional staff, provision of sport achievements and taking care of top sportsmen;*
- e) organizing football matches for national teams of the Republic of Croatia;*
- f) continuous improvement of football and its promotion in conformity with the principles of Fair Play;*
- g) maintaining international sporting relationships associated with football in all its aspects;*
- h) providing sources of funds for the financing of football;*

¹³ Statute of the CFF, Art. 1 and 2, available at <http://hns-cff.hr/hns/propisi-i-dokumenti/>, (10-06-2014).

¹⁴ Statute of the CFF, *o.c.*, Art. 3.

¹⁵ Statute of the CFF, *o.c.*, Art. 11(1, 2).

- i) *performing tasks from the National sports programme and participation in planning and implementation of the Annual programme of implementation thereof;*
- j) *participation in the planning and implementation of annual programmes of public necessities in sport;*
- k) *developing grassroots football and coordination of all activities and subjects connected to the grassroots program;*
- l) *promotion and enforcement of anti-doping control and activities connected to prevention of doping, substances abuse and prohibited procedures in sports activities and competitions of the Federation, in accordance with the World Anti-Doping Code;*
- m) *performing other jobs and activities stipulated by the law, Statutes and regulations of the Federation.*

*In order to accomplish the objectives stated herein, the Federation shall co-operate with state administration bodies, regional and local self-government bodies, schools and other educational institutions and with corresponding scientific institutions”.*¹⁶

The members of the CFF are 20 county football associations and the football association of the City of Zagreb. The members of the Federation may also be other sports associations or institutions organized in accordance with the provisions of the Sports Act, provided that the CFF renders a decision thereof. Football clubs are indirect members of the CFF through membership in county football associations or the Football association of the city of Zagreb. Football clubs, players, coaches, referees and other football officials are members of county football associations according to their registered domicile or residence.¹⁷

Football clubs holding professional status (professional clubs), participating in the matches of the *First Croatian Football League* (hereinafter: First CFL), may, with the consent of the CFF, establish their organization – *First CFL Association of professional clubs*, which is subordinated to the CFF and its Statutes and by-laws are approved by the CFF’s Executive Board. The Association and the CFF enter into an agreement regarding a mutual relationship through which the rights and obligations between the parties to the agreement are regulated in detail. Such an association carries out and organizes the competition of the First CFL and proposes: the competition regulations of the First CFL, calendar of matches, and system of professional competition of the Federation.¹⁸

The bodies of the CFF are: the Congress, the Executive Committee, the President of the CFF and its legal bodies.¹⁹ The CFF’s legal bodies are: the Disciplinary Committee, Appeal Committee, Committee for the authentication of clubs and player registrations, Licences Committee and Appeal Committee for

¹⁶ Statute of the CFF, *o.c.*, Art. 12(2, 3).

¹⁷ Statute of the CFF, *o.c.*, Art. 17(1-3) and 18.

¹⁸ Statute of the CFF, *o.c.*, Art. 31(1-4).

¹⁹ Statute of the CFF, *o.c.*, Art. 33.

licences.²⁰ The Arbitration tribunal of the CFF is also among these legal bodies.²¹

2.4 Professionals (non-amateur)

Players may have non-amateur status under the terms and conditions set by legal regulations and regulations of the CFF. A player's status is determined by the *Regulations for the Status of Players of the CFF*, in accordance with *FIFA Regulations for Status and Transfer of Players*.²² The term player(s) in the CFF's Regulations refer to the male football players, female football players and five-a-side football players registered with the football and five-a-side football clubs appearing in the CFF competitions.²³

The CFF Players have the status of amateur or non-amateur (professional) players. Non-amateur players are players who entered into a contract with a club in accordance with the provisions of the CFF Regulations.²⁴ As will be demonstrated hereunder, in Croatia, native professional football players are being discriminated against in comparison to foreign players playing in Croatia; since the foreign players may have a labour law contract, while the Croatian players have self-employed status.

The professional player is a non-amateur player entering into a professional playing contract with the club. Such a contract may be concluded by the player who has turned sixteen (16) years of age and is an independent sport activity contractor. Exceptionally, a player who is a foreign national may enter into an employment contract for a determined term with the club which, pursuant to these regulations, in terms of status has equal status to the professional contract. The player with dual citizenship, of which one is of the Republic of Croatia, is not considered to be foreign national.²⁵ The issue of scholarship contracts will be elaborated *infra ad* 2.8.

2.5 Amateurs

As previously defined, the Croatian Sports Act states that if an athlete is not defined as professional, he/she has the status of amateur. The same is stated in the CFF Statute.²⁶ According to the CFF Regulations, which are in conformity with *FIFA Regulations on the Status and transfer of Players*, amateur players are players who have not entered with a club into the contract specified *supra ad* 2.4.

²⁰ Statute of the CFF, *o.c.*, Art. 55.

²¹ Statute of the CFF, *o.c.*, Art. 61.

²² Statute of the CFF, *o.c.*, Art. 71(3, 5).

²³ CFF Regulation on the Status of Players, available at: [http://hns-cff.hr/en/cff/regulations-and-documents/\(15-06-2014\)](http://hns-cff.hr/en/cff/regulations-and-documents/(15-06-2014)), Art. 1.

²⁴ CFF Regulation on the Status of Players, *o.c.*, Art. 2(1, 2).

²⁵ CFF Regulation on the Status of Players, *o.c.*, Art. 4(1-3).

²⁶ Statute of the CFF, *o.c.*, Art. 71(4).

2.6 Semi-professionals

According to what was previously stated, in Croatian sports in general and in football in particular semi-professionals are not recognized.

2.7 Self-employed

As already indicated, it is common practice in Croatian professional sports that sportspersons have the legal status of self-employed. The only exception are foreign football players, who may (and usually often do) have a labour law status.

2.8 Voluntary work

Volunteering is generally defined as an activity that is run freely, is free of charge and is oriented towards the well-being of others or to some specific aim.²⁷ It is regulated by a *lex specialis*: *Act on volunteering*.²⁸ According to the Art. 6(1) “a volunteer is a natural person who is volunteering in the Republic of Croatia, in conformity with national and international law in force, if it is not differently regulated by this Act”.

When we talk about volunteering work, according to the *Labour Act* if a law or another regulation provides that an occupational exam or work experience is a prerequisite for the performance of jobs within a certain occupation, the employer may admit a person who has completed schooling for such an occupation to occupational training without commencing employment with him or her with a contract in written form (“unpaid internship”). The period of the unpaid internship shall be counted as part of the traineeship and work experience prescribed as a prerequisite for working in a certain occupation and may not exceed the traineeship period.²⁹ Furthermore, unpaid interns are subject to the provisions of the *Sports Act* and other laws governing employment, with the exception of the provisions on concluding labour contracts, on salary and salary compensation, and on terminating labour contracts.³⁰

On the subject of sports, it should be highlighted that the *Sports Act* does not recognize volunteering or voluntary work. On the other hand, volunteering is of course present in sport, but a proper legal framework does not exist in Croatia.

Even if it is not voluntary work, it is important to say a few words about scholarship contracts. In the CFF regulations, the scholarship agreement is recognized, and it is stated that “pursuant to provisions of the *FIFA Regulations*

²⁷ S. Barić, “*Volonterstvo kao inherentno socijalno odgovorna djelatnost – pravni aspekti*”, in N. Bodiroga-Vukobrat, S. Barić, *Socijalno odgovorno gospodarstvo*, TIM Press, Zagreb, 2008.

²⁸ Act on volunteering (*Zakon o volonterstvu*), Official Gazette (Narodne novine) No. 58/07, 22/13.

²⁹ Labour Act, *o.c.*, Art. 41.

³⁰ Labour Act, *o.c.*, Art. 41 (4). See I. Grgurev, “*Ugovor o radu*”, 1-46, 41-42, in (Ž. Potočnjak Ed.), *Radni odnosi u Republici Hrvatskoj, o.c.*

on Statutes and Transfers, the non-amateur players who have entered into a professional player or scholarship contract³¹ have the status of a professional player”.³² A scholarship receiving student is a non-amateur player who has entered into a scholarship contract with the club (the scholarship contract) which may be concluded by a person, as player, who is at least twelve (12) years old, whilst with an adult player it may be concluded for up to the end of the competition year in which such player turns twenty-six (26).³³ On the other hand, what seems very problematic, if we consider civil and labour law principles and regulation, is that “upon the club’s proposal, the player who has reached the minimum age of 12 shall, if so offered by the club, conclude a scholarship contract. The player whose scholarship contract has expired, and is below the age of 18, is obligated to sign a new contract, provided that such contract has been offered by the club”. “If the player below the age of 18 refuses the offer of the club to conclude the contract and if the club, within an 8 day period, notifies the competent body of the county football federation, i.e., football centre, of such refusal, they are obligated to request publishing of the refusal to enter into the contract in the CFF gazette. This player may not be registered with another club of the First or Second Croatian Football League for the following two (2) competition years (seasons), and the CFF entity competent to confirm the players’ registrations is obligated to keep and publish the records of the players that have not accepted the club’s request for entering into the corresponding contract”.³⁴ The author is of the opinion that this rule is not in conformity with civil and labour law principles, along with the courts’ jurisdiction, since it obliges one contract party to sign a contract because otherwise they risk a suspension sanction which is a threat towards a young player who has just started his football activity. Furthermore, the player is being discriminated on the ground of his age. All this is contrary to EU Law and Croatian legal system.

2.9 Discrimination law and equal treatment

As with other EU Member States, Croatia and its football system are also subject to the principles of equality and non-discrimination. According to the *Croatian Constitution*, the application of EU law is guaranteed.³⁵

³¹ Standard Scholarship Contract of Play Form, available at CFF web page: <http://hns-cff.hr/hns/propisi-i-dokumenti/> (20-06-14).

³² CFF Regulations on the Status of Players, *o.c.*, Art. 2(4).

³³ CFF Regulations on the Status of Players, *o.c.*, Art. 4(2-3).

³⁴ CFF Regulations on the Status of Players, *o.c.*, Art. 7.

³⁵ Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*), Official Gazette (Narodne novine) No. 56/90, 135/17, 113/00, 28/01, 76/10, 5/14, Art. 141.c (Art. 145):

(1) *The exercise of the rights ensuing from the European Union acquis communautaire shall be made equal to the exercise of rights under Croatian law.*

(2) *All the legal acts and decisions accepted by the Republic of Croatia in European Union institutions shall be applied in the Republic of Croatia in accordance with the European Union acquis communautaire.*

On the other hand, the *Croatian Constitution* guarantees the right to equal protection and the right of protection against any form of discrimination.³⁶

The *Labour Act* also forbids any form of direct or indirect discrimination in the field of work and work conditions along with criterias of employment etc.³⁷ In general, in Croatia the *Anti-discrimination Act*³⁸ is in force.

Concretely regarding football, the *Statute of the CFF* states that: “Discrimination of any kind in respect of countries, persons or groups of persons based on their race, nationality, religion, sex, language, political orientation or anything else is prohibited and shall lead to suspension or expulsion from the Federation”.³⁹

Furthermore, even the *CFF standard contract of professional play* has the provision that: “The Club is obliged not to discriminate against the Player in any way in relation to other players of the Club”.⁴⁰

3. Individual employment relations in professional football

3.1 Essential elements and legal qualification

Since professional football players in the Croatia mostly, with the exception of non-Croatian players, see *supra*, do not have employee status, but instead have the status of self-employed persons; at this point only a basic outline of the nature and content of labour law in the Croatia will be offered. Instead, autonomous (internal) rules of the CFF and the standard contract content will be paid attention to.

In Art. 2 of the CFF standard (formulary) contract (“*The contract of professional play*”) issued by the CFF, it is stated that the player has to be registered as a self-employed person (similar to the status of a craftsman) according to Croatian Sports Act and the Income Tax Act.⁴¹

(3) Croatian courts shall protect subjective rights based on the European Union *acquis communautaire*.

(4) Governmental agencies, bodies of local and regional self-government and legal persons vested with public authority shall apply European Union law directly.

³⁶ Constitution of the Republic of Croatia, o.c., Art. 14:

(1) All persons in the Republic of Croatia shall enjoy rights and freedoms, regardless of race, colour, gender, language, religion, political or other conviction, national or social origin, property, birth, education, social status or other characteristics.

(2) All persons shall be equal before the law.

³⁷ Labour Act, o.c., Art. 5(4).

³⁸ Anti-discrimination Act (*Zakon o sprječavanju diskriminacije*), Official Gazette (Narodne novine) No. 85/08, 112/12.

³⁹ Statute of the CFF, o.c., Art. 14(2).

⁴⁰ CFF Standard Contract of Professional Play, *Obrazac HNS-a Ugovora o profesionalnom igranju*, available at: www.hns-cff.hr/upl/products/Ugovor_o_profesionalnom_igranju.doc, (10-06-2014), Art. 9(1).

⁴¹ CFF Standard Contract of Professional Play, o.c., Art. 2.

3.2 *The employment contract*

Under the Croatian *Labour Act* the employment contract must be in writing and must contain the following essential elements:

- (a) contractual parties' details;
- (b) type of work;
- (c) place of work;
- (d) day of starting work;
- (e) duration in case of a fixed term contract;
- (f) the notice period;
- (g) wage conditions;
- (h) working time;
- (i) length of holidays, etc.⁴²

The parties may also, by not determining the specific provisions, under *fitto i above*, point in the contract to specific *Labour Act's provisions* or some other acts, collective agreement's or labour regulations' provisions.⁴³

Employment may be contracted for an indefinite period of time ("opened labour contracts") or for a definite period of time ("fixed term contract"), which should be an exception.⁴⁴ Fixed time contracts may be used when employment duration is determined by a specific time limit, performance of a specific task or occurrence of a specific event.⁴⁵

Employment for a fixed term in consecutive contracts may only be concluded for no longer than three years in total. The length of the first fixed term contract is not limited.⁴⁶

According to what was previously stated, there would therefore immediately emerge a potential conflict with sports contracting practice, where fixed-term contracts may be awarded for up to five years and even repeatedly. On the other hand such problems may be resolved by collective agreements determining other specific duration periods or by some other acts.⁴⁷

3.3 *Players' rights and obligations*

The *Statute of the CFF* provides for the general obligations of all persons and entities operating within CFF to abide by the sports rules set forth by the CFF, FIFA and UEFA; while the *Codex on Behaviour of Football Participants*⁴⁸ contains

⁴² Labour Act, *o.c.*, Art. 13. etc.

⁴³ Labour Act, *o.c.*, Art. 13(2).

⁴⁴ Labour Act, *o.c.*, Art. 9 and 10.

⁴⁵ Labour Act, *o.c.*, Art. 10 (1,2)

⁴⁶ Labour Act, *o.c.*, Art. 10(1-3).

⁴⁷ Labour Acts, *o.c.*, Art. 10(3).

⁴⁸ Codex on Behaviour of Football Participants (*Kodeks ponašanja nogometnih djelatnika*), available at: www.hns-cff.hr/file/document/file/817-Kodeks%20pona%C5%A1anja%20nogometnih%20djelatnika.pdf (23-06-2014).

a code of conduct that must be followed by all those who are subject to the sports rules of the CFF.

Article 11 of the CFF Statute and Chapter 4 of the CFF Codex state that all persons and entities registered with the CFF or operating within the Federation must conduct themselves according to the principles of loyalty, honesty and integrity.

These standards of conduct, like in other states, represent the pillars on which the CFF's sports justice is based. Not only do all sports offences described by the CFF's acts or other sports rules and regulations represent a specification of, and can be related to, these principles; but any other behaviour not in keeping with the general principle of sportsmanship, even if not expressly codified, can be sanctioned by relevant sports justice bodies of the CFF.

As previously stated, the *CFF Standard Contract of Professional Play* in Croatian football, regulates the rights and obligations of players and clubs. Professional football contracts in Croatia, like the usual professional football contracts in most countries that have contracts of employment, entail some of the standard terms, especially the rights and duties of the parties.

In comparison to the club's obligations, the obligations of the player are more precisely regulated in 16 points (while the club's obligations are regulated in 7 points).⁴⁹ To illustrate the position of professional football players it is important to highlight that players are obliged to take out an insurance policy against professional illness and accidents at work for the duration of the contract on their own and to pay the total contributions for mandatory health and pension insurance.⁵⁰ Other player obligations are: to make efforts to play and train at best of his/her ability and to avoid anything that could distort the image of the club or have effect on the club's results and club's functioning; to behave in a sporting and fair manner towards all participants of a football match including the spectators; not to take part in other football activities which do not derive from the contract and which are potentially dangerous without the club's approval (national team matches are an exception); not to take part alone or with other persons in sport betting on matches form the competition in which the club is taking part; to take part in club's merchandising (the player's participation in any media must be approved by the club); to treat as a business secret any information prescribed as such by the club's acts; to present themselves before the club's medical staff immediately in case of illness or injury and to inform its coach about what happened; to play for another club (loan) upon the club's order⁵¹ and to appoint an accountant.^{52 53} By concluding the contract, the player agrees to confer their image rights completely to the club.⁵⁴ In regard to

⁴⁹ CFF Standard Contract of Professional Play, *o.c.*

⁵⁰ CFF Standard Contract of Professional Play of the, *o.c.*, Art. 5, point 14 and 15.

⁵¹ There is no obligation to obtain player's consent for that loan.

⁵² Professional players in Croatian football have the legal status of self-employed persons, so they have to have a contract stipulated with an accountant or complete their financial returns on their own.

⁵³ CFF Standard Contract of Professional Play, *o.c.*, Art. 5.

⁵⁴ CFF Standard Contract of Professional Play, *o.c.*, Art. 6.

the legal status of professional players in Croatia; it is quite unusual for someone coming from countries with a labour law status in sports that since players are self-employed persons they issue an invoice to their club every month for their sports performances in the previous month.

As previously stated, professional football players in Croatia do not enjoy the labour and social law protection that they deserve. According to the current legal status, it is impossible for a football player to challenge an autonomous decision of the club's board regarding the player's disciplinary responsibility⁵⁵ or for employers (clubs) to subject themselves to the requirements of the relevant provisions of labour law and notably to the rules on unfair dismissal.

3.4 Club's rights and obligations

Clubs obligations derived from the *CFF Standard Contract of Professional Play* are: to fulfil economic and other obligations towards the player; to provide professional vocational training to the player; to allow the player to join their national team for preparation and games; to provide adequate sports equipment; to allow a player attending mandatory schooling or university to fulfil his educational obligations.⁵⁶ Other club obligations in the field of medical protection are described *infra ad. V*.

Furthermore, it is important to highlight that the primary duty of the club is to pay the player the remuneration (salary) agreed throughout the duration of the contractual engagement between the parties.⁵⁷ As will be demonstrated in this chapter, the letter of the law is not respected as it should be.

There have also been cases in Croatia in which the sport clubs prevented their professional players from taking part in the training process and excluded them from the first team simply because they did not want to conclude a new contract or to agree to a decrease in salary. In the (labour) relationship between the player and the club, there are rights but also obligations on both sides. The sport clubs are required to fulfil their obligations deriving from individual contracts with the players, and their obligations arising from the collective agreement, as is the case for example in Italy, Spain etc. In Croatia, since players are not workers, but self-employed persons, there is neither a collective agreement in Croatian sport in general, nor in football in particular.

⁵⁵ See for example: Former Dinamo defender Vida fined £ 80,000 for opening a can of beer and Dinamo midfielder Sammir was fined Euro 270,000 for partying in night clubs, available at: www.dailymail.co.uk/sport/football/article-2208590/Dinamo-defender-Vida-fined-80-000-opening-beer.html (22-04-2014). The Disciplinary Regulation of the CFF, *o.c.*, Art. 45 (which stipulates the maximum amount of sanctions that a club may prescribe in its autonomous acts) is not implemented in a proper manner and players are helpless in this regard.

⁵⁶ CFF Standard Contract of Professional Play, *o.c.*, Art. 7.

⁵⁷ J. Anderson, *Modern Sports Law*, Hart Publishing, Oxford, 2010, 299.

3.5 Remuneration

Because of their status, professional football players do not enjoy the protection of the Croatian *Minimum Wage Act*.⁵⁸ In the 2014, the minimum gross wage in Croatia is: 3.017,16 HRK (cca 396 Euro).⁵⁹

According to the *CFF Standard Contract of Professional Play*:

(1) *“For the services which the Player is obliged to fulfil towards the Club, and which are being determined in this Contract, and in accordance with the regulations of the Club, the contractual parties determine the minimum amount of monthly compensation of _____ HRK, which may not be changed without concluding an annex to this Contract”.*

(2) *“Apart from the basic monthly compensation from paragraph 1 of this Article, the contractual parties determine the following special compensations _____”.*

(3) *“Apart from the compensation, the contractual parties determine the following special stimulations _____”.*

(4) *“The amount of special compensations and stimulations from paragraph 3 of this Article is changeable and the contractual parties, by signing this Contract, agreeably accept that the change in the amount of compensation may be made in accordance with the Club’s Regulations governing rewarding. Such a change in the amount of compensation is valid without signing an annex to this Contract and it shall be considered that the applicable amount of compensation is the one determined by implementing the Club’s Regulations governing rewarding, which the contractual parties unconditionally accept. The Regulations governing rewarding determine the rights and obligations and deadlines for payments of premiums and rewards, depending on the successfulness of the team and players”.*⁶⁰

As was mentioned before, what seems completely illogical from the point of view of countries with a labour law status is that professional players in Croatia have the obligation to issue an invoice to the club for each month in which the player has performed their sporting activity.⁶¹ By issuing the invoice, players are obliged to pay mandatory contributions and taxes to the state, irrespective of the fact the club has or has not paid the player. This puts players in an uncomfortable situation. According to the Croatian footballers union “Football Trade Union”⁶² official dates, only 5 out of 10 clubs in the Croatian first division football league fulfil their financial obligations towards their players with an average period of delay in payment of 4,8 months. Out of 250 professional players, 58 players have their bank account blocked by the National Tax Office because of non-payment

⁵⁸ Minimum Wage Act (*Zakon o minimalnoj plaći*), Official Gazette (Narodne novine) No. 39/13.

⁵⁹ Regulation on the amount of the minimal wage for 2014, (*Uredba o visini minimalne plaće za 2014*), Official Gazette (Narodne novine) No. 156/13.

⁶⁰ CFF Standard Contract of Professional play, *o.c.*, Art. 4(1-4).

⁶¹ CFF Standard Contract of Professional play, *o.c.*, Art. 4(5).

⁶² This Union of football players is not a trade union since players do not have a labour law status, but is a FIFPro member and a social dialogue partner representing football players in Croatia.

of mandatory contributions and taxes.⁶³

3.6 Working time and annual leave

Under the Croatian *Labour Act*, working time is limited to a maximum of 40 hours per week. In the case of force majeure, an extraordinary increase in the scope of work and in other similar cases of a pressing need; the worker shall, at the employer's request, work longer than the full-time working hours ("overtime work"), but for at most 8 hours a week. If the nature of the job requires so, full-time or part-time working hours may be rescheduled so that during one period, not longer than 12 consecutive months, they last longer; while during another they last less than full-time or part-time working hours, but on average not longer than full-time or part-time working hours. If working hours are rescheduled, along with overtime work, they shall not exceed 48 hours a week. Exceptionally, it could constitute as much as 56 hours a week, or 60 hours a week if the employer works seasonally; and it is determined by a collective agreement and with formal written consent of the worker.⁶⁴ Employees are entitled to at least four weeks of paid annual leave.⁶⁵

Because of their status as self-employed persons on professional athletes in sports, the *Labour Act* is not applicable. In *The standard contract of professional play* there are no provisions on working time and annual leave.

3.7 The end of the employment relationship

Under the *Labour Act*, a labour contract terminates:

1. upon the death of the worker;
2. upon expiration of the period for which a fixed-duration labour contract has been concluded;
3. when the worker has turned 65 years of age and has 15 years of mandatory pension insurance, unless otherwise agreed by the employer and the worker;
4. under an agreement between the worker and the employer;
5. upon the submission of a legally effective decision on retirement due to general inability to work;
6. by cancellation (notice);
7. by a decision of the court having jurisdiction.⁶⁶

3.7.1 The termination of the professional football contract

If the Croatian labour law were applied in sports, undoubtedly there would be problems with the cases sub (2) and sub (4) because it would be contrary to the principle of the contractual stability and "protected periods".

⁶³ Dates put at the author's disposal by the Croatian footballers union "Football Trade Union".

⁶⁴ Labour Act, *o.c.*, Art. 45 and 47.

⁶⁵ Labour Act, *o.c.*, Art. 55(1)

⁶⁶ Labour Act, *o.c.*, Art. 104.

According to the *CFF Regulations on the Status of Players* “The contracts will be terminated upon expiry of the term for which they have been entered into, by mutual agreement of the contract parties, annulment or termination by the competent body of the Croatian Football Federation”.⁶⁷ Furthermore, if the club is transferred to the amateur category of the competition upon completion of the competition year, all contracts concluded between the club and the player will cease to be valid.⁶⁸

In the *CFF Standard Contract of Professional Play*, regarding the termination of contract, it is also stated that if, after the end of the competition year, the club is relegated to a competition in which professional contracts may not be concluded, this contract shall be automatically terminated.⁶⁹ In Art. 11 there is a blank part in which the club and the player may write conditions upon which the club and the player may terminate the contract.

3.7.2 Termination for just cause and termination without just cause

According to the *CFF Regulations on the Status of Players* the contracts will be terminated upon: expiry of the term for which they have been entered into; by mutual agreement of the contract parties; annulment, or termination by the competent body of the CFF.

The player may terminate the contract for sports causes by notifying the club in writing of such termination at least fifteen (15) days after the latest official match of the club in which he has been registered for that competition year, provided that in the course of that competition year he has appeared for the club in less than 10% of the official matches in local and European competitions. If the club decides that there are particular circumstances that render contract termination for sports causes unjustified, or that the player is to pay the compensation, it may request that the CFF Arbitration Tribunal decides whether the request is grounded. Until the finalization of the proceeding before the Arbitration Tribunal, the contract will remain in effect. It is considered that the player has not played if he was recorded in the minutes of the match but did not enter the game.⁷⁰

3.8 Disciplinary rules and sanctions

This part of the paper focuses on the CFF’s rules. According to *the Statute of the CFF* and *the Disciplinary Regulation of the CFF*, there are disciplinary sanctions applicable to clubs, players, officials, agents, trainers, staff and other persons registered with the CFF.⁷¹

⁶⁷ CFF Regulations on the Status of Players, *o.c.*, Art. 6(4).

⁶⁸ CFF Regulations on the Status of Players, *o.c.*, Art. 6(5).

⁶⁹ CFF Standard Contract of Professional Play, *o.c.*, Art. 12.

⁷⁰ CFF Regulations on the Status of Players, *o.c.*, Art. 6(4).

⁷¹ Statute of the CFF, *o.c.*, Art. 58; Disciplinary Regulation of the CFF, available at: http://hns-cff.hr/files/documents/125/Disciplinski%20pravilnik%202014_v3.pdf, (30-06-2014), Art. 8-49.

Sanctions applicable to clubs are:

- warning;
- reprimand;
- fine;
- ban from playing matches in a certain stadium or in all stadiums in a certain region;
- ban from playing matches outside Croatia;
- playing one or more matches behind closed doors;
- transfer ban for one or two transfer windows;
- deduction of points or negative points; and
- exclusion from a competition and relegation to the lower divisions.

Players, officials, agents, trainers, staff, and other persons registered with the CFF and/or operating within the organization of the CFF may be sanctioned for their misconduct. These offences may either be reported in the documents written by referees and other officials or result from the evidence given during an investigation or disciplinary process. The persons charged with sports offences may be provisionally suspended during the disciplinary proceedings opened against them.

For the purpose of this book, the author will highlight the sanctions applicable to players, which are quite similar to those applicable to other persons in Croatian football. Sanctions applicable to players, include:

- warning;
- reprimand;
- fine for the players who have a contract with the club;
- suspension for a determined number of matches;
- suspension for a determined time frame;
- exclusion from a football club; and
- exclusion from the football organisation.

To conclude, upon finding that sports offences have been committed, the disciplinary bodies of the CFF impose on the persons and/or entities found guilty the sanctions provided for by the relevant acts or other applicable sports rules and regulations. The disciplinary bodies of the CFF determine the type and extent of sanction according to the nature and gravity of the offence, while taking into account the applicable mitigating and aggravating circumstances, if any. Furthermore, the sanction may be reduced due to the collaboration of the party, and increased in the case of recidivism.

As regards disciplinary offences, offenders will be charged for offences made with intention or negligence except in the case of disorder in the stadium or in the case of supporters' insults on the grounds of racial or other forms of discrimination; whereas the club will be charged for whatever happens within its stadium. Clubs are responsible for maintaining safety and security and for the behaviour of their supporters, both inside and around the stadium; before, during and after their matches.⁷²

⁷² Disciplinary Regulation of the CFF, *o.c.*, Art. 3.

During the match, the referees are in charge of imposing disciplinary sanctions and their decisions are final.⁷³ The disciplinary bodies are: *the Disciplinary committee of the CFF* in the first instance and *the Appeal committee of the CFF* in the second instance, with both having five members appointed by the Executive committee of the CFF of which at least the president and one member should be lawyers.⁷⁴ In exceptional cases, *the President of the Disciplinary committee* can give judgments on his own.⁷⁵ The procedure should be urgent and economical and, in the first instance, it should not last more than three months.⁷⁶ The procedure in the second instance should also last not more than three months.⁷⁷

None of the persons or entities subject to disciplinary proceedings can be exempted from responsibility because they were not aware of the sports provision they have breached, however in claiming this defence they may be charged with a milder sanction.⁷⁸ All sports rules are immediately binding and are presumed to be fully known by all persons and entities operating within the CFF.

According to the *CFF Standard Contract on Professional Play*: “*The Club has a right to determine the amount of fine payable by the Player in accordance with the general acts of the Club in case of a breach of the provisions of this Contract. By signing this Contract, the Player accepts the implementation of the Regulations governing the fixing of the amount of fines in such a way that he shall pay the relevant fine to the Club or the Club shall make a decreased payment of the invoice received by the Player. The Contractual Parties agree that the maximum amount of a single fine and total yearly fine a club can impose is determined by a special decision of the Executive Committee of the CFF*”.⁷⁹

4. Medical and doping issues

When medical issues are taken into consideration, it is important to highlight that players are obliged to personally take out an insurance policy against professional illness and accidents at work for the duration of the contract and to pay the total contributions for mandatory health and pension insurance. Furthermore, they have to present themselves before the club’s medical staff immediately in case of illness or injury and to inform their coach about what has happened.⁸⁰

On the other hand, clubs are obliged to put at player’s disposition, and free of charge, their sports-medical and therapeutic care; and to fulfil their obligations to the player if he/she suffers an injury or professional illness during performance of the duties of their contract.⁸¹

⁷³ Disciplinary Regulation of the CFF, *o.c.*, Art. 107.

⁷⁴ Disciplinary Regulation of the CFF, *o.c.*, Art. 109 and 110.

⁷⁵ Disciplinary Regulation of the CFF, *o.c.*, Art. 111.

⁷⁶ Disciplinary Regulation of the CFF, *o.c.*, Art. 125

⁷⁷ Disciplinary Regulation of the CFF, *o.c.*, Art. 147.

⁷⁸ Disciplinary Regulation of the CFF, *o.c.*, Art. 5.

⁷⁹ CFF Standard Contract on Professional Play, *o.c.*, Art. 11(1).

⁸⁰ CFF Standard Contract on Professional Play, *o.c.*, Art. 5.

⁸¹ CFF Standard Contract on Professional Play, *o.c.*, Art. 7.

According to the *CFF Standard Contract on Professional Play* the club and the player are obliged to respect all anti-doping regulations drawn up by FIFA, UEFA and CFF. Doping is defined as the use of substances which are on the list of prohibited substances and the use of forbidden methods mentioned in the doping lists included with the regulations as well as in other relevant doping lists. The player is obliged not to engage in doping and the club is obliged not to order him to engage in doping. The club's obligation is to undertake all necessary precautionary measures in order to prevent the use of doping, as well as educate the player on the prevention of doping.⁸²

The Croatian Sports Arbitration Council⁸³ is, in particular, authorised to resolve disputes and issues pertaining to the execution of the tasks of the National Olympic Committee of Croatia. Particularly significant among these are: decisions on disciplinary measures and decisions regarding doping; decisions on disciplinary and other procedures that involve or imply long-term bans or prohibition from participation in sports competitions; decisions that pertain to Olympic candidates or top athletes (category I to III); the principles and conditions of sports competitions and other issues regulated by the NOC of Croatia Statute.

5. *Transfer of players*

5.1 *Transfer rules*

The *CFF Regulations on the status of players*, in regard to the transfer rules, determine that the club that wishes to engage a player shall, before the start of negotiations with such player, inform the club with which the player has been registered of this in writing. Each direct or indirect verbal or written intervention relating to the player whereby the player is induced to violate the obligation will invoke the disciplinary responsibility of the club, club responsible persons and player, i.e., responsibility according to the *FIFA Regulations for the Status and Transfer of Players*. If the player's contract has expired, neither the player nor the other club are obligated to notify the player's former club of the negotiations for a potential transfer. If such a player signs the contract with a new club, the new club shall send the notification thereof within 15 (fifteen) days to the club entitled to the player's training and development compensation according to the provisions of *FIFA Regulations on Statuses and Transfer of Players* and the decisions of the CFF Executive Committee relating to the amount of the compensation.⁸⁴

⁸² CFF Standard Contract on Professional Play, *o.c.*, Art. 8.

⁸³ Sports Act, *o.c.*, Art. 52. More details about the CAS Croatia and CSAC in: J. Čizmić, H. Momčinović, "Športsko arbitražno sudište HOO-organizacijske i postupovne odredbe", *Collected papers of the Law Faculty of the University of Split (Zbornik radova Pravnog fakulteta u Splitu)*, vol. 48, 2011, no. 4, 759-773.

⁸⁴ CFF Regulations on the Status of Players, *o.c.*, Art. 13.

5.2 Labour issues

Since there is no labour law status in professional football in Croatia, labour law issues are not applicable on the transfer system in general, and transfer rules in particular.

5.3 Training compensation systems

The training compensation system scheme is also included in the *CFF Regulations on the Status of Players*. It is prescribed that if, before the expiry of his contract, the contracted player enters into a contract to transfer to another club based on the agreement between those clubs; then his current club has the right to compensation in the amount established by the clubs by mutual agreement. A portion (5%) of any compensation paid to the current club will be allocated to the club(s) that participated in the players' training and education. This allocation will be done in proportion to the number of years of the player's registration with the corresponding clubs in the period between 12 – 23 years of age (solidarity mechanism).

The new club will pay the set amount within 30 days from the date of the player's registration. The responsibility of the new club is to calculate the amount of the solidarity contribution and define the mechanism of allocation of such amount based on the player's former club(s).

If it is not possible to establish the connection between the player and any other club that trained the player, or if the clubs do not contact the club obligated to pay the solidarity contribution within twenty four months (24) from the date of the player's registration, the compensation shall be paid to the federation(s) of the club(s) in which the player was trained. The federation(s) is entitled to claim the compensation within six (6) months upon expiry of the period of twenty-four months after the player's registration date.

If an amateur player is transferred to another club without changing status, his former club is not entitled to compensation.

If the player, previously described, within the period prescribed in *FIFA Regulations on Statuses and Transfer of Players*, acquires a non-amateur (professional) status, the clubs in which such player was formerly registered, are entitled to claim compensation for the player's training and development in the period from the beginning of the competition year in which the player turned twelve (12) to the end of the competition year in which the player turned twenty-one (21). The compensation is paid if the first non-amateur contract was concluded by the end of the competition year in which the player turned twenty-three (23).

The clubs in which the player was registered as an amateur player have the right to claim from the club with which the player has entered into the first non-amateur contract, compensation for the training and development of the player within twenty four (24) months from the date when the player acquired the status of a non-amateur player. Upon the expiry of this period of twenty-four months, the

compensation shall be paid to the football federation of the club in which the player was trained.

The compensation for the training and development of the player shall be paid every time the player changes club if, by the end of the competition year in which the player turns twenty-three (23), the player enters into a contract with a new club; regardless of whether he had amateur or non-amateur player status at the previous club. The club may request compensation for the training and development of a player only once.

As an exception, a club that unilaterally terminates the contract with a player under the age of 23 is not entitled to training and development compensation.⁸⁵

The amount of compensation for training and development is determined in the agreement between the player's club and the club to which the player intends to transfer. Any agreement between the player or third parties and the player's future club on the amount of the compensation is null and void. The decision on the amount of the compensation for the training and development of the players is made by the CFF Executive Committee.⁸⁶

Non-payment of the compensation for the development and training of the player when the player transfers from one club to another, does not terminate the player's right to join another club and to be registered with it according to the provisions of the *CFF Regulations on Registration of the Clubs and Players*.⁸⁷

5.4 Player's agents

On the subject of player's agents, it should be pointed out that the *CFF Regulations on the Status of Players* also regulate this issue. It is stated that if the services of a licensed agent have been used by a player in entering into a transfer contract between two clubs or a contract between the player and the club; this must be specified in the corresponding contract by quoting the name of the licensed agent. Use of the services of a non-licensed agent by a player for such purposes, and payment of any fees to such agent, constitutes a disciplinary violation subject to the applicable provisions of the *CFF Disciplinary Regulations*.⁸⁸

There are also specific regulations of the CFF in this regard, the *CFF Regulations on the Work of Player's Intermediaries (player's agents)*⁸⁹ and a List of Licensed Player's Intermediaries.⁹⁰

⁸⁵ CFF Regulations on the Status of Players, *o.c.*, Art. 14.

⁸⁶ CFF Regulations on the Status of Players, *o.c.*, Art. 15, Art 16(1). CFF Decision on the amount of training and development compensation, available at: http://hns-cff.hr/files/documents/old/150-Odluka_o_naknadi_za_treiranje_i_razvoj_igraca-2011.pdf, (11-06-2014).

⁸⁷ CFF Regulations on the Status of Players, *o.c.*, Art. 17. CFF Regulations on the registration of clubs and players, available at: http://hns-cff.hr/files/documents/124/Pravilnik%20o%20registraciji%20klubova%20i%20igraca%202014_v3.pdf, (13-06-2014).

⁸⁸ CFF Regulations on the Status of Players, *o.c.*, Art. 20.

⁸⁹ CFF Regulations on the Work of Player's Intermediaries (player's agents), available at: http://hns-cff.hr/files/documents/old/160-Pravilnik_o_radu_posrednika_u_transferima_igraca.pdf, (14-06-2014).

⁹⁰ List of Licensed Player's Intermediaries (*Lista licenciranih posrednika*), available at:

6. Social security principles (unemployment and pensions)

6.1 Injuries, illness, and disability

As has been previously stated *sub ad. III and IV* clubs have some obligations towards players regarding medical issues. It is important to stress that there is no clear and express obligation for the club to provide medical treatment and to continue to pay a player's basic wages during the period when he is injured or otherwise incapacitated.⁹¹ In fact there is an obligation of the club which is similar to this, but it does not have the same meaning and puts the player in an unfavourable position regarding their health care. "The Club is obliged to put at the Player's disposition its sports-medical and therapeutic care, without fee. If the Player during the performance of the contract suffers injury or professional illness and is not able to fulfil their obligation towards the Club for a certain period or for a longer period, the Club will perform its obligation in conformity with the Club's Regulation concerning rewarding".

Even if at first sight it seems that these two articles are not that different from the usual employment law ones, there remains a big difference. There is no obligation for the club to provide medical treatment, but only to put its own medical infrastructure at the player's disposition. With almost half of clubs competing in the first division having budget problems and without financial resources, it is obvious that medical health facilities are not at a proper level. Secondly, there is no obligation to pay the player in conformity with the contract, but in conformity with the club's regulations, which is an autonomous act and could be amended by the club without consultation with the players or the players' trade union.⁹²

6.2 Unemployment benefits

Unemployment benefits are provided to those who are or have been insured within the public unemployment insurance scheme, those with a labour law status in general. So this mandatorily concerns all the employed; and from among the self-employed persons, only those who were insured voluntarily. Regarding football, there are no provisions either in state governance or in sports governance.

6.3 Pension schemes

Pension schemes are a three pillars system and, in Croatia, comprise the pension

http://hns-cff.hr/files/documents/132/POPIS%20POSREDNIKA%20za%20web_v4.pdf (10-06-2014).

⁹¹ CFF Standard Contract of Professional Play, *o.c.*, Art. 5 and 7.

⁹² Since players are not defined as workers, no trade union exists from the labour law point of view. The Croatian Union "Football Trade Union" (a FIFPro member), is an ordinary union of persons (football players), but not a real trade union with its collective labour law rights including industrial actions rights.

insurance administered by the Croatian pensions insurance institute and also the so-called second and third pillar pension schemes, which are not insurance per se, but rather funded savings schemes.

Unfortunately, there is not a special fund for sportspeople and they are, as self-employed, left to pay their contributions on their own; but since they are not paid on time, or not paid at all, the system is not functioning properly.⁹³

6.4 *Careers Funds*

Unfortunately, no regulation for career funds exists in Croatia.

6.5 *Clubs' insolvency and players' protection*

In case of a company's insolvency and its winding up, the workers' financial rights are protected by the *Act on insurance of workers' financial demand in case of employer's insolvency*.⁹⁴ This Act helps to protect some of workers' unpaid financial demands towards their employers facing financial problems.⁹⁵

Since professional players are not workers, they are not allowed to enjoy those rights and in cases of a club's insolvency they usually do not have their demands fulfilled, but still have their own debts towards the State (mandatory contributions and taxes) to fulfil.

7. *Labour dispute settlement*

From the labour law point of view, disputes between employees and employers are heard and decided by courts. On the other hand, Croatian labour law also provides the opportunity to settle employment disputes in arbitration or mediation.⁹⁶ So should sport, and particularly football, have a labour law relationship; this provision would make it also possible to use the services of autonomous sports arbitration bodies, such as the CFF Arbitration Court, or the CAS in Lausanne.

⁹³ For instance tennis players, with their special health and pension system administered by the ATP is a good example how the things are going on in professional sports, see H. Kačer, M. Ančić, "Mirovinsko i zdravstveno osiguranje igrača u muškom profesionalnom tenisu", *Hrvatska pravna revija*, 2008, no. 12., 81-86.

⁹⁴ Act on insurance of workers' financial demand in case of employer's insolvency (*Zakon o osiguranju potraživanja radnika u slučaju stečaja poslodavca*), Official Gazette (Narodne novine) No. 86/08, 80/13.

⁹⁵ V. Smokvina, D. Bodul, A. Vuković, "O načelu socijalnog postupanja u stečajnom postupku s naglaskom na pravima radnika", *Zbornik Pravnog fakulteta Sveučilišta u Rijeci (Collected papers of the Law Faculty of the University of Rijeka)*, vol. 34, 2013, no. 1, 525-560.

⁹⁶ *Labour Act, o.c.*, Art. 132. See also: M. Dika, Ž. Potočnjak, V. Gotovac, Radni sporovi, 690-711 in (Ž. Potočnjak Ed.) *Radni odnosi u Republici Hrvatskoj, o.c.*

7.1 Mediation

In Croatia, mediation is regulated by the *Mediation Act* of 2011.⁹⁷ Within football, mediation is not used in a formal sense, but during the arbitration procedure before the CFF Arbitration tribunal, *infra*, the parties may reach a settlement.⁹⁸

7.2 Arbitration

According to the autonomous acts of the CFF, *the Arbitration tribunal of the CFF* has been established.⁹⁹ As an autonomous and permanent tribunal of original jurisdiction, it is competent to rule on status questions of coaches and players and, connected to that, the material questions originating between two single subjects of the CFF (club-club, player-club, coach-club, club-single county football federation) in conformity with the provisions of the acts of CFF; FIFA and UEFA regulations; and Croatian laws. From 2002 when it was founded to 2010, the Arbitration tribunal of the CFF adjudicated in more than 500 cases mainly concerning non-payment of contract obligations and contract resolution.¹⁰⁰ In most cases the decision was delivered in 3-4 months, but there are also exceptions with cases pending for a year or more.

The Arbitration tribunal of CFF has eleven members¹⁰¹ and delivers its decisions in boards of three members. Members of the Arbitration tribunal of the CFF are elected by the Executive Committee of the CFF upon the proposals of the Croatian Union “Football Trade Union”, the First CFL Association of professional clubs and the Executive Committee.¹⁰² In the work of the Tribunal, it uses as sources of law: the Statute and the regulations of the CFF and FIFA; along with the *Act on obligations*, the *Arbitration Act* and the *Civil procedure Act*,¹⁰³ as well as other legislation. There are no ordinary legal remedies against the Arbitration tribunal of the CFF’s decisions, since its decision is final. There is the possibility for a reopening of a case in two months from the date of the decision if there is new evidence and new facts which were unknown at the date of the decision.¹⁰⁴ On the other hand, according to the *Arbitration Act*, it is a possible to take action against an arbitration decision and call for its annulment before ordinary state courts.¹⁰⁵

⁹⁷ Mediation Act (*Zakon o mirenju*), Official Gazette (Narodne novine) No. 18/11.

⁹⁸ Regulations on the Work of the CFF Arbitration Tribunal (*Pravilnik o radu Arbitražnog suda HNS-a*), Art. 41, available at: <http://hns-cff.hr/files/documents/1339/Pravilnik%20o%20radu%20Arbitražnog%20suda%202014.pdf>, (10-06-2014).

⁹⁹ Statute of the CFF, *o.c.*, Art. 60-63.

¹⁰⁰ S. Hautz, “Arbitražni sud Hrvatskog nogometnog saveza”, *Pravo u gospodarstvu*, vol. 50, 2011, no. 4, 914-918.

¹⁰¹ The author is an arbitrator of the CFF Arbitration tribunal, nominated for the period 2014-2018.

¹⁰² Regulations on the Work of the CFF Arbitration Tribunal, *o.c.*, Art. 5.

¹⁰³ Civil procedure Act, (*Zakon o parničnom postupku*), Official Gazette (Narodne novine) No. 53/91, 91/92, 112/99, 129/00, 88/01, 117/03, 88/05, 2/07, 96/08, 84/08, 123/08, 57/11, 25/13.

¹⁰⁴ Regulations on the Work of the CFF Arbitration Tribunal, *o.c.*, Art. 48.

¹⁰⁵ Arbitration Act (*Zakon o arbitraži*), Official Gazette (Narodne novine) No. 88/01, Art. 36.

This tribunal has no competence in disputes between subjects in the football organisation derived from the application of sports rules, training compensation, the solidarity mechanism, disputes against which not all legal means were used before the Federation etc.¹⁰⁶ As well as giving decisions, the Arbitration tribunal of the CFF may also mediate in a dispute settlement.

Ivkošić is of the opinion that we cannot recognise the character of the chosen tribunal (arbitration) because it does not fulfil the elementary principles of the arbitration procedure: freewill in concluding the contract on arbitration (or arbitration clause), the independence and autonomy of arbitrators, and compliance with the elementary principles of the arbitration procedure.¹⁰⁷

It is important to highlight that there is a strong mechanism of enactment for the decisions of the Arbitration tribunal of the CFF,¹⁰⁸ *inter alia* in the question of due payment of contract obligations. In the event that a football club does not fulfil its obligations derived from the decision of the Arbitration tribunal of the CFF and upon the proponents demand; the Arbitration tribunal of the CFF will make a request to the Disciplinary committee of the CFF for suspension¹⁰⁹ and the initiation of the disciplinary procedure against the football club which did not fulfil its obligations¹¹⁰ derived from the Arbitration decision.¹¹¹

For example in the case A-2671/05: *Stjepan Čordaš (coach) v NK Osijek (club)*, before the Arbitration tribunal of the CFF the club had not paid its due obligations derived from the contract to its coach. The coach made a claim before the Arbitration tribunal of the CFF seeking the payment. After that, the parties reached an agreement before the tribunal and the case was closed. In another interesting case A-42/08: *Ante Vitaić (player) v NK Osijek (club)*, the club had not fulfilled its contract obligation for payment, and the player made a claim. The Arbitration tribunal of the CFF made a decision and obligated the club to pay its debt. Since the club had not paid in the stipulated period and had not respected the Tribunal's decision, the claimant (player) made a demand to the Disciplinary committee to institute disciplinary proceeding against the club. The Disciplinary committee made a decision No. 129/09 and suspended the club. From the Arbitration tribunal's decision to the Disciplinary committee's decision 30 days passed. In the end, the club paid all the debts.¹¹²

7.3 Courts

As an outcome of the legal status of players as self-employed, it is not

¹⁰⁶ Statute of the CFF, *o.c.*, Art. 60(2).

¹⁰⁷ M. Ivkošić, "Pravni okvir transfera profesionalnih sportaša", in I. Crnić et al., *Uvod u sportsko pravo*, Zagreb, Inženjerski biro, 2009, 124.

¹⁰⁸ Even though, according to the Arbitration Act, the recognition and enactment of an arbitrary decision is made before ordinary state courts. Arbitration Acts, *o.c.*, Art. 47.

¹⁰⁹ The club may not play official and friendly matches.

¹¹⁰ Disciplinary Regulation of the CFF, *o.c.*, Art. 136.

¹¹¹ V. Puljko, "Arbitražno rješavanje sporova u nogometu", *Pravni vjesnik*. vol. 10, no. 2, 62.

¹¹² V. Puljko, "Arbitražno rješavanje sporova u nogometu", *o.c.*, 62.

surprising that there are only a few regular court judgements on this issue. One very interesting judgement of the Supreme Court of the Republic of Croatia of 1997, when actually there was a *sui generis* labour relationship in force in Croatian football, stated “*a contract between a professional sportsman and a sports organization, because of its contents which do not demonstrate that it is a contract of employment, should be defined as a sui generis contract*”.¹¹³

Every football player and every club has the right to demand the protection of their rights before ordinary (state) courts, but if actually such protection is sought (which is very rare primarily because of duration of the procedure; and better flexibility, greater informality of procedure and less costs in the arbitration procedure), such a demand is connected with the violation of contract obligations or due payment arising from the contract obligations. On the other hand, it should be noted that it neither conforms with what was previously stated nor with the relevant FIFA and UEFA regulations, that the Statute of the CFF determines that: “*In case of a disputes which are within the competence of FIFA, UEFA, CAS, the Arbitration and the Arbitration tribunal of the CFF or the legal bodies of the CFF, subjects of para. 1 of this article oblige themselves not to present claims before ordinary (state) courts*”.¹¹⁴

7.4 Sports special bodies

The sports movement in Croatia, along with football, is characterized by specific dispute resolution procedures and authorities. Sports organisations (federations and clubs) seek to prevent the settlement of disputes before ordinary courts. Instead, the athletes and sports organisations are advised to turn to special dispute settlement bodies – the arbitration panels, or arbitration commissions. Except for the *CFF Arbitration Tribunal*, which deals with sport-specific entities, two other bodies should be highlighted.

At its 19th session on 25 May 1999 the NOC of Croatia’s Assembly established the independent and autonomous NOC of Croatia bodies: the *Court of Arbitration for Sport (hereinafter: CAS Croatia)* and the *Croatian Sports Arbitration Council (hereinafter: CSAC)*. Their role is the resolution of sports disputes and disputes related to sports, as well as the reconsideration of decisions of sports associations where other means of legal remedy have been exhausted or do not exist and, among other things, provision of legal opinions at the request of the NOC of Croatia Council or a NOC of Croatia member.

The arbitration rules for CAS Croatia, also adopted at the 19th session of the NOC of Croatia’s Assembly, regulate in detail the issues of competence, composition, structure, rules of arbitration procedure and mediation procedure.

¹¹³ Croatian Supreme Court, Decision No. Rev 1120/95, of 26-11-1997, (*Odluka Vrhovnog suda Republike Hrvatske, Revr 1120/95*) available on the official web page of the Supreme Court of the Republic of Croatia: <http://sudskapraksa.vsrh.hr/>.

¹¹⁴ Statute of the CFF, *o.c.*, Art. 62(2).

The scope of CAS Croatia's competence is, as a rule, previously agreed by the parties.¹¹⁵

The Sports Act establishes the competence and activities of the Croatian Sports Arbitration Council and of the Croatian Court of Arbitration for Sport.¹¹⁶

The CSAC is authorised, in particular, to resolve disputes and issues pertaining to the execution of the tasks of the NOC of Croatia. Particularly significant among these are decisions on disciplinary measures and decisions regarding doping, decisions on disciplinary and other procedures that involve or imply long-term bans or prohibition from participation in sports competitions, decisions that pertain to Olympic candidates or top athletes (category I to III), the principles and conditions of sports competitions and other issues regulated by the NOC of Croatia Statute. Since its establishment the CSAC has ruled in 39 cases,¹¹⁷ and reached more than 10 decisions and legal opinions important for the development of sport.¹¹⁸

Members of the CSAC are elected by the assembly from eminent attorney-athletes and former athletes, officers and professionals.

All NOC of Croatia members, with the exception of the Croatian Football Federation, have provisions in their statutes concerning the competence of the CSAC for disputes related to their respective sport.

A CSAC decision may be appealed before the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, if the case is related to the Olympic Games, which then renders a final decision on the dispute pursuant to the Sports Arbitration Code.

The CSAC has deliberated on various sports disputes pertaining to: requests to review decisions made by the bodies of sports associations where other means of legal remedy have been exhausted within these associations; bans against individual members in these associations, i.e. bans from the sport; the expulsion of a club or person from membership of a federation or the rejection of an application for membership; the amounts of compensation payable for damages or the non-payment of damages for a player transfer; the issuing of licences to play in the Croatian Football 2nd League and many other issues; and requests that have been submitted for legal opinions on issues of contention in the field of sports.

8. Conclusion

As has been demonstrated and elaborated in this paper, the issue of legal (labour)

¹¹⁵ Arbitration rules of the Croatian Court of Arbitration for Sport of the Croatian Olympic Committee (*Arbitražna pravila športskog arbitražnog sudišta pri Hrvatskom olimpijskom odboru*), Official Gazette No. 72/99.

¹¹⁶ Sports Act, *o.c.*, Art. 52. More details about the CAS Croatia and CSAC in: J. Čizmić, H. Momčinović, "*Športsko arbitražno sudište HOO-organizacijske i postupovne odredbe*", *o.c.*

¹¹⁷ H. Kačer, A. Perkušić, B. Ivančić-Kačer, "*Postoji li u Republici Hrvatskoj (kvalitetno) sportsko pravo?*", *o.c.*, 731.

¹¹⁸ More available at: www.hoo.hr/637-v-vijece-sportske-arbitraze-jednostavnije-do-odluke.aspx (23-05-2014).

status of professional sportspeople in general, and football players in particular, is a great problem in Croatia and Croatian football. This should change. Let's hope that the implementation of the social dialogue in the professional football sector's outcome – the *Autonomous Agreement regarding the Minimum Requirements for Standard Player's Contract (2012)* and FIFA and EU institutions initiative to implement the *Agreement* until April 2015 will give us some help.

There is no doubt that professional players are workers and that they should be treated as workers, with all rights and obligations deriving from their status. The author is of the opinion that a brighter future is coming for professional footballers in Croatia, at least they will have a deserved labour law status.

EMPLOYMENT RELATIONSHIPS AT NATIONAL LEVEL: CZECH REPUBLIC

by *Marketa Haindlova**

SUMMARY: 1. Historical perspectives – 2. Employment regulation and football structures – 3. Individual employment relations in professional football – 4. Social security principles (unemployment and pensions) – 5. Labour Dispute settlement – 6. Social dialogue

1. Historical perspectives

Professional football players in the European Union are commonly defined as employees under labour contract. However, this is not the case in the Czech Republic that joined EU in 2004, where professional football players still nowadays enter into civil law contracts and have a legal status of so called self-employed persons who themselves are obliged to pay taxes, social security and sickness insurance.¹ For this reason, there is no collective bargaining agreement in football or sports in general at all. As a consequence, the relationship between a football club and a professional player in the Czech Republic is in practice not in balance and players as the weaker party are not duly protected under the employment contracts.²

Another important aspect regarding to the legal status of professional football players has to be emphasized. Contrary to the developed European countries, professional players in the Czech Republic did not have their independent representation in form of a players' union until recently. In established countries, especially in the Western countries such as England, where the Professional Footballers' Association has more than one hundred years lasting tradition, these players' unions represent interests and needs of players and are a strong partner in the so-called social dialogue in European football.

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¹ www.epravo.cz/top/clanky/vykon-zavisle-prace-mimo-pracovnepravni-vztah-u-sportovcu-94447.html
- www.epravo.cz/top/clanky/pravo-a-profesionalismus-ve-sportu-36109.html.

² <http://pravniradce.ihned.cz/c1-58072000-sportovni-pravo>.

Due to the negative perception of trade unions in the Czech Republic as one of the so called “post-communist countries” it was very difficult to build up a functional negotiation mechanism between representatives of employees (clubs) and representatives of employed persons (athletes). Even if such independent representative organizations were founded, they struggled to build a strong position and to be accepted by sports governing bodies, leagues and other sports stakeholders. This was also the main reason why the Czech Association of Football Players (players’ union) has only existed for three years. As evident, one of its main goals is to take part in the social dialogue and to establish employment relationship for professional football players in the Czech Republic.

Based on the abovementioned, it is evident that the players’ union plays an essential role in the sports sector and should be considered as an equal partner for the Football Association of the Czech Republic (the Czech FA), which is the highest football governing body and the League Football Association representing professional football clubs.³

2. *Employment regulation and football structures*

2.1 *Sources of law and approaches (public law, private law, employment law, ...)*

Specific laws on sport and football (e.g. specific laws on sport, on athletes, collective bargaining,)

Generally, the main sources of labour law are three acts: the Labour Code, the Collective Bargaining Act and the Employment Act. The area of labour law is governed by other important regulations, namely the act stipulating further requirements for health and safety at work, the labour inspection act, the sickness insurance act and the social security act. The fundamental regulation in the area of labour law is the Labour Code (Act No. 262/2006 Coll.) which regulates, inter alia, the following labour law relations: the way of origination, duration and termination of employment, working discipline, working conditions, working hours, breaks at work, overtime work, night work, sick leave etc. It also regulates the wage and reimbursement of wage, occupational health and safety, employee care, female and juvenile workers’ working conditions, labour disputes, compensation for damage and the like.

Besides, the Collective Bargaining Act (Act No. 2/1991 Coll.) regulates the collective negotiations between the respective trade unions organizations and employers, the participation of the state, as the case may be, the purpose of which is the conclusion of a collective agreement. It further regulates the requisites of the collective agreement, the procedure of concluding collective agreements, collective

³ www.epravo.cz/top/clanky/jak-zalozit-odborovou-organizaci-15982.html.

disputes, strike within a dispute related to the conclusion of a collective agreement etc.

Another important legal regulation is the Employment Act (Act No. 435/2004 Coll.) which concentrates on the state's employment policy, the goal of which is to attain full employment rate and protection against unemployment, fair treatment and ban on discrimination in the course of persons asserting their right to employment, the activities performed by labour offices and their powers, the assessment of natural persons' health condition and healthcare providers' cooperation with the assessment of their health condition, the right to employment.

The Labour Code is also closely linked to the Act Stipulating Further Requirements for Health and Safety at Work (Act No. 309/2006 Coll.), which regulates requirements concerning occupational health and safety in labour law relations as well as the provision for the protection of health and safety at work or the provision of services outside labour law relations.

In general, legal issues in sport are regulated by private law statutes such as the Czech Civil Code⁴ and the Commercial Code, while tax matters are regulated by the Income Tax Act⁵ and employment matters (not common and applicable in the Czech sports environment) are regulated by the Labour Code.⁶

Sports legislation might be described as sports regulations⁷ in any appropriate sports field which observance is required in connection with the exercise of a particular sports field and which breach is (to various extent, with various intensity and consequences) sanctioned by special entities. Similar aspects with ordinary legislation might be found when considering the purpose of its existence as well as the content, form, certainty, universality and other attributes necessary for a proper, quality and effective application as a rule of behavior. The purpose of its existence is therefore of the same nature, i.e. to regulate behavior of involved participants in order to accomplish followed aim and to ensure coexistence of participants with sufficient legal certainty, in another words general legal principles.

However, sports legislation should not be considered as an isolated phenomenon. To indicate the relationship between sports legislation and ordinary legislation it is of crucial importance to define a nature of sports activities.

On the other hand, sports activities may include material, institutional, financial and other organization of sports activities. Unlike the abovementioned, ordinary legislation dominates in this area. Legal issues such as tax benefits of sport organizations, subsidies from the state and other public budgets, sponsorship, employment contracts with athletes, etc. are primarily regulated by ordinary legislation.

The primary regulation of the sports law, especially contracts between

⁴ Act No. 89/2012 Coll., the Civil Code.

⁵ Act No. 586/1992 Coll., the Income Tax Act.

⁶ Act No. 262/2006 Coll., the Labour Code.

⁷ M. Sup, '*Sportovní normy (pravidla) a jiné nepravňní prameny pravidel chování sportovce*', in J. Kuklík, *Sportovní právo*, Prague, Auditorium, 2012, 82.

players and clubs are regulated by civil law with its character as private law. The basic act is the Act No. 89/2012 Co., the Civil Code. The reason for this is that a player is defined as a self-employed and thereby provides services to a club as an independent contract party opposed to a normal employment relationship. The Czech legal system does offer a special act for sport, the Promotion of Sport Act.⁸ Nevertheless, this Act contains mainly declaratory provisions rather than specific articles dealing with complicated sports issues.

2.2 *Football structures (associations, leagues etc.)*

Sports associations (predominantly associations according to the Civil Code) created a comprehensive legislative framework as well as a structure of authoritative bodies to govern the particular sports field.⁹

These bodies are responsible for creating internal normative regulations, executive bodies and quasi-judicial bodies. It has to be mentioned that sports associations are obliged to follow general basic legal principles and a Czech legal system as well as the European and International legislation in order to ensure a properly working system in a particular sports association. Sports associations work with the premise that they are legal entities, entitled to exercise their “power” only in relation to their members.¹⁰

As mentioned above, sports associations are considered as private law entities and therefore limits/restricts ordinary courts possibility to review decisions of sports associations. On the other hand, a legal doctrine occasionally assigns the public law character to sports associations. In this case, sports associations as public corporations would be part of a public administration, i.e. all decisions of sports associations would be considered as the result of administrative procedure and therefore reviewable before administrative courts. Courts are only allowed to interpret whether a concerned decision is in conformity with associations’ internal rules but lack the power to enforce its own decision. Consequently, it is dependent only on the goodwill of the Association to implement the court decision or not.

Although the Czech legal system does not provide a strict regulation of sports (civic) associations, it is obvious that these associations should intervene only in domains of their members closely connected to activities of a particular association. Nevertheless, they may not decide on matters that fall within state’s authorities, e.g. a decision regarding a deprivation of liberty of players who have intentionally and seriously injured opponents during a match or decisions on private claims among its members (with some exceptions of arbitration issues) especially in cases of liability. These issues are exclusively assigned to ordinary courts.

It is very important to explain the organizational structure of football in the

⁸ Act No. 115/2001 Coll., the Promotion of Sport Act.

⁹ Legislativní rada Českého olympijského výboru. ‘Právní úprava spolků dle nového občanského zákoníku.’ Praha, Český olympijský výbor, 2013, 2.

¹⁰ <http://nv.fotbal.cz/cmfs/Legislativa/index.php>.

Czech Republic, which could be described as some kind of classical pyramid structure. On the top of this scheme there are two different championships namely Czech Football League (1st division) and Football National League (2nd division), organized by the Czech FA. There are 16 clubs in each of these leagues. On the third level of the scheme exist two other leagues, namely Bohemian Football League (ČFL) and Moravian–Silesian Football League (MSFL). Lower divisions are divided into 8 other levels.

Winners of Czech Divisions A, B and C are promoted to the ČFL, because these are the lower level of this league and winners of Czech Divisions D and E are promoted to the MFSL. Teams, which are relegated from the 2. League, will either play in CFL or MSFL depending on teams' geographical/regional location. The number of promoted teams can vary in each season.

Below the 4th Divisions, there are 14 regional divisions and the winners of each division are promoted to the corresponding 4th division. Teams are placed to particular divisions according to their location/FA decision. Clubs from Bohemia (regions below Divisions A/B/C) can't play with clubs from Moravia-Silesia (Divisions D/E) though.

It is very difficult to make the distinction between the professional players and the amateur ones and most probably from the European perspective only first and second league will be considered as the professional one.

Level of League	League/Division				
1	Gambrinus Liga				
2	Fotbalová národní liga				
3	Česká fotbalová liga (ČFL)			Moravskoslezská fotbalová liga (MSFL)	
4	Division A	Division B	Division C	Division D	Division E

3. *Individual employment relations in professional football*

3.1 *Essential elements and legal qualification*

A professional football player's contract regulates in detail the rights and obligations of a player and club, all this in relation to the Civil Code regulation and the regulation of the Czech FA. The player contract is qualified as a commercial contract between two independent contracting parties concluded as *contractus innominatus* under Section 1746 Sub-Section 2 of the Civil Code whereas further requirements of player's contracts are set in the Regulation of the Czech FA on the Evidence of Professional and Non-Amateur Contracts. Even though there is formally no standard players' contract defined by the Czech FA, it can be stated that most of the professional player's contract are of very similar content.¹¹

The player's contract is divided into several parts as follows: player's and club's rights and obligations, duration and termination of the contract, remuneration, image rights, status of the player with regard to taxes, validity and final provision including dispute settlement. Disciplinary rules and sanctions are in some cases part of the main obligations of both contracting parties, however it is also not unusual that the contract refers to a separate disciplinary rules of a club. In the latter case there might arise a problem with the validity of such rules because they are not always signed by the respective player but instead the captain and/or the coach of the team and in fact the player does not know the content of the club's disciplinary regulations which is essential for his sporting activity.

The Czech legal system does offer the possibility of employment contract, but this option is rather uncommon than usual. For both contracting parties it seems to be more profitable to engage into a commercial contract rather than employment contract, especially in relation to tax benefits and lower payments into the public social and healthcare system.

3.2 *Players' rights and obligations, Club's rights and obligations*

The main part of player's contract is based on the rights and obligations of both contracting parties. The main obligations of the players are participating on trainings, behavior during trainings and matches, obligation to take care of health, responsibility of the property of the club and others. Players are also prohibited to engage to a contractual relationship with another club during a contract period and obligated to inform the club of his health problems or other circumstances, which indispose the player.

¹¹ www.epravo.cz/top/clanky/vykon-zavisle-prace-mimo-pracovnepravni-vztah-u-sportovcu-94447.html.
www.epravo.cz/top/clanky/vykon-zavisle-prace-mimo-pracovnepravni-vztah-u-sportovcu-94447.html.
www.epravo.cz/top/clanky/cinnost-profesionalniho-sportovce-vykon-nezavisleho-povolani-nebo-pracovnepravni-vztah-79923.html.

On the other hand, the club is obliged to ensure adequate healthcare, to provide free time for players, to inform the player about the organized training plan, to create adequate conditions for trainings and matches, to provide the player with accommodation during the training camps and matches.

Regarding financial disputes between clubs and players, which typically concerns of the salaries and bonuses set out in professional players' contracts and bonus schemes of the clubs. It has to be pointed out that the clubs mostly agree with the claims of the players and the national dispute resolution chamber of the Czech FA formally approves reconciliation between the parties.¹²

The professional player's contract often contains a confidentiality clause regarding the content of the contract itself but also with respect to statements about the club. According to this clause the player shall refrain from (any and all) expressions regarding the club, its functioning and activities or officials in media including social media, which may harm the reputation of the club and its good name. Otherwise the club is entitled to impose fine on the player. The national dispute resolution chamber of the Czech FA ruled that the concerned contractual provision is common practice, which is in compliance with the legislation of the Czech FA and the respective club has a competence to impose disciplinary measures for breaching the confidentiality clause.¹³ In this particular case, the Arbitrational Panel came to the conclusion that fine imposed by the club to the player was illegal because the player was informed about the application of the disciplinary measure after the club and the player signed an agreement modifying the original player's contract with respect to its duration and the financial obligations of the club toward the player.¹⁴

3.3 *Remuneration, Working time*

Regarding the fact, that the footballer is a self-employed person and an independent contracting party, thus the remuneration and working time provisions are negotiated on an individual basis. The main amount of remuneration depends always on the individual attractiveness of the player for the club. The contract also regulates the amounts of different bonuses such as remuneration for won matches or for remises. The contract can also regulate additional bonuses for different purposes such as subsidy for accommodation or subsidy for clothing.

Furthermore, the working time is regulated individually in each contract, but some similarities can be found in each of them. The main vacation time is set in most of cases on four or five weeks. The main working time is not exactly specified, but the player has the obligation to participate on trainings and matches, which

¹² Arbitrational awards of the Arbitrational Panel of the Czech FA No.SR FACR/AK/42/13, SR FAČR/AK/57/13, SR 61/13.

¹³ Arbitrational award of the Arbitrational Panel of the Czech FA No. SR FACR AK/70/13 from 26.2.2014.

¹⁴ Arbitrational award of the Arbitrational Panel of the Czech FA No. SR FACR AK/70/13 from 26.2.2014, 7-9.

forms player's working time. The club has the obligation to inform the player about the training plan and upcoming matches. The free time is commonly scheduled by the club.

3.4 *Disciplinary rules of associations and sanctions*

The specificity of sport is represented by imposing sanctions within particular sports associations.¹⁵ It is necessary to bear in mind, that private law provisions are applicable in the procedure before sports institutions, it might be stressed that a disciplinary procedure should contain basic criminal proceedings principles. The system of sanctions should have been considered as a system of regulations that provide a rigid and exhaustive list of offences and sanctions as commonly known in the field of criminal law.¹⁶

With this regard, it has to be mentioned that not whole system of sanctions applied by disciplinary authorities of sports associations in the Czech Republic comply with these fundamental principles, especially with the right of fair trial.

The former Appeal and Audit Committee of the Czech FA which was competent to review decisions of the Disciplinary Committee of the Czech FA established that the principle of the legal certainty and predictability has to be applied and that the Disciplinary Committee of the Czech FA shall decide similar cases should according to consistent principled rules so that they will reach similar results.¹⁷

With relation the Czech FA, a significant change of the disciplinary rules was introduced after a corruption case in 2012. In September 2012 the owner of Sparta introduce extensive findings of corruption to the president of Czech FA. The so-called Kretinsky' bag contained a 40-page file of "omnipresent dirt" that was discovered by a private detective hired by the owner of Sparta. Several first league clubs as well as referees were allegedly involved in match fixing. All the evidences were handed to the police and the Czech FA. As a result, the Czech FA amended the Disciplinary Code and under the new Code only the police have power to investigate bribery allegations and Czech FA shall wait for results of the police investigation. In fact, this meant that the Czech FA deprived its power to investigate offences with criminal potential within the Czech football. In fact, the Head of the Disciplinary Committee was willing to proceed with the case and when the owner of Sparta did not come up with any evidence he wanted to launch disciplinary proceedings against the owner on the basis of bringing the Czech football into disrepute. As this was against the position of the Czech FA, which did not want to investigate the scandal, an immense pressure on him was made so he finally

¹⁵ Hamerník, P. *'Sportovní právo. Hledání rovnováhy mezi specifickou sportovním úpravou a platným právem'* Praha, Ústav státu a práva AV ČR, 2012, 37-38.

¹⁶ Legislativní rada Českého olympijského výboru. *'Právní úprava spolků dle nového občanského zákoníku.'* Praha, Český olympijský výbor, 2013, 4-5.

¹⁷ Decision of the Appeal and Audit Committee of the Czech FA No. 19/2013 from 24.5.2013.

resigned from his position. Until recently, speculations were made whether such materials existed or not. It might have been a scheme to undermine Viktoria Plzen's standings/position in the League, orchestrated by Sparta, the arch enemy of Viktoria Plzen. On June 2013, the court handed over the decision on this matter, by concluding that there was not sufficient evidences to prove the corruption allegations. However, the state prosecutor lodged an appeal against this decision.¹⁸

4. *Social security principles (unemployment and pensions)*

4.1 *Insurance system*

The social security system in the Czech Republic comprises the pension, sickness and health insurance systems. Other components of the system are financed from the State budget. Premiums are paid by employers and employees or by self-employed persons. The health- and pension insurance and national employment policy system are mandatory for every economically active individual; the sickness insurance scheme is obligatory for employees and voluntary for self-employed people. Unemployment insurance is a compulsory social insurance scheme financed by contributions covering the active population, including self-employed persons and providing earnings-related benefits. The Act No.589/1992 provides a basic regulation for social insurance payments as the Act No. 592/1992 concerns healthcare insurance payments. It has to be mentioned that the obligation of parafiscal payment into public social and healthcare system is divided between club and player. This regulation is applied just in the cases of employment relationship between club and player. Player as self-employ has the obligation to pay all charges to full extent.¹⁹

4.2 *Unemployment benefits*

Unemployed persons can receive unemployment benefits for a maximum period of 6 months. A Minimum Living Standard (MLS) also exists as a last-resort financial assistance. There is no housing benefit except within MLS, but there are both universal and means-tested family benefits. The tax unit is the individual, partners are taxed separately. All Czech and EU citizens are eligible for this benefit, as long as they meet the following conditions: recipients is unemployed; recipients must be registered as a jobseeker with the Labour Office; they must have 12 months of basic pension insurance in the past two years, gained from the employment period or some other part-time work or temporary occupation). The last condition means that the self-employed person is disadvantaged in comparison to employees.

¹⁸ www.sport.cz/fotbal/gambrinus-liga/clanek/435903-tajemna-kretinskeho-kabela-zustava-tabu-i-pro-strahovskou-generalitu-tvrdi-fotbalovy-sef-pelta.html, www.ceskatelevize.cz/sport/nejnovejsi-vidoa/275719-reportaz-pavly-kubalkove-kretinskeho-kabela-u-soudu/.

¹⁹ <http://pravnihradce.ihned.cz/c1-62046160-pravni-prostor-2014-sport-ma-problem-profesionalni-sportovci-musi-byt-zamestnani>.

The amount of unemployment benefit is calculated and determined based on the previous earnings and the duration of unemployment period. Unemployment benefits are calculated from monthly earnings over the last quarter of the year. The amount of benefit also decreases over time, as follows: 65% of reference earnings for the first two months; 50% of reference earnings for the following two months; 45% of reference earnings for the rest of the period of support.

4.3 *Pension system*

To retire at the statutory age, a minimum of 29 years' insurance is required if he/she has reached the retirement age in 2013. The required minimum of insurance periods will be constantly raised to 35 years in 2018 and above. The retirement age is different for men and women. Men may retire at the age of 62 years and six months. The retirement age will be gradually increased by two months for men until it reaches 65 years. The value of the pension depends on earnings and the insurance period. The pension is calculated from the following two elements: a basic amount of Euro 86 per month, to which is added a percentage amount tied to earnings and calculated from the personal assessment base and the number of years of contributions. The minimum value of the percentage amount is set at Euro 30 per month.

In the Czech Republic, the social insurance system is financed by contributions from employers and employees. Pensions in general are granted by the system of social insurance. Participation is mandatory for employees, assimilated groups, and also for self-employed persons. The Pension Insurance Act lists those required to join the pension insurance scheme, provided they meet the conditions stipulated in the Act. According to the Act a self-employed person is obliged to disclose following information to the Social Security Administration of the District; Permanent residence, that they have commenced or re-commenced self-employment or co-operation in the self-employment of another person, or that they have terminated their self-employment, by the eighth day of the calendar month following the month in which the event to be reported occurred.

5. *Labour Dispute settlement*

5.1 *Mediation and Arbitration*

Generally speaking, arbitration is a form of alternative dispute resolution (ADR) using independent and impartial arbitrators and offered as an alternative to litigation for property disputes. Arbitration in the Czech Republic is governed by the Act. No. 216/1994 Coll., on Arbitration Proceedings and Enforcement of the Arbitral Awards, as amended, that came into force on 1 January 1995. Prior to the adoption of Act No. 93/1963 Coll. on the arbitration proceedings, only international commercial disputes were permitted to solve in arbitration proceedings. By adopting the new

Act, the possibility to use these proceedings for adjudicating disputes outside the courts of law was much reinforced as the current rules of law enabled use arbitration for any property disputes, except for the disputes relating to enforcement of decisions and “incidence disputes”, provided that both parties agree thereupon.

However, commerce remains the traditional area where arbitration is most often used, and today it is no longer restricted to international commerce but also includes domestic commerce. Arbitration may be conducted by one or more arbitrators appointed by the parties to the dispute (ad hoc arbitration) or as proceedings before an institutionalized arbitration court established by an act (institutional arbitration).²⁰

Another advantage of arbitration is that arbitral awards are easily enforceable since the New York Convention from 1958 guarantees the recognition and enforcement of arbitral awards in over 140 signatory countries.

On March 2013 the Parliament requested the Czech Association of Football Players to establish an independent arbitration body for sports. However, the time was not right for the sports arbitration due to lack of political coherence and support. Nevertheless, the Minister of Justice supported the project in order to provide assistance for ordinary courts' workload and furthermore improve the flexibility in the sports matters.²¹

5.2 Courts

Sports organizations in the Czech Republic enjoy relatively broad autonomy and therefore legal regulation can be in general characterized by less interventional actions taken by the state than in many other sectors. The autonomy of sports organizations arises from the statutory regulation that admits the intervention of state authoritative bodies only in exceptional cases and according to statutory principles defined in advance.²²

The most important intervention in the autonomy of sport associations is Section 258 of the Act No. 89/2012 Coll., Civil Code, under which each member of the relevant association, or a person who has legal interest, may request the civil court to decide on the validity of a decision of an association due to its conflict with the law or by-laws but only if the validity of such a decision has been challenged with the association itself (i.e. internal means of protection of an association were exhausted).²³ This means that cases, which are submitted to the general jurisdiction of state courts apply next to specific sport regulation also general law. According to the constant jurisdiction, no decision of bodies of a sport organization should be

²⁰ Hamerník, P. ‘*Sportovní právo. Hledání rovnováhy mezi specifickou sportovním úpravou a platným právem*’ Praha, Ústav státu a práva AV ČR, 2012, 12-15.

²¹ Spory-ve-sportu-mozna-bude-resit-zvlastni-rozhodci-soud-269585.

²² Hamerník, P. ‘*Sportovní právo. Hledání rovnováhy mezi specifickou sportovním úpravou a platným právem*’ Praha, Ústav státu a práva AV ČR, 2012, 14-16.

²³ www.epravo.cz/top/clanky/soudni-prezkum-rozhodnuti-organu-sportovnich-organizaci-91545.html.

reviewed unless it is a decision that seriously interferes with the right of a person and directly affects such a person. Considering the fact that a court precedent is not a source of law in the Czech Republic as such, it is in the discretion of the relevant court to choose a procedure for each relevant case.²⁴

With regard to the legal status of professional athletes and also with regard to the evaluation of the valid legal regulation on athletes, the jurisprudence of the Highest Administrative Court of the Czech Republic (the Court) has to be presented. The Court rendered an important decision on 29th of November regarding the legal position of athletes.²⁵ For the first time it has been decided by a court that the contract between an athlete and his club might be a labor contract. At the same time the Court advised a change in Czech labor law.

The case was about a professional ice-hockey player, which was commuting from his hometown to Prague and claimed the travelling costs as deductible costs at the national tax authorities, based on the labor contract with his club. Tax office refused to accept this tax-deductible item and taxed the player. Then the ice hockey player went to an administrative court, which did not allow the deduction of these travelling expenses. However, having considered the contractual rights and obligations of both parties, this court deemed the contract to be a labor contract, unlike the tax authorities. After that the player lodged an appeal with the Highest Administrative Court.

The Court pointed out that the difficulty of the legal question was based on the lack of legal regulations for professional contracts in the sports field. The Court stated explicitly that this field is legally very unclear and acknowledged that the contract at hand had attributes of the dependent work – labor contract – particularly the dependence of the player on the club and the obligation of the club to pay remuneration to the player.

However, the Court stated that the economic nature of the contract is valid and in compliance with the Czech law. With respect to the effective legal regulation where the rights and duties of professional sportsmen are not explicitly solved, the business character of a contract takes into account activities of those professions more sensitively, the Court added.²⁶

The Court came to conclusion that until a substantial change of labor law also contracts of a business character have to be considered as in compliance with the Czech law. The Court held the business character for additional to the labor character of relationships between professional sportsmen and clubs. The court came also to conclusion that the character of the relationship between contracting parties is determined by the contract autonomy. So it fully depends on both contracting parties, which way of regulation they choose. It has to be mentioned that the fixed experience of the clubs in Czech Republic was confirmed by this

²⁴ Gábriš, T. *‘Športové právo’* Bratislava, Eurokodex, 2011, 354.

²⁵ Decision of the Highest Administrative Court No. 2 Afs 16/2011.

²⁶ www.epravo.cz/top/clanky/cinnost-profesionalniho-sportovce-vykon-nezavisleho-povolani-nebo-pracovnepravni-vztah-79923.html.

decision of the highest administrative Court. In conclusion, the court pointed also out, that there is turbidity in the question of regulation of the relationship between professional player and the club, which should be solved in future. The main conclusion of the decision can be shorten into the enunciation of the court that “*the attributes of the activity of a professional player are very similar to the classic employment relationship, but it doesn't fill all attributes of dependent work and therefore it can't be considered as employment*”.

5.3 *Sports special bodies*

As a result of negotiations launched by the Czech Association of Football Players, the Czech FA introduced a national dispute resolution chamber in June 2013 which has to be seen as a crucial step in promotion of players' rights including the fundamental right of fair trial because the parity principle as required by FIFA regulations that was introduced many years ago. However, the parity principle has been anchored only for the first instance where three arbitrators decide on a particular case, but not for the appeal body. Members of the second instance are being elected at the General Assembly of the Czech FA where players are not represented at all. The Czech Association of Football Players has been repeatedly discussing this issue with the Czech FA and demanded an amendment to the respective legislation. At the meeting on 30 January 2014, the Czech FA stated that it will amend the regulations at the upcoming General Assembly in June 2014 in order to introduce the equal representation in the appeal body. However, the General Assembly did not anchored this regulation for the appeal body.

6. *Social dialogue*

In April 2012, all partners in the professional football social dialogue (UEFA, EPFL (leagues), ECA (clubs) and FIFPro (players) signed the Autonomous Agreement and thereby committed themselves to ensure that the minimum requirements enter into force throughout the UEFA territory within three years. Each and every country within the EU and in the rest of the UEFA territory must implement and comply with the Autonomous Agreement. A large number of mainly Western-European countries already have standards that meet the minimum requirements.

Three most important issues on the agenda during the implementation of the Autonomous Agreement were to improve social dialogue in each country, to establish an appropriate arbitration system (National Dispute Resolution Chamber) with equal representation of players and clubs with an independent judge in between and to introduce employment contracts with reference to labor law for each football player.

After the “kick-off” meeting held at UEFA headquarters in Nyon, Switzerland on 17 January 2014, a meeting of social partners in the Czech Republic was organized on 30 January 2014 at the headquarters of the Czech FA. One of

the main topics discussed was the use of employment contracts or “self-employment” contracts for players. Given that the “Autonomous Agreement” makes a specific reference to “employment contract” and that the European stakeholders also want to ensure a level playing field and minimum standards of protection across the UEFA territory, it is necessary to emphasize that, in order to fully comply with the minimum requirements, employment contracts are to be used.

At the meeting, the Czech FA presented the current state of players’ contracts in the Czech Republic, which do not fully meet the requirements of a professional players’ contract. It was presented that no standard contract exists yet and that self-employment contracts are used instead of employment contracts because Czech labor law does not give enough flexibility and cannot be amended by a collective bargaining agreement. At the same time it was concluded that numerous provisions of the Autonomous Agreement are implemented through football regulations.

Therefore, the participating parties dealt with particular steps, which will lead to the implementation of the minimum requirements for players’ contract. Several issues pointed out by the Czech Association of Football Players were discussed: among others the registration process of players contracts, the arbitration process or the health care provided for players. All parties agreed on the fact that the issue concerning minimum requirements in players’ contracts should be resolved before the end of the year 2014. The Czech FA then committed to render a draft of a standard professional player contract in accordance with these minimum requirements which will be then commented on by the LFA and the Czech Association of Football Players before the end of 2014 and finally adopted by the Czech FA.²⁷

Currently, the implementation of employment relationship of professional football players, which directly affects also other professional athletes, is negotiated at the governmental level (prime minister, minister for finance) and with the highest state authoritative bodies. As this essential agenda requires a complex legal regulation, negotiations with the Ministry of Education, Youth and Sport, Ministry of Labor and Social Affairs and Ministry of Finance are taking place and a committee composed of representatives from these bodies together with the Players Union and the Football Association. It has been established in order to draft a governmental proposal for the new legal regulation and proposal for standard contract for professional football players. The deadline is March 2015.²⁸

²⁷ www.epfl-europeanleagues.com/esd_2014_kick_off_czech_rep.htm.

²⁸ www.asser.nl/default.aspx?site_id=11&level1=13910&level2=13986.

**EMPLOYMENT RELATIONSHIPS AT NATIONAL LEVEL:
DENMARK**

by *Jens Evald**

SUMMARY: 1. Employment regulation and football structures – 2. Individual employment relations in professional football – 3. Doping and medical issues – 4. Transfer of players – 5. Social security principles – 6. Labour Dispute settlement – Conclusions

Abstract:

The article describes the Danish football 'labour market'. Denmark has a long tradition of social security and this is clearly seen in both in the collective agreements between the parties of the labour market and in Danish legislation. Social security and social responsibility are deeply rooted in Denmark (and other Nordic countries) both in public policy and in sport. It comes as no surprise that this view of the welfare state has influenced the football 'labour market'. Even though Danish football can (only) be described as a quasi-labour market, many or most ordinary legal principles on employment have been adopted in football.

1. *Employment regulation and football structure*

1.1 *Public Regulation*

In Denmark, employment is regulated by a number of Acts, e.g., Act No. 240 of March 2010 on Employers' Obligation to Inform Employees of the Conditions

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Applicable to the Contract or Employment Relationship, Consolidation Act No. 81 of 3 February 2009 on the Legal Relationship Between Employers and Salaried Employees, Consolidation Act No. 202 22 February 2013 on Holiday, Consolidation Act No. 899 of 9 May 2008 on Equal Treatment of Men and Women in matters of Wages, Consolidation Act No. 645 8 June 2011 on Equal Treatment of Men and Women as regards Access to Employment, etc., Consolidation Act No. 1349 of 16 December 2008 on Prohibition of Discrimination in the Labour Market and Consolidation Act No. 600 of 8 September 1986 (as amended by Act No. 385 of 22 May 1996) on Contracts. Together with different legal principles these acts form the fundamental rights of employees in Denmark. Below we shall see the importance of these acts for sport and employment.

Act No. 240 of March 2010 on Employers' Obligation to Inform Employees of the Conditions Applicable to the Contract or Employment Relationship implements Council Directive 91/533/EEC.

The purpose of the Act is to avoid insufficiency of evidence as to what has been agreed between employer and employee. The Act lays down a duty for the employer to inform the employee in writing about various subjects. The Act includes all employment relationships with a duration of more than one month and an average working week exceeding eight hours. This means that more or less all employment relationships in sport are affected by the Act. According to section 2, the employer has to inform the employee in writing of all working conditions.

Beside this, the employer has to inform the employee if there are any restrictions of competition, overtime, conditions referring to paid maternity leave and illness, and other burdensome/favourable conditions. In sports contracts, the employer must inform the employee about sponsorship rights, image rights, disciplinary punishment, and transfer conditions. If a football player is hired to a club outside the country, the employer must inform him or her about the duration and the currency in which the wages will be paid. If the employer infringes the law, he can be fined (in average DKK 10,000).

Consolidation Act No. 81 of 3 February 2009 on the Legal Relationship between Employers and Salaried Employees includes different types of employment, e.g. office workers, shop assistants and persons whose work is wholly or mainly to manage or supervise the work of other persons on behalf of the employer. Legal literature has discussed whether coaches are included in this. Section 1 subsection b says that 'persons whose work takes the form of technical or clinical services (except handcraft work or factory work), and other assistants who carry out comparable work functions' are included. It has been discussed if the work of coaches 'takes the form of technical services'. There is no case law, but it is safe to say that the work of a coach does not fall within the meaning of the wording 'technical services'. Coaches are therefore not covered by the act due to the content of their work. However, some coaches have a right to lead and supervise other employees, e.g., assistant coaches, physiotherapists and talent scouts, which means that they are covered by the act. The consequence is that the provisions laid down

in the Act may not be departed from by agreement between the parties (coach and club) to the prejudice of the coach, see section 21.

Consolidation Act No. 202 22 February 2013 on Holiday implements Council Directive 93/104/EEC. The act includes all employment relationships and as a point of departure it may not be deviated from to the prejudice of the employee. An employee, e.g. a football player, is entitled to an unconditional right of five weeks of holiday from his first year of employment. The employee has the right to at least fifteen consecutive days off, which shall be taken in the period from 1 May to 30 September, see section 14.

Consolidation Act No. 899 of 9 May 2008 on Equal Treatment of Men and Women in matters of Wages aims to ensure that men and women get equal pay for equal work. Sport is divided into male and female sport and there is a considerable difference in earnings due to the difference in male and female sport economy. The Act has no or little relevance for sport.

Consolidation Act No. 645 8 June 2011 on Equal Treatment of Men and Women as regards Access to Employment, etc. implements Council Directive 76/207/EEC. The purpose of this Act is to prevent discrimination on ground of sex. This applies both to direct discrimination and indirect discrimination, in particular by reference to pregnancy or to marital or family status, see section 1, subsection 1. Direct discrimination shall be understood as taking place where one person is treated less favourably than another is, has been or would be treated in a comparable situation on ground of sex. Direct discrimination on grounds of sex shall also be understood as taking place in connection with any form of discrimination related to pregnancy and during a woman's fourteen weeks of absence after childbirth, see section 1, and subsection 2. According to section 9, an employer may not dismiss an employee for having put forward a claim to use the right to absence or for having been absent due to maternity leave or for other reasons related to pregnancy, maternity or adoption. Pregnancy will at some stage mean that e.g., a handball player cannot fulfil her contract but, as mentioned, the club cannot terminate the contract with reference to the pregnancy. During a job interview the employer is not allowed to ask if the applicant is pregnant.

Consolidation Act No. 1349 16 December 2008 on Prohibition of Discrimination in the Labour Market implements Council Directive 2000/78/EEC. The act applies to both direct and indirect discrimination, in particular with reference to: race; colour; religion; faith; political orientation; sexual orientation; age; handicap; or national, social or ethnic origin. The prohibition includes advertising, dismissal, transfer, promotion, in-service training and salary and working conditions.

According to Danish law, persons under 18 years of age are minors and cannot enter into agreements. Many player contracts in football are entered into by players under 18 years of age. These contracts can only be entered into with the acceptance of the guardian (the person who has custody of the child). If a club enters into a contract with a minor, the contract is void. As a point of departure the employer and the employee are free to decide the content of the contract. Section

36 of the Danish Contracts Act contains an important modification by stating that “a contract may be modified or set aside, in whole or in part, if it would be unreasonable or at variance with the principles of good faith to enforce it. The same applies to other juristic acts. In making a decision hereof, regard shall be had to the circumstances existing at the time the contract was concluded, the terms of the contract and subsequent circumstances”. There is no case law on section 36 and sports contracts.

1.2 *The structure of Danish Football*

The Danish Football Organization, DBU, is the governing body of football in Denmark. It was founded in 1889 and today (2014) it is an organization of 1,658 clubs with 329,955 members, of these 264,788 are men and 65,167 women. The DBU runs the professional Danish football leagues and men’s and women’s national teams. The DBU is a founding member of both FIFA and UEFA. DBU is the supreme body of football in Denmark, and all clubs, players, coaches etc. are governed by the rules and regulations promulgated by the DBU. Formally, the DBU consists of two members, The Association of Local Unions (FLU) and The Association of Division Clubs (DF), who represent amateurs and professionals, respectively.

The Association of Division Clubs (DF) is an interest and employers’ association for 60 clubs playing in the Premiere League (Super League), the 1st Division and the 2nd Division (the Nordic Bet League). The DF was founded in 1969 by the then 1st Division and was later extended to include both the 1st and the 2nd Divisions. The DF represents the clubs in the Board of the DBU and is a member of the Association of European Professional Football Leagues (EPFL). According to the 2007 regulations of the DF, the purpose of the association is to create an “efficient frame” for the development and running of professional football in Denmark. The regulation emphasizes that as a member of the DBU, the DF is bound by the rules and regulations promulgated by the DBU.

The Danish Football Players’ Association or just the Players’ Association (SPF) was founded in 1977 on the threshold of professional football in Denmark. The SPF is the trade union of players in the Super League, the 1st and 2nd Divisions plus the women’s Elite Division. According to the SPF’s regulations; its purpose is to supervise, protect and promote the professional football player’s sporting as well as financial interests both during and after the player’s active carrier. The SPF is part of three organizations. The *first* is the umbrella organization the Danish Elite Athlete Association (DEF), which is a non-governmental and independent association of athletes that safeguards the interests of all Danish Athletes. The purpose of the DEF is to maintain, protect and develop the athletic, economic and social interests of all Danish elite athletes during and after their careers. The *second* is the Danish Confederation of Trade Unions (LO), which is the largest national trade union confederation in Denmark with 18 member unions and about 1.1 million members.

The LO seeks to influence the government and the political parties when it comes to drafting and implementing legislation especially in relation to labour market policies. The *third* is FIFpro (Fédération Internationale Des Associations De Footballeurs Professionels), the worldwide representative organization for all professional players. FIFpro was established in 1965 and currently has 43 members.

2. *Individual employment relations in professional football*

2.1 *Historical outline*

Until July 1999, the legal aspects between professional football players and the clubs were regulated by the standard contract drawn up by the DBU. The standard contract laid down that all contracts had to be approved by the DBU in order to become valid and come into force. On March 23rd 1999, the DF and the SPF signed two documents entitled “Collective Agreement” and “Agreement”. The “Collective Agreement” comprises the fundamental principles to be laid down concerning the relationship between the DF and the SPF. The “Agreement” is based on the “Collective Agreement” and comprises the minimum content of the players’ working and payment conditions. With reference to these two agreements, the DF and the SPF worked out a new standard contract in 1999 which stated that contracts should no longer be approved by the DBU but should be entered according to the “Collective Agreement” and the “Agreement”. The DBU took a stand against the new standard contract and refused to issue player licenses unless all contracts used were those issued and approved by the DBU. The conflict resulted in a compromise. On the front page of today’s player contract, you have to tick which one of the alternatives applies. One says that the contract is entered according to the “Collective Agreement” and the “Agreement” while the other says that the contract does not follow the “Collective Agreement” and the “Agreement”. In 2003, the SPF took legal action against the DBU to test if the standard contract issued by the DBU was legally binding for the SPF and the players and if the DBU was obliged to alter the standard contract according to the “Agreement”. The main goal of the SPF was to convert the contractual system into an ordinary labour market system based on collective agreements, and thereby invalid the DBU’s right to approve all contracts. The end result would be that clubs’ and players’ rights and obligations were laid down by the genuine parties of the labour market, namely the SPF and the DF. This goal was never realised and, instead, the Supreme Court (*Supreme Court case 2010 UfR 1*) ruled that the DF and all clubs and players were covered by the rules and regulations of the DBU. The Supreme Court argued that the DBU was not obliged to follow the “Agreement”. The fact that the DF is a member of the DBU did not imply that the DBU was a part of the “Agreement”. The Supreme Court stressed that the DBU, to a certain extent, had addressed the “Agreement” between the DF and the SPF in the standard contract.

Today (2014), the legal status in the standard contract for players is the

same as in 1999. The club and the player decide if they want to follow the “Agreement” by ticking either of the two boxes on the front page of the player contract as mentioned above. All clubs and players in the Super League and most clubs and players in the 1st and 2nd Divisions have chosen to follow the “Agreement”.

The existence of the “Collective Agreement” and the “Agreement” means that the contractual system of Danish football may be characterized as a *quasi-labour* market system, where you find the same legal remedies as in the ordinary labour market system, e.g. strike and lockout.

2.2 *The Player Contract*

The standard contract (SC) for players regulates the rights and obligations of the player in detail. The SC consists of four parts: part 1 describes hours of work, training camps and matches; part 2 describes the rights and obligations of the parties; part 3 is about transfers; and part 4 comprises the closing provisions. In the following sections we will examine the content of the SC more thoroughly. Transfers are described below in part 3.

2.2.1 *SC Part 1, Hours of Work etc.*

The SC has three categories of player. The first is where football is a sideline for the player. In this case the SC does not put any restrictions on the player’s right to take on other work, provided that the player can otherwise fulfil the contract. The second is where football is the players’ part time-job. In this case the contract means that the player cannot take on another job at weekends, on holidays, on a Sunday and during the period specified in the SC. The third is where football is the players’ full-time job. In this case the contract means that the player cannot take on other work without the prior approval of the club.

In all three cases the club and the player shall pay Danish Market Supplementary Pension contributions (ATP) and associated contributions in accordance with the rules, cf. for a more detailed description, see below part 5.

2.2.2 *SC Part 2, Rights and Obligations of The Parties*

Part 2 consists of sections 1-17, and in overview the sections regulate the following: Section 1 - Loyalty etc.; Section 2 - Absence and participation in matches; Section 3 - Doping; Section 4 - Betting; Section 5 - Use of clothing and equipment provided by the club; Section 6 - Transport and accommodation in connection with away matches; Section 7 - Time off to play for national teams and other officially selected teams; Section 8 - Treatment of injuries; Section 9 - Illness, Section 10 - Insurance; Section 11 - Information on current rules, etc.; Section 12 - Time off to take part in the work of Players Association bodies; Section 13A - Advertising and sponsorship contracts, etc.; Section 13B - Advertising and sponsorship contracts, etc.;

Section 14 - Pay; Section 15 - Holiday Leave; Section 16 - Compulsory pension scheme; Section 17 - Voluntary savings scheme.

The two most detailed sections are section 13A on advertising and sponsorship and section 15 on Holiday Leave. The very detailed regulation in section 13A shows that this area has been the battlefield of many disputes between players and clubs.

2.2.3 SC, Part 4, Closing Provisions

Part 4 consists of sections 1-8 and, in overview, the sections regulate the following: Section 1 - termination if the club is relegated from the men's or woman's national championship; Section 2 - Money owed to the club or parent club; Section 3A - Disciplinary matters and breach of contract, etc. (applies if the contract follows the Collective Agreement); Section 3B - Disciplinary matters and breach of contract, etc. (applies if the contract does not follow the Collective agreement); Section 4 - Disputes; Section 5 - Approval of the contract; Section 6 - Conditions for approval of the contract; Section 7 - Action plan for minors; Section 8 - Players' agents. For reasons unknown part 4 deals with both disputes, termination of the contract and the exact opposite, namely the validity and entry into force of a contract (the DBU's approval of a contract). It would seem more natural to have the rules describing the procedure of how the contract comes into force placed at the very beginning of the SC.

Section 3A-B (disciplinary matters and breach of contract, etc.) and section 5 (Approval of the contract) will briefly be commented on while section 4 (disputes) is described in more detail below in part 6.

The SC section 3A, which applies if the contract follows the Collective Agreement states that the provisions of the act on the Legal Relationship between Employers and Salaried Employees with regard to disciplinary offences, unfair dismissal and gross breach of contract shall apply.

The consequence is that the club cannot fine the player, make salary deduction or the like unless it is written en the contract. The sanctions include a warning, termination and expulsion.

The SC, section 3A.2 states that strikes and lockouts provided for by the Collective Agreement and other forms of work stoppages provided for by the Collective Agreement shall not affect the validity of the contract between the player and the club.

The SC section 3B, which applies if the contract does not follow the Collective Agreement, states if the player is guilty of misconduct, breaks any of the club's training rules or disciplinary regulations, or is in breach of the provisions of the contract, the club can make a salary deduction up to a maximum of two weeks' basic salary or suspend the player for a maximum of 14 days. The disciplinary sanction can be appealed to football's own arbitration, cf. below part 6.

The SC section 5 comprises the above-mentioned rule on approval of the

contracts. The validity and the entry into force of the contract depend on the DBU's approval or, to be more precise, the approval by the DBU's Contract Committee. This approval system means that the contract cannot enter into force before approval. The club and the player are bound by the contract as section 5.3 rules that the parties are bound by their signatures, but no more than four weeks from the day of signing the contract. The consequence is what is known as a 'halting legal status'. If the player has signed the contract on, for example, the 1st March and the club on the 14th March, the player is bound four weeks from the 1st March and the club four weeks from the 14th March. Modifications and supplements to the contract must also be approved by the DBU and this includes any termination of the contract which the player and club have agreed upon. As a result of this, a termination of the contract is not binding until the DBU has approved it. The approval system shows that the DBU is the central factor of power in Danish professional football regardless of the 'Collective Agreement' and the 'Agreement'. There is probably a long way to go before professional football in Denmark can be regarded as a matter solely for the parties (clubs and players) of the labour market.

3. *Doping and medical issues*

3.1 *Doping*

According to the SC, part 2, section 3; the player shall be under obligation to comply with the anti doping regulations issued by the DIF (and the Anti Doping Denmark, ADD), including making himself or herself available for doping tests in accordance with the anti-doping regulations. Any violation of the anti-doping regulations that results in punishment in the form of a final, unconditional ban of more than three months shall be regarded as a gross breach of contract unless the violation took place with the knowledge of the club or a doctor assigned by the club, cf. section 3.2. If a gross breach of contract occurs under section 3.2, and if the club wishes to draw employment consequences from that breach; the club can choose either to suspend the player's contract for a certain amount of time, which may not exceed the player's unconditional ban as a result of the doping violation, or to terminate the contract immediately due to the breach. The club must inform the player in writing of the exact employment consequence of the course of action it is proposing to take within eight days of the doping sanction becoming final and the club becoming aware of the doping sanction. If the club fails to give the player such notice before the eight-day deadline expires, its right to draw employment consequences in respect of the doping violation shall lapse, cf. section 3.3.

3.2 *Medical issues*

The SC, part 2, section 8.1 states that the club shall give the player medical attention or other necessary or appropriate treatment for injuries incurred in the course of

participation in matches and training, less the sums paid by public health insurance. Section 8.2 states that the player shall be under an obligation to allow himself or herself to be treated by a doctor/physiotherapist/chiropractor assigned by the club on condition that the club pays the full cost of treatment, less public subsidies. Section 8.3 says that the player, however, is always entitled to see his or her own doctor and refuse the treatment prescribed by the club if the player can show by means of a statement from a specialist that the proposed treatment may not be correct or appropriate.

Section 9 states that the club, during illness, including injuries, shall pay the player the basic salary and other non-match related fees. Illness, including injury, shall not affect the player's employment.

4. *Transfer of players*

4.1 *The Legal Sources Concerning Transfer*

The SC, part 3 - Transfers are by far the shortest part of the whole SC. The parties either have to tick the box saying: "The parties have not made any special agreement concerning transfers" or the box saying: "The parties have made the following special agreements concerning transfers". This wide scope in the SC does not imply that everything is left to the parties to decide. The regulation on transfers is extensive. The FIFA regulations include e.g. 'Regulation on the Status and transfer of Players, including Annexes (1-5)' and 'Players' Agents Regulations, including Annexes 1-3'. To this 11 circulars and annexes must be added, e.g. no. 1249, 'FIFA Regulations on the status and Transfer of Players – training compensation and the categorization of clubs' and no. 1354, 'Regulations on the Status and transfer of players – categorization of clubs and registration periods'. The regulations have been implemented into the DBU's circulars, e.g. Circular 83 (2014) on registration periods, training compensation and solidarity contribution. As just mentioned, the FIFA regulations must be implemented by the national organization and there is no exclusive 'Danish perspective' concerning transfer.

Agents play a significant role in transfer of players. The legal sources concerning players' agents comprise FIFA's 'Regulations Players' Agents' (2008) implemented by the DBU in 'Circular no. 81 (2013) on Players' Agents' and two standards, one is the 'Representation Contract (Club Representation)' and the second is the 'Representation Contract (Player Representation)'. The standard contracts have been drawn up by FIFA, cf. article 21 and Annex 3 and implemented by the DBU.

4.2 *Transfer of players outside the EC*

If the player is a citizen of a country outside the Nordic countries or the EC, he or she must hold a residence and work permit to reside and work in Denmark. A

residence and work permit can be granted if professional or labour market considerations warrant it, e.g. that the player is a professional athlete. A football player can be granted a residence and work permit if he or she has been offered a position as a professional football player or as a coach. The conditions are that the player has a written contract which specifies salary and employment conditions. Salary and employment conditions must correspond to Danish standards. A residence and work permit will be issued on the assumption that the players' primary employment is sports-related. The position should be full-time (37 hours per week). Normally, a statement will be obtained from the Danish governing body of the sport, *in casu* the DBU, which will state whether there is a particular sports-related reason why the person is required as a player or coach for a club. In order to ensure a faster processing of the application, the employer/sports organization can request an advance statement from the governing body by using the 'Form regarding advance statements by sports governing bodies'. If the club uses the player before the residence and work permit is issued, it will be fined.

The use of the player, however, has no sporting/disciplinary consequence as it is not sanctioned according to the DBU's regulations. In September 2013, the football club FC Copenhagen used the Nigerian player Fanendo Adi in a match before the player was given a residence and work permit. The club was fined 20.000 DKK by the public authorities. Shortly after the match, the DBU stated that the club would not be sanctioned, first and foremost because the club had the players' license and the player, as a result of that, had the right to play. A similar case would never occur in other sports e.g. basketball, where the sports organization – contrary to the DBU – never issues the players' license before the player has a residence and work permit. It is not difficult to understand why some clubs choose to use a player without residence and work permit. It all comes down to the pay check. The club has to pay e.g. 200.000 DKK every month from day one and the public authorities' handling of residence and work permit may take some time, meaning that the club has to pay for a player on the bench. In the match, Fanendo Adi scored the equalizer that secured the club a 1-1 draw.

5. *Social security principles*

The many references to different acts on social security (holiday allowance, pension, etc.) in the SC and the SC's regulation on injuries and illness show that the football 'labour market' is in the progress of being normalized; which means that (many) social security principles are now a part of professional football. This includes the right to unemployment relief if the player is a member of an unemployment fund.

Several sections in the SC are very comprehensive and very detailed. One of the reasons is the references to different acts, e.g. section 15 in the SC and the reference to the Danish Holiday Act. Despite the many details in section 15, the question of holiday-allowance for players has given rise to a landmark case that shook many football clubs in Denmark. According to section 15, the player has a

right to receive a holiday allowance amounting to 12.5% of the part of the player's qualifying pay from the club in the qualification year which was not basic salary or fringe benefits. During holiday leave, the player shall further receive a holiday supplement that is 1% of the player's qualifying pay from the club in the qualification year. In the *Decision of September 2012 SPF v. DF & Brøndby IF Football Club*, the tribunal ruled in a split decision (2-1) that the way to calculate the holiday allowance was in breach with the contract. At the same time the tribunal ruled that the club Brøndby IF had not paid the compulsory pension contribution for all players. The ruling on pensions in particular caused an outrage among many clubs. For many years it has been a custom for several clubs to include the pension in the salary. In this particular case Brøndby IF had contracts that said "incl. pension", but the majority of the tribunal found it "unlikely" that the players and the club had made an agreement on pension. The total additional payment to the players amounted to 26 million DKK. In 2014 another club, AaB (who won the premiership 2014) made an agreement with the SPF to pay 17.5 million DKK.

6. *Labour Dispute settlement*

The SC, part 4, section 4.1. states that the parties of the contract can bring any civil dispute to the construction or effect of the contract either before the ordinary court or before football's own arbitration tribunal. The use of arbitration, however, requires the express or tacit consent of both parties. Section 4.1 is very detailed in describing when and how an arbitration agreement has been made:

"The choice of the affected parties in this respect shall be made at the beginning of the case. The parties can either agree expressly which system is to be used for the dispute or act as specified below. Once this choice has been made, a civil dispute may only be moved from the ordinary courts to football's arbitration tribunal or from football's arbitration tribunal to the ordinary courts, if the parties agree and a ruling has not yet been made.

If the parties have not agreed expressly which system to use and the party commences legal proceedings in the ordinary courts, this action shall dictate that the dispute must be settled finally by the ordinary courts (unless the parties make a joint decision after the lawsuit has been brought and before the court of first instance has made a ruling to terminate the legal proceedings in the ordinary courts and instead submit the dispute to football's own arbitration tribunal with a view to a final and binding decision by that system).

If the parties have not agreed expressly which system to use and the party against whom a complaint has been made to football's competent arbitration tribunal fails to demand in his reply to the complaint at the latest that the dispute must be decided by the ordinary courts, this shall similarly dictate that the dispute be settled finally by football's own arbitration tribunal".

Some disputes between the parties concerning the construction or effect of the contract fall under the jurisdiction of FIFA and section 4.2 states that such

disputes must be settled in accordance with the laws and regulations issued by FIFA and can be brought before FIFA's competent arbitration bodies as the arbitration tribunal of first instance with the right of appeal to CAS.

Apart from the disputes specified in section 4.2, all other civil disputes between the parties concerning the construction or effect of the contract can be brought before football's own arbitration tribunal in accordance with the rules laid down in this respect in the laws and regulations issued by the DBU, cf. section 4.3. Case law (from ordinary courts) concerning employment relationships is rare because the parties usually chose arbitration. The Maritime & Commercial Court case from 2005 (2005 UfR 3471) is therefore unique, but illustrates that the ordinary courts seem to follow the same path in sport as they do in other cases on employment.

On 1 July 2000, a coach entered into a fixed-term contract for one year with a football club as head coach. After the one-year period, the coach was supposed to have continued at the club as an assistant coach. On 21 November 2000, the coach and the club prolonged the contract as assistant coach for two and half years and the date of expiry was 31 December 2003. On 26 June 2002, the contract was terminated. In the letter of termination the coach was notified that he was suspended, which meant that he had no working duties but still received his salary until the contract expired on 31 December 2003. The letter stressed that the coach still had a duty of loyalty in the period of notification. On 9 November 2002, the coach entered into a fixed-term contract for one year (1 January to 31 December 2003) as head coach with a lower league amateur football club. The coach did not receive any salary but his travel expenses were covered by the club. On 17 November 2002, the coach informed his former club that he had entered into a new contract with an amateur club. On 28 November 2002, the former club informed him that the new contract was inconsistent with his duty of loyalty and he, by entering the new contract, had breached the contract with his former club. Therefore, the former club immediately expelled him from the club and as a consequence of this the club stopped paying him his salary. The Maritime & Commercial Court found that the expulsion was unjustified. The court found that the job as head coach for the amateur club was a hobby and that there were no elements of sporting competition between the two clubs. The court stressed that even if the expulsion had been justified, the club had acted passively waiting eleven days before it expelled the coach.

Conclusions

Both in Europe and the US, football players and other athletes have established players' associations/unions that represent the interests of their members. This includes systematized pensions, insurances, education and a number of other issues so the members can get help when most in need. Among the conditions of a member's membership is a statement of solidarity between the players. Still, some clubs and probably some sports organizations consider these trade unions as political

and at times unnecessarily demanding. No matter the opinion, the appearance of these unions has created a more balanced power structure within professional football to the benefit of football. That said, it must be emphasized that the DBU, which is responsible for the content of the standard contract, has shown a strong will to adopt ordinary legal principles and social security principles and therefore bears a big responsibility for the development *from* individual contracts (“Wild West-contracts”) *to* a standard contract that secures for the football players (more or less) the same basic rights as they would have in the ordinary labour market.

EMPLOYMENT RELATIONSHIPS AT NATIONAL LEVEL: ENGLAND

by *Richard Parrish**

SUMMARY: 1. Introduction – 2. Historical perspectives – 3. The structure of English football – 4. Employment relations in English professional football – 5. Transfer rules and the standard contract of employment – 6. Anti-Doping – 7. Conclusions

1. Introduction

A professional footballer's employment relationship with his club is complex. Not only is it informed by general employment and contract laws, he is also bound contractually by the rules of the English Football Association (FA), the rules of the Premier League or Football League, and UEFA and FIFA regulations. This chapter confines itself to a discussion of how the employment relationship is regulated under national law and by the regulations of the English football authorities. It begins with an historical overview of employment relations in professional football before examining the structure of English football, modern employment relations in English football, transfer rules and the standard contract of employment, and anti-doping rules.

2. Historical perspectives

In England, the 'professional' footballer emerged following the decision of the Football Association (FA) to sanction the payment of players by clubs in 1885. By 1888 the establishment of the Football League brought order to the haphazard organisation of the game by offering clubs guaranteed fixtures, regular revenues and the stability of a set of rules and regulations.¹ The new structure concurrently

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¹ HARDING, J. (2009), *Behind the Glory: 100 Years of the PFA*, Derby: Breedon Books, 12.

offered the professional player the actual means of securing a living from the game. However, from the outset, the League was concerned that balanced competition on the pitch required coordinated action off it. Without it, public interest in the game would wane as clubs in large cities would dominate at the expense of those clubs from smaller markets. In a debate surprisingly still relevant today, the League was faced with having to decide between intervening either in the product market (such as enacting revenue sharing arrangements between clubs) or in the labour market (such as placing restrictions on the migration of the best talent to the larger clubs). The absence of a players' union, combined with the strength of employer interests, settled the issue. Two regulatory interventions in the labour market followed.

The first originated in 1891. The so-called retain-and-transfer system sanctioned a restrictive labour practice through which a club retained a player's 'registration' even though contractual relations between the club and player had ended. At the end of the season a player could be retained by his club, even at a wage lower than his previous terms. If retained, the player remained a registered player of the retaining club and so could not take up employment with another club, even though he was not re-employed by the retaining club until he had signed his contract. Players not retained were placed on a transfer list and were not free to sign for a new club, except to those willing to match the transfer fee demanded by the transferee. The objectives pursued by the system were to introduce contractual stability to the profession and limit the concentration of talent within a few clubs thus promoting competitive balance within the league. The practical effect provided the club with a 'virtual monopoly over the player's services... effectively tying him to his club until, and if, the club gave the player permission to move elsewhere'² with players being 'mere chattels to be bought and sold by clubs'.³ The second labour market intervention devised in 1900 saw the establishment of the maximum wage. According to this measure, a player, no matter how talented, could earn no more than £4 a week, although some benefitted from unauthorised 'boot-money'.

The combined effect of the retain-and-transfer system and the maximum wage saw the prospect of commercial freedom offered by professionalism and the formation of the League quickly denied to players. Clubs even attempted to deny player's employee status in order to limit their statutory employment related liabilities.⁴ In *Walker v Crystal Palace Football Club* [1910], the Court of Appeal applied a new 'control test' as a common law means of distinguishing an employee subject to the control of the employer from a self-employed contractor who is not.⁵

² Thomas, D., (2006), *The retain and transfer system*, in: Andreff, W & Szymanski, S. Handbook on the Economics of Sport, Cheltenham: Edward Elgar, 630.

³ Dabscheck, B., (1986), *Beating the off-side trap: the case of the PFA*, *Industrial Relations Journal*, 17(4), 353.

⁴ The Workman's Compensation Act (1906) established the right for employees to receive compensation for injuries sustained at work.

⁵ *Walker v Crystal Palace Football Club* [1910] 1 KB 87.

The Court decided that the employee status of professional footballers could be established because of their subjection to the training regime and general instructions of the club. The victory for Walker established, but did not normalise, the employment status of professional players because in a wider context the retain-and-transfer system and the maximum wage formed part of a wider control mechanism of management over players.⁶

The fight for contractual and financial freedom was taken up by a newly formed players union, established in 1908, but fearing the prospect of strike action by the players, the FA withdrew its initial recognition of the union. Part of the process of re-recognition saw the players union secede from the General Federation of Trade Unions. Succession limited the industrial relations strength of the players union meaning that the challenge to the transfer system and maximum wage was likely to be a legal one. The first opportunity to challenge the retain-and-transfer system arose in 1912 in the case of *Kingaby v Aston Villa*.⁷ The system survived, in large part due to the 'disastrous' approach taken by Herbert Kingaby's counsel.⁸ Rather than attacking the retain-and-transfer system as an unlawful restraint of trade, Kingaby's counsel focussed on Aston Villa's motives in demanding a fee for the out-of-contract player. Once the Court proceeded on the basis that the retain-and-transfer system was lawful, the motives of the club became irrelevant and Aston Villa had no case to answer.

With the abolition of the maximum wage in 1961, an apparently more propitious climate seduced the players' union to support a second challenge to the retain-and-transfer system. In *Eastham v Newcastle United FC & others* [1964] the Chancery Division of the High Court ruled that the 'retain' element of the system substantially interfered with the player's right to seek employment and therefore operated in restraint of trade.⁹ Whilst the Court found that the element of restraint in the transfer provisions was less severe than in the retention system, the two systems, when combined, were in restraint of trade and since the defendants, including the Football Association and the Football League, had failed to show that the restraints were no more than was reasonable to protect their interests, the entire system was ultra vires.¹⁰

The judgment in *Eastham*, whilst damning, only necessitated amendments to the retain system. Following *Eastham*, the Football League introduced an 'option and transfer' system in which a club had the option to extend an expired contract for a similar duration as the first and on no less favourable terms for the player. If the option was not exercised, the player was a free agent. However, free agency

⁶ Caiger, A. & O'Leary, J., (2000), *The end of the affair: The Anelka doctrine – the problem of contract stability in English professional football* in: Caiger, A. & Gardiner, S. (eds). *Professional Sport in the EU, Regulation and Re-regulation*, The Hague: T.M.C. Asser Press, 198.

⁷ *Kingaby v Aston Villa FC*, *The Times* 27 and 28 March 1912.

⁸ McArdle, D., (2000), *One hundred years of servitude: contractual conflict in English professional football before Bosman*, [2000] 2 Web JCLI.

⁹ *Eastham v Newcastle United Football Club Ltd and others* [1964] Ch. 413, 430.

¹⁰ *Eastham* [1964] Ch.413, 439.

this was not. A club could retain a player, and the right to demand a fee for his transfer, simply by offering a new contract on no less favourable terms. A new dispute resolution system was established to resolve disputes in instances where a player rejected a new contract. In reality, this system simply fixed the fee for the player's transfer.¹¹ Although a player would continue to receive a wage, a departure from the previous system, ultimately he was still not a free agent on the expiry of his contract. Reforms in 1978 brought free agency a step closer. Under the terms of an agreement concluded by the Professional Footballers' Negotiating and Consultative Committee, transfer fees were still payable for a player under contract and a club could still seek to retain a player by offering a new contract on no less favourable terms than those in the final year of his expiring contract. However, a player was free to reject these terms and move to a new club, although the former club was entitled to a compensation sum which was to be agreed, post-departure, between the clubs or set by arbitration. Although this system granted players over the age of 33 with more than five years' service with a club the right to a free transfer, the compensation system still impeded other out-of-contract players from securing alternative employment, although the restriction was much less acute than before.¹²

The English style transfer system was gradually adopted by national football associations throughout Europe and the rest of the world with mutual recognition secured through a series of agreements between the associations.¹³ Ultimately, the emergence and maturation of FIFA provided the basis for the development of an international transfer system regulated by one body. This system survives to this day, albeit in an amended form following the judgment of the European Court in *Bosman*.¹⁴

3. *The structure of English football*

The Football Association (FA) is England's national governing body and is affiliated to the European (UEFA) and global (FIFA) football regulators. It is a member association of clubs and County Football Associations (counties being a regional entity in the UK) who are its shareholders. The FA is guardian of the Laws of the Game in England and it is responsible for conducting or supervising disciplinary proceedings at all levels of the game from the Premier League to the grassroots. In addition, the FA organises the FA Cup and manages the England national team and its related infrastructure such as Wembley Stadium and the national training facility.

¹¹ Thomas, D., (2006), *The retain and transfer system*, in: Andreff, W & Szymanski, S. Handbook on the Economics of Sport, Cheltenham: Edward Elgar, 632.

¹² Dabscheck, B., (1986), *Beating the off-side trap: the case of the PFA*, *Industrial Relations Journal*, 17(4), 354.

¹³ Lanfranchi, P & Taylor, M., (2001), *Moving with the ball: the migration of professional footballers*, Oxford: Berg, 216.

¹⁴ *Union Royale Belge Sociétés de Football Association and others v Bosman and others* Case C-415/93 [1995] ECR I-4921.

The FA operates a dual-board organisational structure: The FA Board and the FA Council.¹⁵ In practice, the FA Board is the main decision maker although many powers are delegated to committees and boards such as the National Game Board, the Professional Game Board and the Football Regulatory Authority, the latter being the FA's regulatory, disciplinary and rule making authority. The Premier League and Football League jointly hold a share in The FA which grants these bodies an influence in FA affairs. The rules of the FA are extensive and located in its 'Rules and Regulations of the Association Season 2013/14' handbook.¹⁶ In addition to its comprehensive list of disciplinary matters, the FA also have *inter alia* regulations on: the sanctioning and control of competitions; referees; kit and advertising; equality; child protection; anti-doping; football agents;¹⁷ third party ownership;¹⁸ owners' and directors' test for clubs competing below the Football League level; and youth development.

The Premier League is a private company wholly owned by its 20 member clubs. This membership changes each season as the Premier League and the Football League retained promotion and relegation between the two leagues. The clubs within the league identify themselves as 'Premier League clubs' and the league acts not only as their trade association but it also organises their competition, exploits their rights, and passes and enforces rules specific to Premier League competition. The FA plays a very limited role in the running of the Premier League, but it exerts influence by way of a special (21st) share it holds in the company which entitles it to a veto over changes to various Premier League corporate and operational matters. The rules of the Premier League are laid out in the 'Premier League Handbook Season 2013/14'.¹⁹ The handbook contains regulations pertaining to: finance and governance; insolvency; owners' and directors' test, disclosure of ownership, managers and their conduct; player contracts; player registrations; and player transfers (including a prohibition on third party investment); disciplinary matters and dispute resolution. In February 2013 the Premier League agreed to a new set of Financial Fair Play regulations. A home grown player rule took effect from season 2010/11.

The Football League is a private company representing the interests of the 72 professional football clubs outside of the Premier League who compete within the Football League's competitions - the Championship, Football League One and Football League Two. The Football League has an extensive rule book covering *inter alia*: financial issues and Financial Fair Play; home grown player requirements;

¹⁵ This structure has attracted criticism and calls for reform. See House of Commons (2011), Culture, Media and Sport Committee, 'Football Governance', Seventh Report of Session 2010-12, HC 792-I, London: The Stationary Office Limited. See also the response of the FA, Premier League and Football League to this inquiry: www.premierleague.com/content/dam/premierleague/site-content/News/publications/other/response-to-dcms-report-on-football.pdf.

¹⁶ Available at: www.thefa.com/football-rules-governance/more/rules-of-the-association.

¹⁷ Following a review of the FIFA Player Agent Regulations, the FA Player Agent Regulations are also in the process of review.

¹⁸ The FA, Premier League and Football League all prohibit third party investment in players.

¹⁹ Available at: <http://m.premierleague.com/content/dam/premierleague/site-content/News/publications/handbooks/premier-league-handbook-2013-14.pdf>.

player registration; player transfers; prohibition on third party investment; player agents; player contracts; player approaches and inducements; media requirements and disciplinary issues.²⁰

4. *Employment relations in English professional football*

The UK operates a non-interventionist sports model sport in which sports are organized by the sporting associations themselves rather than being directly regulated by state legislation.²¹ Two prominent exceptions to this rule concern safety and public order at sports grounds where the state has enacted sports specific legislation.²² The regulation of employment relationships in sport is not an area regulated by sports specific legislation, although general employment laws do apply to sport.

4.1 *Non-discrimination*

The non-discrimination rights contained in the Equality Act 2010 extend to those persons who are employed, meaning those working under a contract of service or apprenticeship or a contract personally to carry out the work. This definition results in a wide range of 'employed' people being covered including employees and the self-employed. Footballers, regardless of their official employment status, are therefore protected by the non-discrimination provisions in the Act. Although the employment status of footballers has never been subject to statutory intervention, at common law, since *Walker v Crystal Palace*, professional footballers are considered employees.²³

The Equality Act 2010 establishes the statutory framework governing non-discrimination, including protection for the characteristics of: age;²⁴ disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race;²⁵ religion or belief; sex;²⁶ sexual orientation. The Act sets out conduct which is prohibited in relation to these characteristics. Broadly, this conduct includes direct discrimination, indirect discrimination, victimization and harassment, although other causes of action

²⁰ Available at: www.football-league.co.uk/page/RegulationsIndex/0,,10794,00.html.

²¹ See Chaker, A.N., (1999), *Study of National Sports Legislations in Europe*, Strasbourg: Council of Europe.

²² See Parrish, R. & Pendlebury, A., (2013), International and Comparative Sports Justice: England, *European Sports Law and Policy Bulletin*, 1/2013, 97-127.

²³ *Walker v Crystal Palace Football Club* [1910] 1 KB 87.

²⁴ In *Martin and Others v Professional Game Match Officials Ltd* (Employment Tribunal 2802438/09) an Employment tribunal found that the practice of compulsorily retiring referees in the season after they reached 48 amounted to unjustified age discrimination.

²⁵ In *Hussaney v Chester City Football Club and Ratcliffe* (Employment Appeals Tribunal 203/98, 15/01/2001), a black football player successfully brought a race discrimination claim against a football club and manager (under the Race Relations Act 1976, repealed by the Equality Act 2010).

²⁶ In *Nagle and Feilden* [1966 2 QB 633] the Jockey Club refused a trainers license to women because of her sex. Although the case pre-dated anti-discrimination legislation, at common law the court found there was a right to work without fear of sexual discrimination from those who regulated admission to the profession.

apply to specific characteristics. The Equality Act does recognize the specificity of sport through the provision of sports specific exemptions. Section 195 provides that:

- I. A person does not contravene this Act, so far as relating to sex, only by doing anything in relation to the participation of another as a competitor in a gender-affected activity.
- II. A person does not contravene section 29, 33, 34 or 35, so far as relating to gender reassignment, only by doing anything in relation to the participation of a transsexual person as a competitor in a gender-affected activity if it is necessary to do so to secure in relation to the activity (a) fair competition, or (b) the safety of competitors.
- III. A gender-affected activity is a sport, game or other activity of a competitive nature in circumstances in which the physical strength, stamina or physique of average persons of one sex would put them at a disadvantage compared to average persons of the other sex as competitors in events involving the activity.
- IV. In considering whether a sport, game or other activity is gender-affected in relation to children, it is appropriate to take account of the age and stage of development of children who are likely to be competitors.
- V. A person who does anything to which subsection (6) applies does not contravene this Act only because of the nationality or place of birth of another or because of the length of time the other has been resident in a particular area or place.
- VI. This subsection applies to (a) selecting one or more persons to represent a country, place or area or a related association, in a sport or game or other activity of a competitive nature; (b) doing anything in pursuance of the rules of a competition so far as relating to eligibility to compete in a sport or game or other such activity.

4.2 Other employment rights

Being defined as an employee brings with it a range of implications for the employee and employer. First, as footballers are employees, it falls to their employer (club) to deduct at source income tax and secondary Class 1 National Insurance (NI) contributions, the latter entitling the employee to a range of state benefits.²⁷ The self-employed settle their tax and NI liabilities with the tax authorities themselves, and in doing so can set off business expenses against income for tax purposes. Second, employers are vicariously liable for the actions of their employees. If the action of a player, for example a tackle resulting in injury to an opponent, amounts to a tortious act (for example negligence) then the employing club will be vicariously liable for the acts of their employee player.²⁸ Third, employees can access a range of employment rights, other than those specified in the equality Act.

²⁷ Social Security Contributions and Benefits Act 1992.

²⁸ See *McCord v Swansea City Football Club* [1997] *The Times*, February 11, *Watson v Gray and Huddersfield Football Club* [1998] *The Times*, November 26 and *Gaynor v Blackpool Football Club* [2002] CLY 3280.

Many of these additional employment rights are contained in the Employment Rights Act 1996. For example, employees are entitled to a written statement of terms and conditions, although in practice the internal rules of football require footballers to be engaged under a written contract which details these issues (see below). Another right is the right not to be unfairly dismissed.²⁹ As professional footballers are employees of their clubs, a contract of employment forms the basis of the relationship between a club and its employees (players and managers). Out of this relationship a number of common law and statutory claims can arise. Breach of contract³⁰ and wrongful dismissal³¹ claims often arise following the dismissal or resignation of these employees. These claims can be heard by County Courts, the High Court or Employment Tribunals. By contrast, breach of a statutory right claim, such as unfair³² and constructive³³ dismissal, are heard by specialist Employment Tribunals where compensation limits apply.

4.3 *Employment law and the law of tort*

English law, along with many internal regulations of sports bodies, also recognises that where a contract has been lawfully entered into, it is unlawful for a party to induce a breach of it. The tort of procuring a breach of contract can result in damages being sought by the injured party. Commonly in sport inducement to breach a contract is connected to approaches to players or managers already under contract. Litigation in the ordinary courts is relatively rare³⁴ although more developed under the rules of sports bodies themselves. The related tort of unlawful interference with the performance of a contract was unsuccessfully raised in a case involving serious injury sustained to a professional football player following a tackle by an opponent.³⁵

4.4 *Restraint of trade*

Where a contract exists, and even in the absence of one, the common law doctrine of restraint of trade provides another avenue through which the decisions of a

²⁹ s94 Employment Rights Act 1996.

³⁰ *Macari v Celtic Football and Athletic Co Ltd* [1999] IRLR 787 CS.

³¹ *McCormack v Hamilton Academical Football Club Ltd* [2010] CSOH 124 CS.

³² *Dennis Wise v Filbert Realisations* UKEAT/0660/03/RN.

³³ Constructive dismissal is a resignation by an employee in response to a serious breach or repudiation of the contract by the employer. This will entitle the employee to argue that he has been dismissed for the purposes of bringing a claim both for breach of contract and for unfair dismissal. For a football example see the resignation by Newcastle United manager Kevin Keegan in 2008 following a disagreement with senior management over transfer policy. Keegan succeeded in his constructive dismissal claim before a Premier League Managers Arbitration Panel.

³⁴ See *Middlesbrough Football and Athletic Co (1986) Ltd v Liverpool Football and Athletic Grounds Plc* [2002] EWCA Civ 1929. See also *Greig v Insole* [1978] 1 WLR 302.

³⁵ *Watson and Bradford City Association Football Club (1983) v Gray and Huddersfield Town Association Football Club Ltd* [1998] *The Times*, 26 November.

sports governing body can be challenged. This doctrine asserts that rules or actions restraining trade (meaning denying or restricting the opportunity to earn a living) are void unless they can be justified.³⁶ Traditionally, governing bodies have argued that restraints are justified *inter alia* with reference to the need to: promote competitive balance; incentivise youth development, encourage solidarity between participants; maintain the integrity, stability and proper functioning of competitions; protect national teams; and maintain the commercial viability of sport. The doctrine requires that restraints are reasonable not only in the interests of the parties imposing the rule, but also in the wider public interest. Restraint of trade has been raised by both clubs and players. In *Eastham v Newcastle United FC & others* [1964] the Chancery Division of the High Court ruled that the ‘retain’ element of the English retain and transfer system substantially interfered with the player’s right to seek employment and therefore operated in restraint of trade.³⁷

4.5 Capacity to contract – Minors and work permits

A player must have the capacity to enter into a contract with a club. Whilst those under the age of 18 do not normally possess this capacity, in football a contract of employment is enforceable if it is in the minor’s benefit, for example if it provides for his training and development as opposed to one which solely seeks to protect the clubs financial interest in the player.³⁸ Players from outside the EU EEA must also possess the capacity to enter into contracts. Normally, these players require a work permit issued by the UK Borders Agency in order to be considered legally employed in the UK. The UK government operates a points based system (PBS) for footballers who are “internationally established at the highest level” and whose employment will develop the sport in the UK “at the highest level”.³⁹ Work permits can be issued for three years, extendable to a maximum stay of six years. In order to be eligible for a Governing Body Endorsement under the PBS:

1. The applicant club must be in membership of the Premier League or Football League. During the period of endorsement, the player may only play for clubs in membership of those leagues (i.e. the player may not be loaned to a club below the Football League);
2. The player must have participated in at least 75% of his home country’s senior competitive international matches where he was available for selection during the two years preceding the date of the application; and
3. The player’s National Association must be at or above 70th place in the official FIFA World Rankings when averaged over the two years preceding the date of the application.

³⁶ *Nordenfelt v Maxim Nordenfelt Guns* [1894] AC 535.

³⁷ *Eastham v Newcastle United Football Club Ltd and others* [1964] Ch. 413, 430.

³⁸ *Aylesbury Football Club (1997) Ltd v Watford Association Football Club Ltd* (12 June 2002, unreported).

³⁹ www.gov.uk.

5. *Transfer rules and the standard contract of employment*

5.1 *Transfer rules*

The UK has not adopted laws governing player transfers. Clubs and players agree to be contractually bound by the transfer rules of the Football Association and FIFA. The rules of the English FA state that clubs must enter into a written contract of employment with their players on the prescribed “Form of Agreement” (see below). A club has no right to a compensation or transfer fee for a player who has attained the age of 24 years on or before 30th June and whose contract with that club has expired. If a club wishes to offer re-engagement to a player or exercise an option contained in the agreement, the club must, within seven days of the first Saturday in May, or the date of the last competitive match of the club’s first team, whichever is the later, give notice in writing to the player indicating that either the club offers a re-engagement or, if appropriate, exercises any option contained in the agreement. The notice of re-engagement must specify the period which the club is prepared to agree and the terms and conditions that are to apply. These terms must be the same or not less favourable overall than those which applied during the initial period of employment or the option period if applicable. If the player rejects the offer, or does not reply to it within 28 days, he is immediately free to negotiate with another club, although the club may be entitled to compensation if the player is under 24 years of age. If a player is transferred during the term of his contract a transfer fee can be demanded.

5.2 *Standard employment contract*

In the English Premier League and Football League, all contracts between clubs and players must be concluded on the prescribed form (the ‘Standard Contract’).⁴⁰ This standard contract, which is governed and construed in accordance with English law, outlines the obligations of clubs and players. The terms and conditions of the standard contract form part of a number of collective agreements⁴¹ between the club (through the League) and the player (through the Professional Footballers’ Association) and the contract reflects the obligations both parties have in relation to FA, UEFA and FIFA rules. In addition to the standard express terms, the parties will agree personal terms detailing issues such as salary and bonuses. Some players might also negotiate an image rights clause and many players also enter into a representation agreement with an agent.

⁴⁰ The Premier League Standard Contract is located in the Premier League Handbook 2013/14.

⁴¹ The status of collective agreements in the UK differs from those in other European Countries in so far as collective agreements are presumed not to constitute legally binding contracts (s179 Trade Union and Labour relations (Consolidation) Act 1992). However, all or part of a collective agreement will become legally binding if incorporated into an individual’s contract of employment.

5.3 Obligations of players

In the standard contract the player agrees to a series of obligations including to attend and participate in club matches and to participate in training and match preparation at any reasonable place. He also agrees to play to the best of his skill and ability at all times; maintain a high standard of physical fitness except where prevented from doing so through illness or injury; not to indulge in any activity sport or practice which might endanger his fitness or inhibit his mental or physical ability to play, practice or train; and to undertake such other duties and to participate in such other activities as are consistent with the performance of his duties. Additionally, the player must allow the release to the club of his medical records; comply with all lawful instructions of the club; play football solely for the club or as authorised by the club or as required by the rules of the governing bodies; observe the Laws of the Game when playing football; observe the relevant rules of the governing bodies; submit to medical and dental examinations as the club may reasonably require; and to undergo at no expense to himself such treatment as may be prescribed by the medical or dental advisers of the club or the club's insurers. On the termination of his contract the player must also agree to return to the club any property, including any car, which has been provided to him.

Elsewhere in the standard contract the player agrees to refrain from acting in such a way that might invoke any exclusion of the player's insurance cover; refrain from wearing anything whilst training or playing which could be dangerous to him or any other person; accept that the club might deem his place of residence as unsuitable for the performance of his duties; accept restrictions on his ability to be engaged in any other employment or business without the prior written consent of the club (although the player can make investments in any business so long as it does not conflict or interfere with his contractual obligations). The player must also not act in a way that brings the club into disrepute. A player must give the club reasonable notice of his intention to make any contributions to the public media. The player, except in the case of an emergency, must secure the consent of the club before arranging or undergoing any medical treatment; player's must be available for up to six hours a week for the promotional community and public relations activities of the club, league and sponsors. In exercising these functions the player also accepts rules relating to marketing activities. The contract also allows the club to deduct from the player, by way of forfeiture, wages due to breaches of discipline. Whilst the above obligations are expressly provided for in the contract, in English law certain duties are also implied at common law into contracts of employment. These include *inter alia* the duties of obedience and loyalty.

5.4 Obligations of clubs

The standard contract also establishes the obligations of the club. The club agrees to pay the player the stated remuneration and benefits and to reimburse any expenses

incurred by the player when undertaking authorised club business. The club is committed to observe the statutes and regulations of FIFA, UEFA, the FA, the League Rules, the Code of Practice and the Club Rules. These are made available to the player. The club must promptly arrange appropriate medical and dental examinations and treatment for the player at the club's expense in respect of any injury to or illness (including mental illness or disorder) of the player except for injury or illness which is caused by an activity or practice on the part of the player which breaches his contract. It must comply with all relevant statutory provisions relating to industrial injury and maintain and observe a proper health and safety policy. In any case where the club would be liable as employer for any acts or omissions of the player in the lawful and proper performance of his playing practising or training duties under his contract, the club also agrees to defend the player against any proceedings threatened or brought against him and indemnify him from any damages awarded. The club also agrees to support a player wishing to follow any course of further education or vocational training which he wishes to undertake. The club must release the player to the national association for representative matches as required by the statutes and regulations of FIFA. The club shall not without the consent in writing of the player take, use or permit to be used photographs of the player, except in those circumstances provided for in the contract; or use or reveal the contents of any medical reports or other medical information regarding the player obtained by the club except for the purpose of assessing the player's health and fitness, obtaining medical and insurance cover and complying with the club's obligations under the rules of the football governing bodies.

As with the obligations of players, common law implies certain employer duties into contracts of employment. Of particular interest is the duty to provide work, the duty of care and the duty of trust and confidence. The duty to provide work is not commonly found in employment contracts unless expressly provided for. As long as the employee is being paid, there is no requirement to provide work. However, the courts have recognised that in certain professions where publicity is important, such as acting, there may be a need to provide work.⁴² Following *William Hill Organisation Ltd v Tucker*⁴³ an implied duty to provide work arguably exists for workers who need to exercise their skills. An employer should not unreasonably withhold work such as in instances where a club refuses to play a player who has refused an offer to sign a contract extension. As Lewis and Taylor point out, this does not necessarily mean that footballers must be allowed to play in the first team but it might be unreasonable for a club to deny a player the opportunity to hone skills in, for example, reserve team football.⁴⁴ According to the FIFA regulations, an established player 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.⁴⁵

⁴² *Herbert Clayton and Jack Waller Ltd v Oliver* [1930] AC 209, HL.

⁴³ *William Hill Organisation Ltd v Tucker* [1998] IRLR 313, CA.

⁴⁴ Lewis, A. & Taylor, J., (2008), *Sport: Law and Practice*, Tottel Publishing, 548.

⁴⁵ Article 15 FIFA Regulations on the Status and Transfer of Players, 2010 edition.

The implied duty of care owed by the club to its players has a relevance in the context of the provision of a safe working environment, the provision of adequate materials and to circumstances in which a third party acts on behalf of the club. Whilst a breach of this duty might give rise to an action in tort, a player could cite breach of his employment contract should the duty be broken by his employer. Finally, the duty of trust and confidence requires the employer not to act in such a way that fundamentally undermines the relationship with the employee. This has implications for, amongst other things, the way in which a club speaks publically about a player. Article 14 of the FIFA Regulations on the Status and Transfer of Players provide that 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.⁴⁶ This duty also has a relevance for a club's relationship with other employees such as coaches. In *McBride v Falkirk Football & Athletic Association*, the Employment Appeal Tribunal found that an employer cannot rely on an industry norm, such as the autocratic style of management in the world of football, to justify what would otherwise amount to a breach of the implied term of trust and confidence.⁴⁷ McBride, a football coach, was told by the club that he would be in charge of the under 19 side without interference. The club acted in a manner inconsistent with this assurance and McBride resigned citing constructive dismissal.

As outlined above, in English law contracts of employment must also include an equality clause, either expressly provided for or implied according to the terms of the Equality Act 2010.

The standard contract also contains the following relevant provisions:

Injury/illness and permanent or prolonged incapacity: The provisions establish the remuneration a player is to receive if injured or ill and the circumstances in which the club can terminate a contract for permanent or prolonged incapacity.

Disciplinary provisions: Disciplinary procedures are annexed to the contract. The club will first undertake an investigation into the alleged incident, convene a hearing and allow for an appeal. Disciplinary penalties are also set out. A grievance procedure is also provided for in the contract. In any disciplinary or grievance procedure the player is entitled to be accompanied by or represented by his club captain or a Professional Footballers' Association delegate and/or any officer of the PFA.

Contract termination by the club: At common law serious breaches of a contract are taken to mean that the innocent party can be released from their obligations given that the party in breach has repudiated their side of the bargain. The standard contract makes this orthodoxy express. By giving fourteen days' notice the club can terminate the employment of the player for reasons of gross misconduct by the player;⁴⁸ if he has failed to heed any final written warning given

⁴⁶ Article 14 FIFA Regulations on the Status and Transfer of Players, 2010 edition.

⁴⁷ *McBride v Falkirk Football & Athletic Club* EATS/0058/10.

⁴⁸ See for example the dismissal of Adrian Mutu by Chelsea FC for substance abuse. Note that the Professional Footballers' Association has proposed that racial abuse should amount to gross misconduct

under the disciplinary provisions; or if he is convicted of any criminal offence where the punishment consists of a sentence of imprisonment of three months or more (which is not suspended).⁴⁹ If a player appeals against his dismissal, the club, pending the hearing, may suspend the player for up to a maximum of six weeks from the date of notice of termination without pay. Upon termination of his contract, the club is required to release the player's registration. Non-renewal of a fixed term contract is considered, in English law, a dismissal and the dismissed party can, assuming they have two years continuous service, make a statutory claim for unfair dismissal.⁵⁰ The standard player contract contains provision that if on the expiry of his contract the club has not made to the player an offer of re-engagement on terms at least as favourable to the player as those applicable over the last twelve months of this contract, then the player will continue to receive from his club a payment equal to his weekly basic wage for a period of one month from the expiry of this contract or until the player signs for another club, whichever period is the shorter. The maximum amount payable to the player under this provision is double the maximum sum which an Employment Tribunal can award as a compensatory award for unfair dismissal.

Contract termination by the player: The player can terminate his contract with fourteen days' notice in writing to the club if the club: is guilty of serious or persistent breach of the terms and conditions of the contract; or fails to pay any remuneration or other payments or bonuses due to the player. The club can lodge an appeal with the league. Upon termination of his contract, the club is required to release the player's registration. The English courts have thus far refused to grant injunctive relief in order to enforce a contract for personal services. This leaves damages the remedy for breach of contract.⁵¹ English law dictates that, so far as is possible, the injured party is restored to the position they would have enjoyed had the contract been performed. Damages clauses in employment contracts are unenforceable if they are designed to penalise the party breaking the contract rather than reflecting the actual loss incurred by the party suffering the breach.

Arbitration: Any dispute between the club and the player not provided for by those provisions relating to grievance, discipline and dismissal shall be referred to arbitration in accordance with the League Rules or (but only if mutually agreed by the club and the player) in accordance with the FA Rules. In this regard, the standard contract also contains a *specificity of football* clause requiring the parties to confirm and acknowledge the special relationship and characteristics involved in the employment of football players. The parties agree that all matters of dispute in relation to the contract are subject to the jurisdiction and decisions of tribunal

in the standard players' contract.

⁴⁹ See for example the dismissal of Marlon King by Wigan Athletic FC following a criminal conviction for assault and the dismissal of Lee Hughes by West Bromwich FC for a conviction of causing death by dangerous driving.

⁵⁰ Ss.95(1)(b) and 136(1)(b) of the Employment Rights Act 1996.

⁵¹ Remedies for breach of statute (unfair dismissal) include compensation, reinstatement and re-engagement.

panels or other bodies established under the relevant football rules. The specificity of sport clause brings the standard contract into line with clauses located elsewhere in the wider football rulebook, particularly in the FIFA Regulations on the Status and Transfer of Players.⁵² However, the reference in the standard contract to the application of English law and to obligations arising out of UK employment law means that the specificity of sport clause cannot be read as implying immunity from ordinary law.

Supplemental provisions: In order to comply with the Employment Rights Act 1996, the standard contract requires the parties to state when the player's employment with the club commenced, the date of termination of the contract (30 June), the date of continuous employment (employment with a previous employer does not count as part of the player's continuous period of employment); the player's hours of work (are such as the club may from time to time reasonably require of him to carry out his duties and the player shall not be entitled to any additional remuneration for work done outside normal working hours); the place of employment (being the club's ground and training ground but the club is entitled to require the player to play and to undertake his duties at any other place throughout the world); pension provisions and remuneration and benefits. The normal retirement age of players is given as 35.

The Professional Football Negotiating and Consultative Committee (PFNCC) considers questions concerning players' remuneration and other terms and conditions of employment, including contractual obligations, minimum pay, bonuses governed by League rules, pensions, fringe benefits, holidays, standard working conditions and insurance, as well as procedural matters involving the negotiating machinery, and the contract appeals machinery. No major changes in the regulations of the Leagues affecting a players' terms and conditions of employment can take place without full discussion and agreement in the PFNCC. For the sake of completeness it should be pointed out that the EU wide professional football social dialogue committee has concluded an autonomous agreement on minimum requirements for standard player contracts.⁵³

6. *Anti-Doping*

The FA operates an anti-doping policy which footballers must accept as a condition of their participation in the game in England.⁵⁴ Players are obliged to undergo drug tests with testing taking place in competition (on match day) or out of competition (at any other time) without any advance notice. The FA conducts out of competition tests for prohibited substances and prohibited methods that are prohibited at all times (i.e. both in competition and out of competition) and also for social drugs.

⁵² The FIFA Regulations refer to the 'specificity of sport'. For a discussion see *European Sports Law and Policy Bulletin* (2011), Contractual Stability in Football, Issue I-2011.

⁵³ Signed in Brussels on April 19, 2012.

⁵⁴ The Football Association Handbook Season 2013/14: Rules and Regulations of the Association, 267. Available at: www.thefa.com/football-rules-governance/more/rules-of-the-association.

The FA is therefore also entitled to charge a player with an anti-doping offence if a social drug is present in an out of competition test.

Anti-doping offences are dealt with using the strict liability principle meaning that a player will be guilty of an anti-doping rule violation if a prohibited substance, metabolite or marker is present in the player's body regardless of whether the player intended to take the prohibited substance. The use or attempted use of a prohibited substance or prohibited method by a player is prohibited unless the player establishes that the use is consistent with a therapeutic use exemption that has been granted to the player. For doping offences the FA impose mandatory penalties as set out in the Anti-Doping Regulations of WADA. Only in "exceptional circumstances" can that these penalties be reduced. A doping offence includes the failure or refusal by a player without compelling justification to submit to drug testing after notification by an anti-doping official. Players must be present and available for drug testing in accordance with the whereabouts information provided by their club to the Football Association. It is prohibited for a player to have missed three tests within any 18 month period.

Players who are the subject of an anti-doping suspension are not permitted to participate in any capacity in any match or any other football related activity other than in anti-doping education or rehabilitation programmes. The FA retains discretion to permit a player who has been suspended for six or more months to return to training and/or other football related activity with his club, excluding match participation, prior to the end of his suspension. The anti-doping regulations also permit the FA to withhold some or all of any sports related payments otherwise due to the player from The FA during the period of suspension.

Anti-doping appeals are heard by an Appeal Board. In addition to the FA and the player, FIFA, the national anti-doping agency and WADA can also lodge appeals. FIFA and WADA also have the right to appeal to CAS for a final and binding decision, against any decision of the Appeal Board in relation to an anti-doping violation.

7. *Conclusion*

To some extent, English football displays characteristics of being a special sector and a distinct labour market. Players are bound by a web of contractual relations involving their club, national association, league and international governing bodies and through this system they subject themselves to a range of employment restraints not found in 'normal' labour markets. However, ordinary laws of contract and employment underpin these relationships and these laws are, in general, applied to sport in the same way as they are applied to any other sector. This means, in the employment context at least, the UK state has refrained from directly involving itself in regulation of sporting relationships and an equilibrium has been reached which balances the rules of the sports bodies with the requirements of English law.

**EMPLOYMENT RELATIONSHIPS AT NATIONAL LEVEL:
FRANCE**

by *Jean-Michel Marmayou* *

SUMMARY: Introduction – 1. Employment regulation and football structures – 2. Individual employment relations in professional football – 3. Medical and doping issues – 4. Transfer of players – 5. Social security and taxation – 6. Labour dispute settlement

Abstract:

An insight into the legal mechanisms governing employment issues in French football. This article provides an overview of how the French football regulations treat professional footballers, and also, but to a lesser extent, amateur footballers. It covers the contents and prerequisites of a valid employment contract, the duties and obligations of clubs and players, the professional ethics and conduct rules to which footballers are subject, termination of contracts and the consequences and disciplinary issues, including dispute resolution mechanisms.

Introduction

A professional footballer's employment relationship with his club is complex. If professional football player is a worker just like any other worker, as *Bosman* case said, ordinary labor law applies although there is some specificity that might complicate. The relationship is subject to the ordinary labor law and ordinary contract law and it's also bound by the rules of a special collective agreement (Charte du

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football professionnel) and, further, contractually by the rules of the French Football Federation (FFF) and UEFA and FIFA regulations.

This article should provide a general overview of provisions in French labor law and its related fields of different collective rules that are relevant for professional football players. It confines itself to a discussion of how the employment relationship is regulated under national law and by the regulations of the French football authorities. For the sake of clarity, it is restricted to the statutory sources of the French football authorities. Moreover, the sources of law of international associations like the FIFA or the UEFA are intentionally excluded, least because the French labor rules are considered public order issues.

1. *Employment regulations and football structures*

A. *Sources of French employment law*

Multiple sources - French employment laws applicable to the footballers contain certain very specific measures. Although French law is based on the Romano-Germanic legal system and is broken down into a variety of specialist legal fields, it does not offer employed footballers the security of a well-defined branch of law specifically applicable to them. In practice, within the various structures formed by the different sources of French law, those that actually apply to footballers have to be sought out. Moreover, the French legal system assigns an important role to an extremely disruptive element: the so-called “*principe de faveur*” [principle of favour]” according to which an employee may benefit from certain privileges over and above those accorded by the laws and regulations.

The main principles of EU law apply to the employment of footballers in France, that is to say freedom of movement, freedom to establish companies, freedom to offer services. EU secondary laws also apply, notably on issues concerning the information of workers, the organisation of work time, health and safety at work, fixed-term employment, employee protection in cases of employer insolvency, etc.

In France, the main principles are contained in a body of constitutional law and especially the preamble to the 1946 Constitution which proclaims the “economic and employment rights that are particularly relevant to our era”, including the right to obtain employment and duty to work, freedom of association, right to strike, prohibition on discrimination against workers, etc.

Most of these rules are to be found in the *Code de Travail* [employment laws]. However, these laws do not encompass all the rules and regulations relating to employment. Indeed, the general rules set out in the Civil Code on the so-called “law of obligations” (such as contract law) continue to govern employment contracts despite the existence of very specific employment rules and regulations, such as those contained in the French 1978 data protection laws, the *Code de la Propriété Intellectuelle* [intellectual property and patent laws], the *Code de Commerce* [business

laws], the *Code de la Santé Publique* [the public health laws], or the *Code de l'Entrée et du Séjour des Etrangers et du Droit d'Asile* [laws on foreigners' rights of residence and asylum].

Another source of French employment legislation is the more or less profession-specific collective bargaining agreements between employees' and employers' representatives, and case law from the *Chambre Sociale* [employment branch] of the *Cour de Cassation* [final appeal court for civil and criminal matters] has often issued very bold and dynamic interpretations of the applicable texts, generally in favour of the employee who is deemed to be the weaker party.

The legal "principle of favour" - This so-called favourable treatment accorded employees is widely expressed in the well-known "principle of favour" which is defined as follows: "when two standards or regulations apply to the same employment relationship, the general rule is that the decision will be more favourable to the employee". This principle, which is enshrined in Articles L.2251-1 and L.2254-1 of the *Code de Travail* ruffles the conventional legal hierarchy since it means that a text from lower authority may override a text from a superior authority if the former contains provisions that are more favourable to the employee.¹ That said, this characteristic of multiple sources of French *Code de Travail* is further complicated by the fact that the "principle of favour" is itself subject to an exception contained in Article L.2252-1 which states that "an industry or professional or inter-professional collective bargaining agreement may contain provisions that are less favourable to employees than to those that are applied by virtue of an agreement covering a wider territorial or professional field, unless this agreement states specifically that no waiver will be permitted in whole or in part". When a collective bargaining or other agreement is reached at a higher level than a prior agreement, the parties adapt the provisions of the prior agreement which is less favourable to employees when a provision in the higher agreement expressly allows this".

B. *Laws and regulations specific to sport and football*

Code du sport [sport laws] - There are a number of provisions in the French *Code du Sport* on the employment relationship between a sportsperson and an employing club. These are Articles L.222-2 to L.222-5 of the *Code du Sport*. However, the scope of these provisions is very restricted and it cannot be said that they define the employment status of professional footballers.

Charte du Football Professionnel – CFP [Professional Football Charter] - In fact, the status of professional footballers, which derives from the *Code de Travail*, has developed through a process of collective bargaining, and more specifically through

¹ According to the Cour de Cassation (Cass. soc. 17 January 1996, n° 93-20066, DT 1996, n° 3, 7) "determination of the most favourable system must result from an overall appreciation of each benefit".

the Professional Football Charter which has the status of a profession-specific collective bargaining agreement.² However, this Charter has to be viewed in association with the *Convention Collective Nationale du Sport - CCNS* [National Collective Agreement on Sport].³ According to this collective agreement,⁴ priority of application has to be given to the Professional Football Charter (which excludes the “principle of favour” to the benefit of the employee), although it does retain the application of certain articles of chapter 12 of the Charter regarding professional classification and training.

The result is that professional footballers have a hybrid status subject to the *Code de Travail* and certain provisions which are very specific to their profession and therefore strictly regulated.⁵

Contents of the Professional Football Charter - The Professional Football Charter is a document of almost 130 pages including its appendices. It is the result of a collective bargaining process between the club employers and their employees in the field of sport. It covers youth coaches, apprentice players and professional players. It has been negotiated in the presence of the French Football Federation and the Professional Football League.

It governs all the conditions of employment, vocational training, and fixes all the employment benefits. It contains many provisions on pay, health and safety, accreditation of training centres, the different statuses of players (apprentice, trainee, elite, professional, foreign), the approval of contracts, transfers, trade union rights, etc.

Status of the amateur player - The status of the amateur footballer is regulated by the French Football Federation which has exclusive competence in this respect. The Federation’s regulations contain specific rules applicable to so-called “federal” players. Only those clubs that do not have a professional status and take part in the national championship, called independent clubs, in leagues 1 and 2 of the French amateur championship and lower leagues such as the mainland France *Division d’Honneur* league and the Reunion Island *Division d’Honneur* are allowed to use players under federal contracts in the club’s first team. Players from the Federal league or players on loan can be incorporated into the first team reserves. Like the professional contracts, the contracts of Federal league players have to be approved, but in this case by the French Football Federation.

² Cass. soc., 3 February 1993, D. 1995, chron. J.-P. Karaquillo, 170. – T. confl., 20 October 1997, Bull. civ., n° 18. – G. Couturier, “*La Charte du football professionnel. Nature et validité*”, in *Les contrats des sportifs. L’exemple du football professionnel*, PUF, 2003, 61.

³ G. Couturier, “*Quelques observations sur la convention collective nationale du sport*”, RJES 2006, n° 78, 9. – D. Jacotot, “*Les conventions collectives relatives au sport*”, Encyclopédie www.droitdusport.com, Étude 254.

⁴ Art. 12.2.2, II, CCNS.

⁵ J.-P. Karaquillo, “*L’application des dispositions du Code du travail au contrat de travail du sportif professionnel*”, RDT 2010, 14.

C. Football structures

The structure of football in France resembles that applied in many other countries. However, it has one particularity in that the national federation has been delegated the power of a public authority by the state.

Federation - The French Football Federation is an association governed by private law. It has been delegated a monopoly for the organisation of competitions that result in international, national, regional or county titles, the corresponding selections, the promulgation of technical rules specific to football, the publication of regulations concerning the legal, administrative and financial conditions that clubs have to meet in order to participate in its competitions, etc.

Players, officials and clubs are all licensed members of the French Football Federation. The Federation itself is made up of deconcentrated services in the form of regional, county and district leagues.

The professional league - The French Football Federation created the Professional Football League, an association governed by private law, to which it has delegated the powers to organise professional football competitions. Every four years, the FFF signs an agreement with the Professional Football League that defines, *inter alia*, the allocation of income received. In compliance with Article L.132-2 of the *Code du Sport*, an organisation has been created to ensure the legal and financial monitoring of clubs, in particular with the specific role of checking that the associations and companies that make up the league satisfy the conditions laid down for taking part in the competitions organised by the Federation. This organisation is called the *Direction Nationale de Contrôle de Gestion* (National Management Control Directorate - DNCG).

2. Individual employment relations and professional football

A. Essential aspects and legal qualification

1) Nature of the contract

The contract of employment - Under French law, the contract between the footballer and his club enabling him to exercise his professional sport cannot be anything other than a contract of employment since the player is in a position of subordination to his club.⁶ This subordination most often results from a player's duty to submit to the rules and discipline of the club and to attend all convocations, in particular for training sessions. Although footballers are the first concerned, this state of

⁶ F. Buy, "Le sportif salarié", Encyclopédie www.droitdusport.com, Étude 239. – J.-P. KARAQUILLO, "Activité sportive et salariat", Dr. soc. 1979, 22. – And for a criticism, J. Barthélémy, "Le contrat du sportif", JCP S 2008, 1430.

subordination can also be applied to the practice of any collective sport.⁷ The legal definition of the term “contract of employment” is not open to interpretation and the courts will not rule on the terminology that the parties have applied to their agreement⁸ nor to the amateur or professional terms that the sports bodies have adopted. Selection for the French national team does not change the relationship between the employee and his club.⁹ Furthermore, no duty of subordination is created when a player is selected to play for his Federation.¹⁰

2) *Contract duration*

Fixed-term employment contracts. - Under French law, a fixed-term contract is not a public law contract of employment. According to Article 1242-2 of the *Code de Travail*, it is necessarily an exceptional measure and can only be agreed for the performance of a specific and temporary task, and only in the cases listed in the article. That said, professional sports, especially football, use this type of contract. In accordance with Article L. 1242-2, and 3, of the *Code de Travail*, the use of fixed-term contracts is only permitted¹¹ for “seasonal employment or when, in certain sectors defined by decree or by agreement or by extension of a collective agreement, it is constant practice not to resort to permanent contracts of employment due to the nature of the business and the temporary nature of these employments”. However, by applying this provision, Article D.1242-1 of the *Code de Travail* opens the door to fixed-term contracts in the field of “*professional sport*”.

Even so, the use of fixed-term contracts has to be justified case-by-case to ensure they comply with three conditions laid down by the law. First of all, the employment in question must be in “professional sport”. In order to satisfy this condition, case law considers the personal circumstances of the employee who may be regarded as a professional when he exercises his profession exclusively¹² or receives a high remuneration.¹³ On the other hand, reference to the professional nature of a sport seems not to be applicable since the *Cour de Cassation* [Supreme Court] has rejected this and will not be constrained by the terminology used in the world of sport.¹⁴ Furthermore, general practice in this field of employment must not involve constant use of fixed term contracts. The collective bargaining

⁷ Ex.: rugby (Cass. soc., 28 April 2011, RDT 2011, 370, obs. G. Auzero; LPA 14 May 2012, 3, obs. G. Rabu); volley-ball (Cass. soc., 9 April 2002, D. 2002, 2706, obs. J.-P. Karaquillo); ice hockey (Cass. soc., 23 January 1997, RJES, 1997, n° 44, 33, obs. J. Mouly).

⁸ Cass. soc., 28 April 2011, prec.

⁹ Art. L. 222-3, C. sport.

¹⁰ Cass. 2^e civ., 22 January 2009, JCP G 2009, II, 10046, note F. and G. Buy; Dr. soc. 2009, 854, note G. Vachet. – D. Jacotot, “*Le statut des sportifs professionnels sélectionnés en équipe de France*”, in *Droit et coupe du monde* (dir. M. Maisonneuve), Economica, 2011, 173.

¹¹ This is a right and is not a duty even if general practice is recourse to the fixed-term contract.

¹² Cass. soc., 20 June 2001, Dr. soc. 2001, p.994, obs. J. Mouly.

¹³ Cass. soc., 16 May 2000, n°98-42628.

¹⁴ F. Dousset, “*Le droit du contrat à durée déterminée d’usage dans le sport professionnel: une nécessaire évolution*”, JCP S 2007, 1828.

agreements generally confirm this practice.¹⁵ This applies to the football where the Charter refers to the provisions of the *Code de Travail* and the *CCNS* whose Article 12.3.2.1 confirms the widespread use of fixed-term contracts. The third criterion is more of a problem. Contrary to the recent ruling by the *Cour de Cassation*,¹⁶ the employment contract cannot be distinguished from the general provisions of Article L.1242-1 of the *Code de Travail* which stipulate that the aim of the fixed-term contract “cannot be to permanently fill jobs relating to the normal and permanent business of the company”. The courts recently recognised this, under the influence of EU-driven pressures that render the fixed-term contract an exception and not a general rule.¹⁷ Henceforth, recourse to fixed-term employment contracts cannot be justified on the grounds of the “*temporary nature of the employment*”.¹⁸ This constitutes a major obstacle in sport since the employment of players seems to form part of the permanent business of the entity (in this case the club).¹⁹ There is no doubt that in the past case law recognised the temporary nature of sportpersons’ employment by examining a series of more or less convincing aspects, such as the seasonal nature of the business,²⁰ the uncertainty of the results,²¹ and even the limited duration of a sportperson’s career.

Although fixed-term contracts should only be used exceptionally, there is a trend towards lasting contractual relations,²² especially in the field of football, where extending the length of contracts stabilizes the workforce, at the same time maintaining the system of costly transfers. Admittedly, there is little restriction on the term of a fixed-term contract and Article L.1242-7 of the *Code de Travail* accepts the stipulation of an uncertain term in employment contract and, most importantly, the *Cour de Cassation* has held that a maximum of 18 months for ordinary fixed-term contracts cannot be applied to employment contracts.²³

Moreover, the extension of a contract is widely accepted: Article L.

¹⁵ However, by virtue of the “principle of favour”, a collective bargaining agreement may not prohibit use of a permanent employment contract and therefore a provision in a collective bargaining agreement that requires the signature of a fixed-term employment contract will not prevent the reclassification of the employment contract as a permanent employment contract (Cass. soc. 2 April 2014, n°11-25442, Dr. soc. June 2014, 576, note J. Mouly ; D. 2014, 1363, note J.-P. Karaquillo; RDT June 2014, 416, note D. Jacotot.

¹⁶ Cass. soc., 26 November 2003, RJS 1/04, n° 9, note P. Bailly. – C. Roy-Loustaunau, “*Les contrats à durée déterminée selon l’usage: nouvelle donne*”, Dr. soc. 2004, 629.

¹⁷ Cass. soc., 12 January 2010, D. 2010, 1692, note J. Mouly; LPA 11 Apr. 2011, 18, obs. F. Buy; Cah. dr. sport n° 20, 2010, 64, note J.-P. Lhernould (the unpredictability of sport does not establish the inherent temporary nature of employment). – J. Barthélémy, “*CJCE, CDD et contrat de travail du sportif*”, JCP S 2006, 1965.

¹⁸ Cass. soc., 23 January 2008, RDT 2008, 170, obs. G. Auzéro; Cah. dr. sport n° 11, 2008, 49, note F. Buy.

¹⁹ J. Mouly, “*Sur le recours au CDD dans le sport professionnel*”, Dr. soc. 2000, 507.

²⁰ Cass. soc., 26 October 1999, n° 98-41465. – Cass. soc., 16 May 2000, n° 98-42628.

²¹ Cass. soc., 28 March 2001, n° 99-40875. – rappr. art. 12.1, *CCNS*.

²² D. Jacotot, “*Renouvellement, condition suspensive : l’allongement de la durée des CDD des sportifs professionnels*”, JCP S 2006, 1401.

²³ Cass. soc., 28 October 1997, n° 95-43101, D. 1998, 126, note J. Mouly.

1243-13 of the *Code de Travail* recognises that a contract can be renewed once, and Article L. 1244-1 authorises a succession of employment contracts without a trial or qualifying period. Lastly, clauses covering extensions, possibly subject to certain conditions,²⁴ are valid and do not in themselves run the risk of the contract being requalified as permanent employment contracts.²⁵ With this in mind, the CCNS stipulates that “contracts are entered into for one or more football seasons (...). *“The duration of a same contract cannot be longer than five football seasons (60 months), including periods of tacit renewal stipulated under the contract. This maximum period does not exclude explicit renewal of the contract or the signature of a new contract with the same employer”*. This flexibility of the contract could nevertheless encounter an obstacle in the form of European Union law that would like to prevent the misuse of fixed-term contracts.²⁶

B. *The contract of employment*

1) *The contract*

Freedom to hire. - Although the principle of freedom to contract applies to employers, it remains subject to certain restrictions. For example, clubs are under an obligation to apply principles of non-discrimination²⁷ on hiring that specifically prohibit discrimination on grounds of health, with the result that contracts signed based on a qualification observed by a person other than an occupational medical practitioner are prohibited.²⁸ Club employers will likewise ensure compliance with multiple employment bans, for instance relating to minors²⁹ or foreigners whose status has not been regularised.³⁰ Furthermore, this freedom to hire is matched by an obligation to observe rules of fair competition,³¹ i.e. an employee should never be hired in a manner that would cause prejudice to the previous employer and could be sanctioned on grounds of poaching or unfair competition.³²

There are fewer restrictions on employees' freedom to contract, but they are not totally excluded. For example, Article L.211-5 of the *Code du Sport* states that an agreement for access to a training centre may contain an obligation for a young player “*who intends to practice as a professional*”, to “*sign with the owner*

²⁴ E.g. subject to the club achieving promotion to a higher division (Cass. soc., 13 April 2005, n° 02-46962). – Adde: Cass. Soc., 26 October 2011, LPA 14 May 2012, 16, obs. G. Rabu.

²⁵ Cass. soc., 31 May 1989, RTD civ. 1990, p.279, obs. J. Mestre.

²⁶ CJCE, 4 July 2006, aff. C-212/04.

²⁷ Art. L. 1132-1, C. trav.

²⁸ See D. Jacotot, note under CA Besançon Court of Appeal, 16 Nov. 2007, Cah. dr. sport n° 11, 2008, 63. – Cass. soc., 1^{er} July 2009, LPA 29 March 2010, 15, obs. F. Buy.

²⁹ Art. L. 4153-1, C. trav.

³⁰ Art. L. 8251-1, C. trav. – note that foreign sportspersons are able to benefit from the “special skills and talent” resident’s permit which is equivalent to a work permit (art. L. 315-1, C. foreigners).

³¹ F. Buy, “*La préparation des transferts des sportifs professionnels*”, RLDC 2005, n° 22, 55 et s.

³² Art. L. 1237-3, C. trav. et art. 1382, C. civ. – on the risk of disciplinary sanctions: TAS, 5 December 2005, AS Roma c/FIFA, Cah. dr. sport n° 3, 2006, 274, note F. Buy.

of the centre a contract of employment defined in subparagraph 3 of Article L.1242-2 of the Code de Travail of not more than three years”.

Contract validity. - Article L.1221-1 of the Code de Travail states that a contract of employment is subject to the rules of public law. For example, an employee may be accused of wilful concealment if he fails to inform his employer of any Federal disciplinary proceedings which may prevent him from correctly fulfilling his contractual obligations.³³

The nature of a sport persons’ contract is also subject to particular requirements: therefore, the contract has to be in writing, give a precise definition of its purpose,³⁴ and contain a series of mandatory mentions such as the duration and the remuneration.³⁵ Failure to comply with these rules will result in the contract being reclassified as a permanent employment contract.³⁶ Considering that these rules have been enacted in order to protect the employee, the Cour de Cassation has concluded that the employee is the only party permitted to seek reclassification³⁷ of the contract and no collective agreement can prevent him from seeking this reclassification.³⁸ Furthermore, the employee benefits from an option that allows him to either accept the system applicable to the fixed-term contracts or seek reclassification of his contract as a permanent employment contract.³⁹

To the conditions stipulated by the law are frequently added those defined in the various sports regulations. As to French football, the Federation authorities require that players “qualify”⁴⁰ in order to take part in competitions. In principle, the absence of qualification should have an impact on the contract but to do so the Federation’s regulations have to have laid down a sanction.⁴¹ In order to avoid advantage being taken of these formalities, it has also been ruled that a lack of qualification is not enforceable against the employee when it results from an employer’s failure to act.⁴² These rules also apply to preliminary contracts, either the texts submit them directly to the qualification formality,⁴³ or they may be

³³ CA Grenoble, 18 April 2007, D. 2008, 1594, note J. Mouly.

³⁴ Cass. soc., 7 March 2012, n° 10-19073.

³⁵ Art. L. 1242-12, C. trav.

³⁶ Art. L. 1245-1, C. trav.

³⁷ Cass. soc., 4 December 2002, Dr. soc. 2003, 293, Opinion P. Lyon-Caen.

³⁸ Cass. soc. 2 April 2014, n° 11-25442, préc.

³⁹ Cass. soc., 10 July 2002, Dr. soc. 2003, 328, obs. C. Roy-Loustaunau.

⁴⁰ Approval rulings on administrative instruments (TA Montreuil, 8 November 2011, LPA 14 May 2012, 3, obs. J.-M. Marmayou). – Adde J.-P. Karaquillo, “La promotion du formalisme: une application particulière aux contrats de travail de sportifs professionnels”, D. 1995, chron. 168.

⁴¹ Cass. soc., 17 March 2010, LPA 11 April 2011, 15, obs. F. Buy; JCP E 2010, 1656, obs. J.-B. Seube.

⁴² Cass. soc., 4 December 1996, RTD civ. 1997, 452, obs. P.-Y. Gautier. – Cass. soc., 13 May 2003, Bull. civ. V, n° 162. – CA Aix, 7 October 2005, Cah. dr. sport n° 3, 2006, 112, note F. Rizzo. – CA Paris, 5 October 2006, JCP S 2007, 1468, note J.-F. Tricoit and F. Bizeur.

⁴³ CA Montpellier, 18 July 2007, LPA 19 January 2009, 15, note F. Buy, confirmed by Cass. soc., 17 March 2010, préc..

classified as a promise of employment, since these preliminary contracts already constitute contracts of employment.⁴⁴

2) *Performance of the contract*

The player's obligations - The *CCNS* clearly summarises the obligations on an employed sportsperson: “the professional sportsperson will make available to his employer, against payment, his skills, physical potential and technical expertise, the time necessary to prepare and to execute a sporting performance as part of a competition or event on a regular or occasional basis and, incidentally, the resulting activities of representation”.⁴⁵ Thus, a player is required to perform a number of sports-related services (take part in training sessions, official meetings, training courses, etc.) without being required to guarantee the quality of his participation. The inherent unpredictability of sport means that these duties constitute an “*obligation de moyens*”,⁴⁶ that is to say ensure an appropriate participation to enable the person to do a job, an aspect that cannot be covered by the contract.⁴⁷ The specific nature of sports events will often be complemented by services of a commercial nature (promotion of the club sponsor, right to use a person's image, etc.). The *CCNS* stipulates in particular that the employee agrees to use the equipment provided by the employer but excludes any specialised equipment for which the sportsperson is free to use the brand of his/her choice.⁴⁸

The club's obligations - The club is required to pay the promised remuneration⁴⁹ taking into account the legal or contractual minima⁵⁰ and any salary cap that may have been imposed by the Federation.⁵¹ According to the *CCNS*, the remuneration includes a fixed salary and benefits in kind, the value of which is set out in the contract. It may also include bonuses for good behaviour, attendance, participation or results paid as a salary or as part of an incentive plan or employee's savings, or through a participation agreement. Every element of the player's remuneration has to be covered by the contract of employment.⁵²

The club has an obligation to provide the employee with work. Although this does not necessarily create a right to play, it nevertheless prohibits the club from preventing the player from training with the group of professional players.⁵³

⁴⁴ Cass. soc., 7 March 2012, JCP G 2012, 779, obs. J.-P. Tricoit.

⁴⁵ Art. 12.3.1.1, *CCNS*.

⁴⁶ Cass. soc., 7 July 1993, RJES 1994, n° 7, 85.

⁴⁷ Cass. soc., 26 October 1999, RJES 2000, n° 56, 57.

⁴⁸ Art. 12.11.3, *CCNS*.

⁴⁹ Cass. soc., 13 October 1999, n° 97-41829. – Cass. soc., 9 January 2008, JCP S 2008, 1201, note C. Lefranc-Harmoniaux. – Cass. soc., 9 April 2008, Cah. dr. sport n° 12, 2008, 39, note F. Rizzo.

⁵⁰ Cass. soc., 7 March 2012, n° 10-19073.

⁵¹ Art. L. 131-16, 3°, C. sport. – J. Colonna et V. Renaux-Personnic, “*Salary cap: aspects de droit social*”, Cah. dr. sport n° 27, 2012, 27.

⁵² Art. 12.6.1, *CCNS*.

⁵³ Art. 12.3.1.3, *CCNS*.

Finally, the club is required to guarantee decent working conditions and thereby guard against the occupational risks inherent in the sport. The *CCNS* states that since there is a more acute risk of accidents for a professional sportsperson, the employer must set up the means required for the sportsperson to practice his or her discipline.⁵⁴ Training on the risks and the rules applicable on questions of safety is organised for the benefit of all sportspersons on signature of the first contract.⁵⁵ The *CCN*'s recalls the existence of an unlikely opting out right to the benefit of the employee.⁵⁶

Working hours - The public law regulations concerning working hours raise important issues due to the very unusual nature of professional sport.⁵⁷ The *CCNS* allows The Football Charter to include the effective time spent in competitive matches, training and certain other activities such as shared meals, promotional events requested by the employer or meetings with the medical staff.⁵⁸ Although the time worked must not exceed the maximum work time (10 hours per day, 48 hours per week), the time worked above the legal limit of 35 hours per week will normally count as overtime.

As to rest time and leave, it has to mention that three rest periods are to be observed. Firstly, daily rest, the maximum duration of which is 11 consecutive hours unless authorised or extended by a company agreement which may be useful when a match has been played away from home on the previous day. Secondly, a weekly rest period of at least 24 consecutive hours +11 hours of daily rest.⁵⁹ Finally, the annual paid leave, the duration of which is normally 2.5 working days per month of work, provided that the total period does not exceed 30 working days. However, the *CCNS* does provide for a longer period. The reference period of June 1 to May 31 is often delayed in order to reflect the sporting calendar (which is usually July 1 to June 30). This arrangement is permitted by law but provided that it is covered by an annual working time agreement.

Contract amendments - The contract can always be amended by a bilateral agreement, or even replaced by a new contract.⁶⁰ On the other hand, and consistent with the principle of contract inviolability, the employer is not able to impose the unilateral modification of a contract on an employee, including when it is the result of a disciplinary measure.⁶¹ The modification of a contract constitutes a serious offence that may justify early termination of the contract by the employee to the detriment of the employer.⁶² However, not all changes are prohibited since, by

⁵⁴ Art. 12.7.3.1, *CCNS*.

⁵⁵ Art. 12.7.3.3, *CCNS*.

⁵⁶ Art. 12.7.3.3, *CCNS*.

⁵⁷ J. Barthélémy, "La durée du travail du sportif professionnel", *RJES* 2001, n° 60, 29.

⁵⁸ Par ex. : art. 12.7.1.2, *CCNS*.

⁵⁹ Art. L. 3132-2, *C. trav.*

⁶⁰ Cass. soc., 25 May 2011, *JCP S* 2011, 1387, note D. Jacotot.

⁶¹ Cass. soc., 16 June 1998, *Dr. soc.* 1998, 806, rapp. P. Waquet.

⁶² Cass. soc., 12 January 2010, *Cah. dr. sport* n° 19, 2010, 52, note F. Buy.

virtue of its managerial authority, the employer is still able to alter the employee's working conditions. Refusal by the latter may then be penalised. Thus, the challenge is to distinguish between that which constitutes on the one hand a modification of the player's contract, and on the other a simple change to his or her working conditions. Case law tends to separate out objectively the basic aspects of contracts that are normally inviolable. Any change to the remuneration of the sportsperson, however small, constitutes a modification of the contract. Similarly, the functions of the employee which may translate into the sportsperson being set aside from a professional group⁶³ or the "declassification"⁶⁴ of a coach by withdrawing from him/her the preparation of a first-team⁶⁵ or depriving him/her of the right to choose the team.⁶⁶

Disciplinary powers of the club - As an employer, the club is vested with three powers. First of all, managerial powers enabling it to issue orders and instructions to employees and to check on the execution of the work. Secondly, the internal regulatory powers that allow the club to establish internal rules for running the business. And finally, disciplinary powers that allow the club to impose penalties on any offending player. According to the *CCNS*, penalties may range from a warning of suspension for a specified period of time to suspension for a breach of contract.⁶⁷ However, fines and financial penalties are prohibited, at least when they take the form of a direct sanction, but in fact even a permitted sanction, such as a layoff, may have a financial impact.⁶⁸ More generally, penalties that are not covered by the club's internal rules are also prohibited since they would be judged invalid since outside the player's contractual framework.

The professional sportsperson is not only subject to the disciplinary powers of his employer, depending on the circumstances he may also be the subject of external disciplinary actions initiated for instance by the Federation or by the anti-drug authorities. The coexistence of these different powers necessarily leads to problems.⁶⁹ The principal applied remains that of the separation of authority and therefore of the repressive actions, that is to say each disciplinary action has its own set of offences and penalties and the decision by a given body has no authority over another, which remains free to punish a sportsperson or not based on its own reference system. However, suspension by the Federation may prevent a player

⁶³ Suspension may be justified by an employee's lack of motivation: Cass. soc., 23 January 2008, Cah. dr. sport n° 12, 2008, 42, note J.-P. Lhernould.

⁶⁴ Cass. soc., 25 May 2011, above.

⁶⁵ Suspension may be justified by an employees lack of motivation: Cass. soc., 23 January 2008, Cah. dr. sport n° 12, 2008, 42, note J.-P. Lhernould.

⁶⁶ Cass. soc., 25 May 2011, above.

⁶⁷ Art. 12.5, *CCNS*.

⁶⁸ Art. L. 1331-2, *C. trav.*

⁶⁹ J. Mouly, "L'exercice du pouvoir disciplinaire de l'employeur à l'encontre d'un sportif salarié convaincu de dopage", *Dr. soc.* 1998, 1003. – J.-C. Breillat, "Répression disciplinaire fédérale et efficacité des conventions collectives dans le secteur sport", *RJES*, 2006, n° 78, 23.

from properly performing his contractual obligations. Certain difficulties arise due to the fact that Article L.1332-4 of the *Code de Travail* requires an employer to begin a legal action within two months from the date it became aware of the fault. However, and regarding the use of drugs in particular, when the act of drug-taking is revealed by a control, it may only become a punishable offense on completion of proceedings before a sports Federation or the AFLD⁷⁰ [French anti-drug authority].

Fundamental rights of players - A sportsperson enjoys freedom of expression both inside and outside his employer's business. Continuing a media controversy with a trainer does not constitute a breach of discipline.⁷¹ Restrictions justified due to the nature of the tasks to be accomplished proportional to the aims sought can certainly be imposed, but the club may not use them to, for instance, force an employee to express an opinion publicly.⁷² The sportsperson has the right to ensure that his private life is respected. Clauses or directives, such as good behaviour obligations, an obligation to remain in good physical condition, etc., are in principle suspect. They can only be valid if justified and proportional. It is also difficult for the employer to penalise a sportsperson for acts committed outside the club. Every employee has disciplinary immunity as part of his personal life, which generally prohibits the characterisation of faults.⁷³ However, recent case law has stated that this could be different when his behaviour constitutes "a breach of duty resulting from his contract of employment"⁷⁴..., which is not very enlightening. Certain decisions also highlight the impact that the personal lifestyle, such as alcohol abuse, may have on the quality of the work furnished by the sportsperson. This is a convenient way of avoiding the issue of any encroachment on the employee's private life.⁷⁵

Contract suspension - A footballer's employment contract may be suspended for a variety of reasons but out of all the possible causes, only two are worth mentioning. The first is more for reference. Indeed, the loan of a player comes under the rules concerning the loan of labour. In fact, under French law 2011-893 dated July 28, 2011, a loan of labour leads to the suspension of the original contract of employment. This has now changed since the law insists that the contract between an "employer lender" and an employee is not suspended.

The second cause covers illness and accidents. It is vital. Without impeding the expiry of the term, these events place the contract in abeyance until the end of the period of work stoppage and rehabilitation of the employee.⁷⁶ The player is not

⁷⁰ CA Limoges, 4 May 1998, Dr. soc. 1998, 1009.

⁷¹ Cass. soc., 28 April 2011, RJPf 2011, n° 10, 12, note G. GIL; LPA 15 May 2012, 4, obs. F. Buy.

⁷² Cass. soc., 26 October 2005, Comm. com. électr. 2006, chron. 10, n° 1, obs. F. Buy.

⁷³ Cass. soc., 3 June 2009, Comm. com. électr. 2009, chron. 9, n° 3, obs. F. Buy – Cass. ch. mixte, 18 May 2007, D. 2007, 2137, note J. Mouly.

⁷⁴ Cass. soc., 3 May 2011, D. 2011, 1568, obs. G. Loiseau.

⁷⁵ CA Nancy, 30 May 2007 cassé par Cass. soc., 3 June 2009, préc.

⁷⁶ Art. L. 1226-7, C. trav.

required to execute his obligations and the employer is, at least in theory, correspondingly released from his. However, insurance cover for illnesses is generally included in the existing collective agreements.⁷⁷ The *CCNS* stipulates for example that sportspersons that are victims of an illness or accident will continued to receive their reference salary for a period of 90 days, within the limits of the French social security bands A and B, and this even in the event of participation in French national teams.⁷⁸

Law 2011-525 of May 17 2011 requires that the payment of the salary shall resume one month after the medical enabling an employee who has been declared inapt and not reclassified to return to his job.⁷⁹ This provides grounds for terminating the contract. This termination is simple: the law has replaced the legal termination by a unilateral right of termination that may be exercised regardless of the origin of the incapacity,⁸⁰ whether professional or nonprofessional, in return for a very reduced compensation.⁸¹

C. *End of the employment relationship*

Expiry of the term - The normal reason for termination of a contract of employment is that the contract has reached the end of its term. In this case, contract law is fully applicable and no compensation for termination is due to the employee, not even compensation for job insecurity that is normally paid at the end of fixed-term contracts that are not concluded under Article L.1242-2, sub para 3 of the *Code de Travail*. Following the same logic, the employer is not required to renew the contract once it comes to an end. However, public law applicable to contracts mitigates this aspect. For instance, the club may be ordered to pay damages if the parties have agreed on a renewal clause⁸² or if the employer is abusing his right not to renew.⁸³

Early termination: authorised grounds - Early termination of a fixed-term contract is strictly regulated by the Law which provides a limited list of cases (Article 1243-1 of the *Code de Travail*. The first is by agreement between the parties, i.e. bilateral termination.

The second case involves “force majeure” grounds which are defined as “the occurrence of an external event that was unforeseeable on signature of the contract and was uncontrollable”. It is very rarely applied in circumstances that would warrant early termination of a fixed-term contract. The injury of a

⁷⁷ Although his loyalty obligation may be deactivated: CA Montpellier, 24 January 2007, Cah. dr. sport n° 9, 2007, 77, note F. Buy.

⁷⁸ Art. 12.10, *CCNS*.

⁷⁹ Art. L. 1226-11, *C. trav.*

⁸⁰ Cons. const., déc. N° 2014-402 QPC, 13 June 2014.

⁸¹ Art. L. 1226-20, *C. trav.*

⁸² Cass. soc., 13 April 2005, JCP S 2006, 1401, note D. Jacotot.

⁸³ Cass. soc., 13 April 2005, Cah. dr. sport n° 2, 2005, 72, note F. Buy.

sportsperson⁸⁴ or receivership of the club⁸⁵ have been ruled not to constitute “force majeure” events.

The third case is “gross misconduct” which is a fault that renders impossible the continued contractual relationship up to the end of the term fixed by the parties. Serious misconduct is an employer’s failure to pay salaries⁸⁶ or provide work. For an employee, it is a serious offence for repeated breaches of various obligations set out in the club’s internal regulations,⁸⁷ rudeness and aggressive behaviour towards other players⁸⁸ or managers,⁸⁹ or the accumulation of sanctions, some for acts of violence.⁹⁰ In contrast, the failure to obtain expected results in sports competitions do not justify termination of the contract,⁹¹ any more than being arrested under the influence of alcohol the day before the resumption of work.⁹² Of course, acts of doping could be sanctioned,⁹³ but the qualification of this misconduct is not automatic. In particular, a contract cannot be terminated for the sole reason that the sportsperson is being investigated since the extent of the facts that may be criminally penalised has not yet been established.⁹⁴ As the termination motivated by an employee’s misconduct amounts to a sanction, the employer has to comply with the disciplinary proceedings and Articles L.1332-1 and thereafter of the *Code de Travail*. Verbal termination is therefore invalid.⁹⁵ Termination for disregard of the contractual termination procedure is also invalid as this is a fundamental protection in favour of the employee. The *Cour de Cassation* infers that in the absence of referral to a legal commission or committee established by a collective agreement, any termination by a club would be abusive.⁹⁶

The fourth case is the “unsuitability” of the employee. In this case, termination takes place on the initiative of the employer based on a declaration of the person’s unsuitability determined by the occupational health service.⁹⁷

The fifth case is when a permanent contract of employment is signed. In this case, public law gives the employee the right to terminate his fixed-term contract. In football, experience has shown that the latter option is mainly used as leverage in certain negotiations.

⁸⁴ Cass. soc., 23 March 1999, Bull. civ. V, n° 136.

⁸⁵ Cass. soc., 6 May 1998, Bull. civ. V, n° 235.

⁸⁶ Cass. soc., 9 January 2008, JCP S 2008, 1201, note C. Lefranc-Harmoniaux.

⁸⁷ CA Grenoble, 19 October 1993, D. 1995, somm. 60, obs. J.-P. Karaquillo, confirmed by Cass. soc., 28 June 1995, n° 93-46424.

⁸⁸ CA Dijon, 17 September 2009, LPA 30 March 2010, 3, obs. F. Buy.

⁸⁹ CA Aix, 9 November 1992, RJS 1/93, n° 98.

⁹⁰ CA Bordeaux, 7 June 2011, LPA 15 May 2012, 3, obs. G. Rabu.

⁹¹ Cass. soc., 21 July 1993, Rev. jur. éco. sport 1994, n° 27, 87.

⁹² Cass. soc., 3 June 2009, Comm. com. électr. 2009, chron. 9, n° 3, obs. F. Buy.

⁹³ CA Limoges, 4 May 1998, Dr. soc. 1998, 1009, note J. Mouly.

⁹⁴ Cass. soc., 13 January 2009, Cah. dr. sport n° 17, 2009, 96, note A. Pilloix; LPA 29 March 2010, 16, obs. F. Buy.

⁹⁵ CA Dijon, 6 May 2006, Cah. dr. sport n° 6, 2006, 71, note M. Collignon-Trocme.

⁹⁶ Cass. soc., 4 June 2009, JCP G 2009, 333, note D. Jacotot.

⁹⁷ Art. L. 1243-1, C. trav.

Early termination: the case of release clauses - Article L.1243-1 and thereafter are public order provisions from which the parties cannot derogate. Clauses for early termination (unilateral termination clause, resolutive clause, resolutive condition, etc.) in players and coaches' contracts are rendered void, including when they are contained in a collective agreement.⁹⁸ However, this rule may be mitigated. On the one hand it is probably only a question of public order protection from which it can be deduced that only the employee is able to claim non-compliance.⁹⁹ Moreover, the characterisation of an exit clause may be discussed in the relatively frequent cases when the parties have included a counterpart clause for financial compensation (so-called release clause¹⁰⁰). The binding nature of the compensation specified could lead to its characterisation by the criminal laws which, far from organising the early withdrawal of the contracting party against compensation, would establish a penalty for faulty termination.

In France, judges do not take a benign view of negotiated departures that take the form of a settlement since the transaction must necessarily occur after termination.¹⁰¹ The legal resolutive solution is also unavailable to the employer. For the employee, it is confined to termination assumptions under Article L.1243-1 and thereafter. Finally the court accepts to "take note" of the termination of the contract that one of the parties, at its peril, claims against the other.¹⁰² This taking note is favoured because it is allowed even when there is a resolutive clause in favour of the employee;¹⁰³ but it has to meet the conditions set out in Articles L 1243-1 and thereafter of the *Code de Travail*.

Penalties without just cause - An illegal breach of contract entitles the employee to damages of an amount at least equal to the remuneration he would have received up to the end of the contract and, for the employer to receive damages and interest corresponding to the prejudice suffered.¹⁰⁴ It is often difficult to assess the prejudice suffered by the club: in particular, it raises the question of whether the market value of the player can be taken into account. Some rulings have accepted this.¹⁰⁵

⁹⁸ Cass. soc., 16 December 1998, Bull. civ. V, n° 552 (unilateral termination clause). – Cass. soc., 1^{er} July 2009, LPA 29 March 2010, 15, obs. F. Buy (resolutive).

⁹⁹ Cass. soc., 30 October 2002, Bull. civ. V, n° 332.

¹⁰⁰ Cass. soc., 18 March 1992, JCP G 1992, II, 21953, note J. Mouly. – F. Buy, "Clause libératoire", in *Les principales clauses des contrats d'affaire* (dir. J. Mestre et J.-C. Roda), Lextenso, 2011.

¹⁰¹ Cass. soc., 29 May 1996, Bull. civ. V, n° 215. – Cass. soc., 25 March 2009, n° 07-44657.

¹⁰² CA Versailles, 10 October 2006, LPA 1^{er} October 2007, 11, note F. Buy; JCP S 2007, 1171, note J. Mouly, confirmed by Cass. soc., 9 April 2008, D. 2008, 2047, note J.-P. Karaquillo.

¹⁰³ Cass. soc., 22 June 2011, LPA 15 May 2012, 5, obs. F. Buy.

¹⁰⁴ Art. L. 1243-3 et L. 1243-4, C. trav.

¹⁰⁵ CA Lyon, 21 May 2008, Cah. dr. sport n° 15, 2009, 65, note F. Rizzo. – CA Toulouse, 27 June 2008, Cah. dr. sport n° 14, 2008, 69, note F. Buy. – TAS, 5 December 2005, *Mexès*, Cah. dr. sport n° 3, 2006, 274, note F. Buy. – TAS 30 July 2009, *Mutu c/Chelsea FC*, JDI 2011, 206, obs. E. Loquin. – contra: TAS 30 January 2008, *Webster*, Rev. arb. 2008, 559, obs. M. Maysonneuve.

3. Doping and medical issues

State machinery - In France, the anti-doping regulations are contained in Articles L.230-1 and thereafter and R.231-1 and thereafter of the *Code du Sport*. These regulations have been amended several times in recent years and tend to increasingly converge on the rules set out in the worldwide anti-doping laws.¹⁰⁶ French law first approaches doping through a list of prohibited actions and substances. It then organises actions in the field of doping prevention and disciplinary actions for prohibited conduct, including criminal penalties in certain cases.

The sports federations play an active part in the French anti-doping system, since they need to protect the health of their licensed players and therefore take the necessary measures to ensure that this is done (such as information, actions in the field, testing). The sports federations are required to ensure that the medical supervision of elite athletes is organised properly. Sportspersons receive a logbook containing medical information on the sports practised.

Doctors also play an important role as they are required to deliver medical certificates for the practice of a particular sport.

Beyond that, a specialised authority is in charge of the fight against drug taking, the *Agence Française de Lutte contre le Dopage – AFLD* [French anti-doping agency]. This is an independent public authority with legal personality and financial autonomy. It defines an annual testing programme. It carries out controls and testing during competitions and international sports events, and during training sessions in preparation for sports events and competitions. When an international competition takes place in France, the *AFLD* can only carry out doping tests with the approval of the competent international organisation or, failing that, the World Anti-Doping Agency (WADA). However, the law does not restrict the authority of the *AFLD* solely to national competitions. Therefore, it can be assumed that it retains the authority to impose sanctions as part of these controls. It is informed of any doping that is brought to the attention of the administration or the sports federations. It carries out or has carried out the analyses of samples taken during controls. It exercises disciplinary authority and applies sanctions. It issues authorisations to use substances for therapeutic purposes.

Internationally, the *AFLD* cooperates with the WADA, with the national anti-doping agencies and the research laboratories recognised by the WADA, and with the international sports federations.¹⁰⁷

Every year, the *AFLD* has to determine the target group of athletes to be tested outside sports events and outside training periods. The list of this target group is valid one year. A sportsperson meeting the conditions defined by Article

¹⁰⁶ J.-M. Marmayou, “*La mise en conformité du Code du sport avec les principes du Code mondial antidopage*”, LPA 12 April 2011, n° 72, 14. – J.-C. Lapouble, “*Mise en conformité du Code du sport avec les principes du Code mondial antidopage : citius, altius, fortius*”, Cah. dr. sport n° 20, 2010, 19.

¹⁰⁷ Art. L. 232-5, I, C. sport.

232-15 of the *Code du Sport* may be included several times in the target group defined by the *AFLD*. The target group of professional sportspersons may include professionals licensed with approved federations or having been professionals for at least one year during the last three years. These sportspersons have a “whereabouts duty”. This means that they have an obligation to provide the *AFLD* with updated and accurate information on their whereabouts so that they can be tested, and especially outside sports events and training periods. This information may be held on computers by the authorised agency after consultation with the French national data freedom and liberty’s authority [*CNIL*]. The sportsperson who does not comply with the obligation to keep the authority informed of his or her whereabouts may have to face disciplinary sanctions.

Approved sports federations have the authority to initiate disciplinary proceedings against their members who have violated the law. However, the *AFLD* is also confident in certain strictly defined situations and in particular for sanctioning persons under the disciplinary power of a sports federation when the latter has not acted within the statutory period. For example, the *AFLD* hears appeals in due time against decisions taken by the first instance disciplinary bodies of sports federations or when the appellate body has not met its own deadlines. The *AFLD* may also alter decisions taken by sports federations. In this case, it takes over the case within two months of the date on which it was informed of this decision. Lastly, the *AFLD* may decide to extend a disciplinary sanction decided by a federation to the sporting activities of the person but acting under the auspices of other sports federations. It may do so on its own initiative or at the request of the federation that imposed the sanction.

When warranted by circumstances, the president of the *AFLD* may, by substantiated order against the sportsperson, order the temporary suspension of his or her participation in events organised by federations approved or authorised by the delegated federation as a precautionary measure pending a final decision. This suspension may not exceed a period of two months. It can be renewed once with the length of the period of suspension deducted from the period of the ban on participation in sports events that the agency may subsequently decide.

As required under the *Code du Sport*, the French Football Federation has adopted specific anti-doping regulations applicable to both amateur and professional football. These cover descriptions of the Federation’s disciplinary bodies and internal procedures and thus rules of investigation and testing.

4. *Transfers of players*

Definition of “transfer” - The French *Code du Sport* contains no provisions on transfers. Rather, Article L.222-7 is the only text that makes an indirect reference to transfers by stating that a sports agent may bring together two clubs so that they may conclude a transfer that will result in the hiring of a player. The National Federation’s regulations do not provide specific guidance on the definition and

classification of the transfer of players. However, this relative silence of the French sports standards does not prevent it from providing a legal definition of the operation. This is because the transfer operation is nothing more than a technique by which a club agrees to end the employment contract of a player before the stipulated contract term to allow him to commit to another club in exchange for the payment by the latter of a certain sum. The operation is based on a tripartite agreement between the sportsperson and the clubs concerned: a first club agrees to release the player in advance of his contract termination and he promises to serve the new club which in turn agrees to pay a certain sum to the first club. This requires the meeting of three conditions. Firstly, the transfer implies that the sportsperson is engaged under a fixed-term contract of employment since if the player is free to resign his employer will be unable to seek any financial consideration. Secondly, the sportsperson's contract of employment has not terminated. In this case, an expired contract allows the sportsperson the freedom to commit to the club of his choice without having to obtain approval from the previous club, apart from the need to comply with the so-called transfer window. Lastly, the transfer involves termination of the initial contract of employment. This distinguishes it from a loan (which is nevertheless designated by the term "transfer" ... but temporary).

Temporary transfers: loans - This procedure consists in a club making one of its players available to another club on a temporary basis. During this period of availability, the sportsperson remains under the authority and control of his new club. Once the period of loan expires, the player is reinstated and, in principle, joins the original club with whom he has retained a contractual relationship. In order to comply with Article L.8241-2 of the *Code de Travail*, the loan has to satisfy four conditions. The player has to agree. An agreement for a temporary loan must be signed between the "lender" club and the "borrower" club. This agreement will define the duration, mention the identity and qualifications of the employee, the methods of determining the wages, the social charges and professional expenses that will be charged to the borrower by the lender. The lender club and the employee will sign an addendum to the contract of employment detailing the role assigned in the borrower club, its work times, its place of work, and the particular characteristics of the post. The contract of employment signed by the player with the lender club is not suspended. During the period of availability, the player is still part of the workforce of his first club. He operates in the borrower club for which he produces sports performances and, if required, commercial activities without being an employee. This means that the amendment to the contract of employment and the agreement signed between the two clubs has to stipulate that the borrower club becomes the creditor of the main interventions that the player is required to execute under his contract of employment, which remains in force. As long as this arrangement continues, and based on the endorsements to the contract of employment and above-mentioned agreement, the "lender" club waives

its main prerogatives over the employed player to the benefit of the “borrower” club. These first three conditions defined in the *Code de Travail* and give rise to problems regarding the requirements for integrity and fairness of the player during sports competitions. Indeed, doubts may be cast on the loyalty of a player taking part in a game between the “lender” and “borrower” clubs that is decisive for the future of the former to which the player is still attached to a contract of employment under Article L 8241-2 of the *Code du Travail* and who will in principle return at the end of the season.

The fourth condition concerns the bills that accompanied the loan transaction. To be valid, it is essential that the loan does not result in a profit in favour of either of the two clubs. The financial aspects should only cover the wages paid, the social charges, and business expenses that may be reimbursed to the player and, where applicable, any administrative and accounting costs involved in dealing with the matter that must be covered by accurate and justified costing. That said, nothing prevents the loan from becoming a unilateral promise of a permanent transfer in association with a payment.

Temporary transfers: selection for a national team - Once a delegated Federation has decided to select a player for a national team in accordance with Article L 131-15 of the *Code du Sport*, the player has to attend if a disciplinary sanction is to be avoided. This applies regardless of whether the player is an employee of a club. The player’s participation in the French national team is considered a “loan of labour”. This is the principle adopted by Article L 222-3 of the *Code du Sport* which equates the selection of a professional sportsperson to a national team as a “loan of labour” but exempts it from the provisions of the *Code de Travail* in order to ensure its legality with regard to the prohibition on “loans of labour” for profit. Thus, the Federation is able to financially compensate clubs that make their players available for the national team, the players remaining employees of their clubs during the loan period.

Permanent transfers - Permanent transfers take the form of a tripartite agreement.¹⁰⁸ Firstly, according to the *mutuus dissensus* [non-retroactivity] legal principle, the club that the player is leaving and the player agreed to the early termination of the contract of employment in accordance with Articles 1134 subparagraph 2 of the Civil Code and L 1243-1 of the *Code de Travail*. No price is established in this relationship between the “vendor” club and the player since the law does not prohibit non-payment under a termination agreement. Thereafter, the “purchasing” club recruits the player on the basis of a new fixed-term contract of employment. Finally, if a “vendor” club accepts the principle of a player leaving without benefiting from any compensation - it is generally on the condition of a transfer contract against some sort of consideration by the “purchasing” club. It is this commercial

¹⁰⁸ CA Douai 16 September 2010, Cah. dr. sport n° 22, 2010, 160, note G. Rabu; JCP G 2011, 450, note F. Rizzo.

agreement between the two clubs that determines the price of the transfer, that is to say, the financial consideration paid to the “vendor” club for consenting to release its player. Under this agreement, the “vendor” club’s contribution consists in the early release of the player from his fixed-term contract and an agreement with the “purchasing” club on the principle and the amount of the sum it is to receive for agreeing to this release. This sum, which is often falsely represented as compensation for the prejudice suffered by the “vendor” club due to the early termination of the player’s contract of employment is in fact a sum of money paid for release from an obligation:¹⁰⁹ it is a price. It is a receivable that may be due in the future and even pledged without difficulty.¹¹⁰ Moreover, in accordance with international accounting standards, the “price” of the transfer is the amount paid for the acquisition of a contractual right and will be classified as an intangible on the club’s asset book.

The process of determining the transfer price is generally negotiated privately between the clubs. Of course, it also governs the drafting of the contractual provisions regarding the payment of compensation. For instance, the parties may provide for the organisation of a friendly match at the expense of the “purchasing” club, the receipts from which will be paid to the “vendor” club. They also have the right to substitute the payment of all or part of the sum agreed to a duty by the “purchasing” club to fund the “vendor” club’s training policy for one or more seasons and communicate its expertise in this field.¹¹¹ In most cases, the parties establish a supplement through various incentive clauses in favour of the “vendor” club, such clauses covering the resale of the player and the results achieved by the “purchasing” club. These clauses, that can be qualified as “earn out” clauses, are growing in the field of football transfers, so much so that the first legal disputes have arisen and emphasised the need for the parties to exercise the utmost vigilance when drafting the price clause.¹¹²

Taxation and transfer operations - The transfer price paid by the “purchasing” club to the “vendor” club (excluding any amounts paid to agents and players) corresponds to the acquisition of a contractual obligation. The search is taken as an intangible for accounting purposes, linearly depreciated over a maximum period of five years.¹¹³ In addition, the transfer price is subject to VAT on services as it is not considered an indemnity for a prejudice, but the purchase of intangible rights.¹¹⁴

¹⁰⁹ CA Lyon, 21 May 2008, n° 07/05766.

¹¹⁰ CA Rennes, 7 February 1996, JCP G 1997, I, 3991, n° 19, obs. P. Delebecque et P. Simler. – Cass. com., 28 January 1997, Bull. civ. IV, n° 35; D. 1998, somm. 140, obs. M.-N. Jobard-Bachellier.

¹¹¹ CA Lyon, 29 January 2009, Cah. dr. sport n° 18, 2009, 160, note F. Rizzo. – Cass. com., 1^{er} June 2010, n° 09-65805, Cah. dr. sport n° 21, 2010, 172, note V. Forti et 174, note G. Rabu.

¹¹² CA Douai, 17 November 2011, D. 2012, 997, note F. Rizzo.

¹¹³ J. Saurel, “*Le sport face à la fiscalité*”, *Economica*, 2011, 73 et s.

¹¹⁴ Instr. Fisc., 4 July 2006, BOI 3B-3-06.

5. *Social security and taxation*

A. *Social status*

General system - In France, the welfare cover of professional sportspersons largely obeys the public social security laws. As an employee, professional footballers are affiliated to the general social security scheme under Article L.311-2 of the *Code de la Sécurité Sociale*.¹¹⁵ As such, the employing clubs have to make a number of declarations to the social security organisations prior to hiring.

Basis of contributions - According to Article L.242-1 of the *Code de la Sécurité Sociale*, the wages, bonuses, benefits in kind or in cash, such as the payment of income tax due by the person but also the amounts paid by virtue of a parallel publicity¹¹⁶ contract or the payment by a club to an insurance scheme established to protect players against the risks of death and invalidity are in principle¹¹⁷ subject to the payment of social security contributions. Since 2011, fixed-term contract severance payments are in principle subject to social security payments. Remunerations that are covered by Article L.242-1-4 of the *Code de la Sécurité Sociale*, that is to say, those paid by third parties. The question is whether this includes fees paid by sponsors or image rights. The law has certainly not been designed to cover this type of situation and it could well be argued that the compensation paid for an activity that can be separated from employee's paid activity should remain outside the field of social security payments. If the text, which targets consideration for an employee's "*activity*", is interpreted literally, another approach could be envisaged: this would be to identify whether the amounts paid by the sponsor are in return for advertising services (subject to contributions on the basis of Article L.242-1-4) or by a management company (non-application of the text but possible reintegration into the contributions due by the employer, as is acknowledged by conventional jurisprudence).

Welfare insurances - Like all other employees, professional sportspersons have illness, maternity and disability insurance cover. They also benefit from a pension scheme. The brevity of careers and job insecurity inherent in professional football prevent a footballer from acquiring a full pension from his sports activity alone, but the periods acquired as part of his activity will be completed by those acquired by the exercise of any other occupation. Generally, the retirement pension paid by the general scheme will be supplemented by a mandatory supplementary pension scheme. In principle, sportspersons will contribute to the supplementary pension scheme for non-executive employees (ARRCO), and in exceptional cases to executives'

¹¹⁵ Circ. intermin. n° 94-60, 28 July 1994, concerning the position of sportspersons with regards to the French welfare payments, BOJS n° 9-10 du 29 September – Circ. ACOSS n° 94-61, 18 August 1994, Bull. jur. UCANSS 94-35.

¹¹⁶ Cass. 2^e civ., 14 December 2004, Cah. dr. sport n° 1, 2005, 72, note F. Rizzo.

¹¹⁷ Cass. soc., 18 December 1997, n° 96-15227.

pension scheme (AGIRC). Relatives of sportspersons also benefit from life insurance. Note that the CCNS¹¹⁸ replaces a capital payment on death under the general scheme with a lump sum equal to 3 years' salary within the Social Security bands A and B paid to family members of a professional sportsperson who dies while still active.

Occupational risk.- The work accidents system provides protection against three different risks: industrial accidents, commuting accidents and occupational illnesses. Occupational illnesses do not generally affect sportspeople. The same applies to commuting accidents. Accidents that may occur during their frequent travelling will usually be considered to be work accidents insofar as the travelling has been organised by the club. In fact, sportspersons are frequently victims of corporal accidents due to their work often resulting in physical injuries and traumas.

Under Article L.2131-1 of the *Code de Travail*, an injury occurring during work time and at the place of work is assumed to be an occupational accident. Thus, an accident occurring in a stadium, gymnasium or on a training ground or during a competition is deemed to be an occupational accident unless the employer or the Social Security provides evidence that the accident resulted from an act totally alien to the work or that at the time of the accident the sportsperson was no longer under the authority of his/her employer.¹¹⁹ An occupational accident must be covered by declarations made generally by the employer to the Social Security organisation.¹²⁰

A professional sportsperson who is victim of an industrial accident is entitled to receive free care and a per diem allowance during the layoff period.¹²¹ If, at the end of the period of temporary incapacity, the sportsperson's disability is found to have decreased his work capacity, he will benefit from a lump sum payment or an annuity depending on the extent of disability. In the event of death, relatives may also obtain payment of an annuity. It should be noted that the victim or his family may obtain full compensation for the consequences of an accident when a foul causing the accident is intentional or inexcusable. It should be added that sportspersons have every interest (clubs also do so on their own behalf) in taking out a private insurance to cover the "loss of license to practice" risk.

Family benefits - Professional footballers are eligible for many benefits to compensate for the increased family expenses due to the arrival of children.¹²²

Unemployment insurance - Professional sportspersons have benefited from the right to unemployment benefits for several years.¹²³ Professional sportspersons

¹¹⁸ Art. 12.10.1, CCNS.

¹¹⁹ Cass. 2^e civ., 3 avr. 2003, Bull. civ. II, n° 100.

¹²⁰ Art. L. 441-1 et R. 441-2 et s., CSS.

¹²¹ Art. R. 433-2 et s., CSS.

¹²² Art. L. 511-1 et s., CSS.

¹²³ Circ. UNEDIC n° 97-10, 23 June 1997. – Conv. UNEDIC, 1^{er} January 2001. – Arr. min. 4 December 2000, JO 6 December 2000.

without a job may also benefit from daily unemployment pay once they qualify for unemployment benefits.

End-of-career nest egg - The National union of professional footballers [UNFP], the French players' union, has established a providence fund to which players contribute throughout their careers at an identical rate (4%) despite wage differences. Clubs also contribute (2.5%) each month under the heading "professional footballers' providence fund". The UNFP contributes around Euro 1 million per year.

Any player who has completed at least 48 months under a professional contract (or federal provided he had been professional) will receive a capital sum on retirement. The amount received by the player - at least six months after the end of his career - is equal to the annual saving (Euro 7460 gross in 2014) multiplied by the number of years of the contract.

Players who have not completed four years under contract (48 months) only receive a refund of their contributions.

B. Tax status

Like the Social Security status, there is no specific tax status applicable to professional sportspersons. Apart from a few particular provisions, the public laws on taxation apply to footballers' incomes.¹²⁴

Income tax - Pursuant to Article 4A of the *Code Général des Impôts* [CGI], sportspersons who are fiscally domiciled in France are liable to income tax on all their income, French and foreign. The tax domicile is defined in accordance with Article 4B of CGI: it refers to the home of the person, his main place of residence, the place where he carried out his professional business, or the centre of his vital interests.¹²⁵

All the sums received by the sportsperson for the exercise of his profession are taxable in the category of wages and salaries regardless of the designation, form, or method of calculation. The main payments made for execution of the contract of employment are naturally taxable, but also any bonuses, benefits in kind and various allowances, or "loans" made by clubs to players. The allowances paid to employees for early termination of a fixed-term contract is more complex: they are taxable as wages and salaries for the part that does not exceed the amount of the wages due under the terms of the contract. Any surplus will be covered by the rules on redundancy payments, that is to say an exception under the conditions and limitations stipulated by the second paragraph of 1 in Article 80 of the CGI. The benefits provided by the professional footballers' insurance scheme under the Professional Football Charter fall into the category of taxable pensions subject to the application of a quotient. However, the capital paid in the event of death or

¹²⁴ J. Saurel, "*Le sport face à la fiscalité*", *Economica*, 2011, 91 et s.

¹²⁵ CE, 17 March 2010, *Cah. dr. sport* n° 19, 2010, 43, note J. Saurel.

total or partial disability is exempt from tax.¹²⁶

Concerning the income of “para-sportspersons” (income from advertising and image rights) I is in principle taxed as industrial and commercial profits [*BIC*]¹²⁷ and therefore subject to a tax system that varies with the importance of the income (special small company tax system, so-called “simplified system or normal system of actually incurred expenditure”). Even so, the tax authorities accept that these cases may be taxed as non-commercial profits (BNC) when the taxpayer agrees to be placed under a single tax rating and that the associated commercial operations are directly related to the exercise of a sport and constitute an extension of this latter activity.

“*Rent a star system*” - Sportspersons may seek to avoid taxes by paying their earnings into a company established abroad. Article 155 of the *CGI* makes it possible to fight against the practice of tax avoidance by stipulating that money received by the company in payment for services executed by the taxpayer are taxable in the name of the latter.¹²⁸ However, unless the company is set up in a tax haven, the liability for tax is only possible if the sportsperson has control over the company and that he is unable to prove that the company carries out another preponderant business.

Attractiveness of French law - The unattractiveness of French law for a time worried the French authorities.¹²⁹ Various aspects were reviewed with the crisis and certain benefits have been removed such as for instance the so-called “*tax shield*” and the “collective image rights”. The now widely reported tax rate of 75% on higher incomes will also be applied to 2014 incomes. Nevertheless, French law continues to provide a fiscal framework that is globally attractive with measures such as:

- *spread or multi-year taxation* (Article 100b of the *CGI*): to mitigate the progressiveness of income tax when an income is irregular, sportspersons have the right to ask for the income to be spread over three or five years so as to produce an average income over this period. Therefore, non-recurring income will not necessarily be taxed in the highest tax bands. This system is not without its risk when sportsperson is reaching the end of his or her career and has not anticipated a fall in income;
- *impatriation* (Article 155B of the *CGI*): the impatriate system offers employees

¹²⁶ Art. 80 decies et 163-0 A bis, *CGI*.

¹²⁷ CE, 3 March 1993, RJF 1993, n° 512. – CE, 6 April 2007, RJF 2007, n° 795.

¹²⁸ TA Lyon, 3 March 2009, Comm. com. électr. 2009, comm. 74, obs. P. Neau-Leduc. – égal. CAA Douai, 6 February 2001, RJF 2001, n° 1032. – CAA Lyon, 23 November 2010, Comm. com. électr. 2011, chron. 10, n° 20, obs. F. Rizzo.

¹²⁹ J.-P. Denis, “*Rapport au ministre des sports, sur certains aspects du sport professionnel en France*”, La Documentation française, November 2003. – E. Besson, “*Accroître la compétitivité des clubs de football professionnel français*”, Rapport remis au Premier ministre, November 2008.

who have not been resident in France for the previous five years and come to take up a post, the possibility of obtaining an exemption from tax at 30% of the additional remuneration paid.¹³⁰ However, the benefit of this special tax rule is lost when the player changes clubs in France.

Contractual guarantees - French law is favourable to tax guarantee clauses under which a club undertakes to pay the sums that the tax authorities could claim from one of its players under a settlement.¹³¹ French legal doctrine in this respect is enshrined in the term “*théorie de l'apparence*” which allows a player to engage his club even though its representative had no authority to give this type of guarantee.

6. Labour dispute settlement

Before judicial State courts - As has already been said, disputes concerning employer/employee relations are generally financial in nature. They are dealt with in an original manner. Hence, in the professional federations (including the French football and rugby federations), collective employment agreements require a preliminary hearing before a legal commission which has the task of reconciling the positions of the parties in the event of a failure to comply with the obligations contained in contracts between a club and the player or coach. Reserved for situations when a breach of contract is to be feared or envisaged, this pre-litigation procedure may, if not avoid, at least put forward adapted solutions.

This procedure is mandatory in football; the social chamber of the Court of Cassation has even considered that this preliminary prerequisite was a considerable guarantee for the employee not to be ignored.¹³²

Once this preliminary procedure followed, the judicial journey of the parties obeys a ordinary law procedure: conseil des prud'hommes (first instance labour court), cour d'appel (court of appeal) and social chamber of the Court of Cassation.

Before arbitration court - Disputes involving the employment laws have to be set aside regarding arbitration. Indeed, although the employment laws are not entirely hostile to arbitration clauses, which are not systematically null and void, it must be borne in mind that these clauses are unenforceable against the employee.¹³³ In France, arbitration in the case of an employer/employee dispute requires that the

¹³⁰ Art. 155 B, CGI. – J. Saurel, “*Le statut d'impatrié fiscal pour les sportifs professionnels étrangers exerçant en France : oasis ou mirage fiscal?*”, Cah. dr. sport n° 4, 2006, 28. – J. Saurel, “*L'impatriation fiscale : l'eldorado des footballeurs*”, Cah. dr. sport n° 17, 2009, 28.

¹³¹ Cass. soc., 12 January 2010, D. 2010, 1328, note F. Rizzo.

¹³² Cass. soc., 4 June 2009, n° 07-41631, JCP G 2009, 333, note D. Jacotot

¹³³ Cass. soc., 30 November 2011, n° 11-12905: The clause is unenforceable against an employee in accordance with Article L1411-4, C. trav. The answer was already raised concerning the clauses inserted in contracts for international works: for example, Cass. soc., 12 March 2008, n° 01-44654 (cyclist).

employee accept the authority of the arbitration tribunal.¹³⁴ Today, French arbitration law takes a rather benevolent view of arbitration clauses and Article 2061 of the Civil Code validates the clauses in contracts signed for professional employment, with the sole proviso that they comply with specific statutory provisions.

¹³⁴ J. Barthélémy, “*L’arbitrage des conflits du travail: une solution pour le sport*”, *Jurisport* n° 129, 2013, 27.

**EMPLOYMENT RELATIONSHIPS AT NATIONAL LEVEL:
GERMANY**

by *Jan Sienicki**

SUMMARY: 1. Employment regulation and football structures – 2. Individual employment relations in professional football – 3. Medical and doping issues – 4. Transfer of players – 5. Social security principles – 6. Labour Dispute settlement – 7. Conclusions

Abstract:

In the wording of the national football association's statutes and ordinances Professional football players in Germany are literally referred to as "employees of a special kind"¹ and "contractual partners of a special kind".² In order to detect the background for this terminology, this article elaborates on the interaction of statutory labour law, the contractual relationship between the athlete and his club and the conflict arising out of this.³

1. Employment regulation and football structures

1.1 Sources of law and approaches

In all of German labour legislation, whether of individual or collective nature, the

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¹ § 10 statutes for licence-players (old edition, prior to 2002)

² Recitals of the LOS (*vide* footnote 13)

³ With respect to all the other distinguished and comprehensive contributions from various countries in this book and considering the title and the defined scope of this chapter, the following analysis is made under the assumption that the player(s) referred to is of German nationality.

point of reference is the existence of an employment relationship - hence the appearance of the term “employee”.

Pursuant to labour jurisdiction, an employee is someone who is bound by instructions and as a service provider is integrated into the work-organisation of the recipient of such services.⁴

A person’s qualification as an employee does have a significant impact on the application of law, e.g. the competence of labour courts together with the procedural particularities in relation to a civil case (procuration, costs etc.), the application of § 623 BGB⁵ and labour protection acts, particularly the Law on the Protection Against Unfair Dismissal (*Kündigungsschutzgesetz* - KSchG), the Act on Continued Remuneration During Illness (*Entgeltfortzahlungsgesetz* - EFZG) and the Works Constitution Act (*Betriebsverfassungsgesetz* - BetrVG).⁶

Contractually stipulated obligations as to the time and place of a training session or competition, especially the participation in a league-competition or duties pertaining to conduct on and off the pitch (e.g. attendance at club’s or sponsor’s appointments/events) do in fact support the notion of professional football players being qualified as employees. However, in order to mark out the legal framework a *Bundesliga*-player is subject to, it is indispensable to take closer look at the football structures in Germany and the regulations deriving from these.

1.2 Football structures

As with basically every Sport in Germany, football is categorised by the pyramidal structure comprised of federation(s) and clubs. Moreover, it is distinguished by a dualism between licensed (professional) football and amateur-football.⁷

While the organisation of football on the amateur-level is incumbent to the *DFB*⁸ exclusively, the professional pillar of Germany’s no. 1 sport is governed by both the *DFB* and the *Ligaverband*,⁹ which is an association constituted of the 36 clubs of the 1. and 2. *Bundesliga* and, as an ordinary member of the *DFB*, is in charge of managing the operational business of these top two divisions.¹⁰ To achieve the latter, the *Ligaverband* founded the *DFL Deutsche Fußball Liga GmbH (DFL*

⁴ Cf. BAG from 16.07.1997 – 5 AZR 312/96.

⁵ BGB: Bürgerliches Gesetzbuch (German Civil Code); § 623 BGB states: *Termination of employment by notice of termination or separation agreement requires written form to be effective; electronic form is excluded.*

⁶ J.M. Menke, *Profisportler zwischen Arbeitsrecht und Unternehmertum - Ein Beitrag zum Arbeitnehmerbegriff am Beispiel des Berufsfußballers*, Hamburg, Dr. Kovac, 2006, 20.

⁷ F. Holzhäuser, *Der strukturelle Aufbau professioneller deutscher Sportligen nach Ausgliederung aus Bundesfachsportverbänden*, SpuRt 2004, 145.

⁸ DFB: Deutscher-Fußball-Bund e.V. (German Football Federation).

⁹ Ligaverband: Die Liga - Fußballverband e.V. (League Association); Ordinary member of DFB as per § 16-16 d) DFB-statutes.

¹⁰ The *Bundesliga* and the 2. *Bundesliga* remain DFB facilities but are being allocated for use to the *Ligaverband* (as their operator); § 4 No 1 a) *Ligaverband*-statutes.

GmbH), a wholly owned subsidiary of the *Ligaverband*, which amongst others implements the *Ligaverband*'s duties such as match/league operations, marketing and licensing.¹¹

1.3 Specific laws on football

Without having been granted a licence by the *Ligaverband*, a player may not be fielded in the 1. and 2. *Bundesliga*. The player, in order to obtain that licence, has to sign a licence-contract (*Lizenzvertrag*) with the *Ligaverband*.¹²

As per § 1 (1) sent. 2 of the players' licence regulation, LOS,¹³ the conclusion of the licence-contract does not constitute an employment relationship between the player and the *Ligaverband*. It is to be qualified as a contract under the law of obligation *sui generis* in terms of §§ 241, 311 BGB.¹⁴ Alongside the right to play in the two top-divisions in Germany, the player, by signing the licence-contract, however, also subordinates himself to the rules and regulations of the *Ligaverband* and the *DFB*,¹⁵ which also comprises compliance with the decision of their organs and commissioners.

Despite the fact that due to the charitable tax-exempt status of associations, professional players are not members of the *DFB*,¹⁶ the adherence to the regime of the *DFB* and *Ligaverband* (as implied by the licence-contract) consistently covers the second relationship a professional football player in Germany enters into: the employment contract with his club (the licensed-player-contract, LPC).¹⁷

A collective bargaining agreement for professional football players could potentially serve as a counterbalance to the aforementioned triangular-structure (*DFB/Ligaverband* - club - player).

For the time being, however, in German professional football there are no CBAs in place. According to the current legal situation, company collective agreements could be concluded between the players' union *VdV*¹⁸ and every single club. A general association agreement between the *VdV* and the *Ligaverband* is not practicable under the applicable law, however: though, pursuant to its statutes, the *Ligaverband* perceives itself as an employers' federation,¹⁹ due to the clubs'

¹¹ § 4 No. 1 c) d) *Ligaverband*-statutes.

¹² § 1 sent. 1 LOS; The conclusion of that contract is subject to the condition precedent that the player has to comply with certain requirements set by association law, cf. § 2 LOS.

¹³ LOS: *Lizenzordnung Spieler* (players' licence regulation).

¹⁴ L. Weber, *Rechtliche Strukturen und Beschäftigungsverhältnisse im Fußballsport*, Hamburg, Dr. Kovac, 2008, 193.

¹⁵ § 2 (1) (2) LOS.

¹⁶ J.M. Menke, *Profisportler zwischen Arbeitsrecht und Unternehmertum - Ein Beitrag zum Arbeitnehmerbegriff am Beispiel des Berufsfußballers*, Hamburg, Dr. Kovac, 2006, 158, 221 f.

¹⁷ The submission of a concluded employment contract between player and club is another requirement for the obtainment of the players'-licence.

¹⁸ *VdV: Vereinigung der Vertragsfußballspieler* (Association of Contract Football Players).

¹⁹ § 4 (1) i) *Ligaverband*-statutes.

mandatory membership therein it is not to be qualified as a ‘coalition’ in terms of art. 9 (3) TVG.²⁰

1.4 *Players’ status*

At the club level, German football distinguishes between licensed-players (“Lizenzspieler”), amateurs (“Amateur”) and contracted-players (“Vertragsspieler”). These terms derive from § 8 SpO:²¹

An amateur is a football player who plays on the basis of his club-membership without receiving compensation money. He is entitled to reimbursement of proven expenses, at the most a lump-sum reimbursement of 149,99 Euro.

As already indicated above, a football player is a professional if he a) plays on the basis of a LPC with his club and b) is admitted to the competition by virtue of a licence-contract with the *Ligaverband*. He is not a member, either of the club, or the *Ligaverband*, or of the *DFB*.

The second type of non-amateur players is the *Vertragsspieler*, also referred to as non-amateur without licence. Alongside his membership he also possesses a contract with the club and, unlike the amateur, does receive compensation and other benefits of at least 150,00 Euro (= semi-professional).²²

Beyond these classifications of the SpO the contemporary profession of a footballer also calls for an attribution as employee or entrepreneur (self-employed).²³

According to the prevailing legal opinion, the licensed player is deemed to be an employee.²⁴ However, critical notions as to that classification *inter alia* derive from a player’s additional business activities (self-commercialization) which rather equal the characteristics of a business(man)²⁵ or an autonomous worker.²⁶ Nonetheless, it is the dependent employment relationship which turns the balance towards the classification of a professional football player as an employee albeit that the particularities of that profession entail and cause various specificities, the latter being elaborated on *infra*.²⁷

²⁰ TVG: Tarifvertragsgesetz (German Collective Bargaining Act); more in detail as regards CBAs in professional football in Germany: W.D. Walker, *Tarifverträge im deutschen Profifußball*, SpuRt, vol. 6, 2012, 222 ff.

²¹ SpO: DFB-Spielordnung (the DFB regulations on the game)

²² L. Weber, *Rechtliche Strukturen und Beschäftigungsverhältnisse im Fußballsport*, Hamburg, Dr. Kovac, 2008, 168, 334 (as to the genesis of and reasons for that 3rd type of player status)

²³ E.g.: J.M. Menke, *Profisportler zwischen Arbeitsrecht und Unternehmertum - Ein Beitrag zum Arbeitnehmerbegriff am Beispiel des Berufsfußballers*, Hamburg, Dr. Kovac, 2006, 237.

²⁴ S. Jungheim, *Vertragsbeendigung bei Arbeitsverträgen von Lizenzfußballspielern*, RdA, 2008, 223.

²⁵ C.f.: A. Dieckmann, *Zur Zuständigkeit der ordentlichen Gerichte bei Streitigkeiten zwischen Amateur-Fußballspieler und Verein*, in: *Das Recht des Fußballspielers*, Schriftenreihe des WFV, vol. 12, Stuttgart, 1980, 24 ff.

²⁶ M. Schimke, J.M. Menke, *Vertragstypen-Freiheit im Profi-Mannschaftssport*, SpuRT, vol. 5, 2007, 182.

²⁷ Vide as of part 2.

1.5 Discrimination law and equal treatment

The unequal treatment of employees without factual reason is illegal. As per § 2 AGG,²⁸ discrimination because of race, ethnic origin, gender, religion and belief, disability, age and sexual identity is prohibited.

The burden of proof with respect to violations of the discrimination prohibition is separately stipulated in § 22 AGG. Thus, in case of dispute, the employee merely has to set out and prove indications which may constitute discrimination. The employer then is obliged to demonstrate that the requirement in question (e.g. gender, age) is a substantial, essential and adequate condition for the exertion required by the job/profession.²⁹

In the event that an employment contract contains provisions which contravene the discrimination prohibition, they are void, § 7 (2) AGG.

In the event of an actual discrimination, the employer, pursuant to § 15 AGG, is obliged to indemnify the employee's material and immaterial damages. The claim for material damages implies the employer's responsibility for the violation, which is also deemed to have existed when the employer failed to take the actions for the protection from discrimination as stipulated by § 12 AGG.³⁰

On the other hand, for immaterial damages, the employee receives adequate compensation even if there is no fault on the part of the employer in terms of unequal treatment, § 15 (2) AGG. If the aggrieved person would not have been employed even in a non-discriminating selection, e.g. due to a lack of experience, the maximum compensation for the non-material damage is three monthly-salaries, § 15 (2) sent. 2 AGG.

2. Individual employment relations in professional football

2.1 Essential elements and legal qualification

With regard to the form and content of the LPC between the professional football player and the club, the *DFB/Ligaverband* has laid down the following conditions:³¹

- Requirement of written form
- Compliance with the entire statutes, rules and regulations of *DFB/Ligaverband*
- Provision as to the assignment and exploitation of personality rights
- Reference to the players agent(s) involved in the contract negotiation

Besides that, clubs and players are free as to the content-related substance of the contract, § 6 No.2 (1) LOS. The *DFL-GmbH* has issued a model contract (model licensed-player-contract, M-LPC) which covers the player's scope of rights

²⁸ AGG: Antidiskriminierungsgesetz (German Anti-Discrimination-Act).

²⁹ M. Beucker, C. Wüterich in: M. Stopper, G.Lentze (eds.), *Handbuch Fußball-Recht*, Berlin, Erich Schmidt Verlag, 2012, 368.

³⁰ E.g.: instruction, announcement of the AGG, prevention etc.

³¹ § 6 No. 1, No. 2 (2), No. 4, No. 5 LOS.

and obligations. However, there is no provision which binds the parties to use that standard contract.³²

The licensed-player-contract is a service contract as defined by § 611 (1) BGB as follows:

“By means of a service contract, a person who promises service is obliged to perform the services promised, and the other party is obliged to grant the agreed remuneration”.

The service promised is the athletic performance in favour of the club against remuneration and not the procurement of sporting and/or economic success.³³ Notwithstanding its non-binding character, the clubs of the 1. and 2. *Bundesliga* usually use the M-LPC as released by the *Ligaverband*.³⁴ But even independent of this fact; generally, employment contracts are not individually negotiated with respect to the particular terms, but are rather based upon sample contracts. Such pre-formulated contracts constitute standard business terms in the meaning of § 305 (1) BGB, which reads:

“Standard business terms are all contract terms pre-formulated for more than two contracts which one party to the contract (the user) presents to the other party upon the entering into of the contract. (...) Contract terms do not become standard business terms to the extent that they have been negotiated in detail between the parties”.

Also in labour law, standard business terms are subject to the content-control under §§ 307 ff. BGB. § 307 (1), for instance, stipulates that *“provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user. An unreasonable disadvantage may also arise from the provision not being clear and comprehensible”.*

The requirement for the content-control prevails irrespective of whether or not it is the intention of the employer to repeatedly use the clauses, § 310 (3) No. 2 BGB. By virtue of § 310 (3) No. 1 BGB standard business terms are deemed to have been presented by the employer unless they were introduced into the contract by the employee.³⁵ It is also worth mentioning, that, by virtue of § 310 (4) sent. 2 BGB, when the content-control is applied to employment contracts, *“reasonable account must be taken of the special features that apply in labour law”.*

If a provision within the M-LPC does not pass the content-control, it is invalid in its entirety. A reduction of invalid provisions to preserve validity is not permissible.³⁶

³² F. Rybak, *Das Rechtsverhältnis zwischen dem Lizenzfußballspieler und seinem Verein*, Frankfurt a.M., Peter Lang, 1999, 39f.; The further analysis is based on the M-LPC.

³³ E.B. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, Baden-Baden, Nomos, 2004, 21.

³⁴ H. Hilpert, *Sportrecht und Sportrechtsprechung im In- und Ausland*, Berlin, De Gruyter Recht, 2007, 186.

³⁵ M. Beucker, C. Wüterich in: M. Stopper, G.Lentze (eds.), *Handbuch Fußball-Recht*, Berlin, Erich Schmidt Verlag, 2012, 379.

³⁶ BAG from 04.03.2004 – 8 AZR 196/03 – BB 2004, 1740.

2.2 Players' rights and obligations

Carrying out the sport of football is a professional football player's main service, owed to his employer.

By virtue of § 611 BGB in connection with the compensation arrangements of the LPC, the player has the right to be paid for his services. According to the principle of contractual freedom (or: parties' independence) the level of remuneration can be negotiated freely up to the limits of *bonos mores* (vide § 138 BGB).³⁷

Usually, the player receives a monetary wage in the form of a non-performance-related salary. The right to remuneration is due by the end of the month, § 614 BGB. The employer is not entitled to retain the player's salary due to mal-performance, § 320 (1) BGB is not applicable. This is different when the player entirely refuses to perform at all. In the legal sense this would create a situation of impossibility of performance as outlined in § 275 (1) BGB with § 326 (1) BGB, since the player is (also) unable to make up for his refused performance.³⁸

Contrary to the non-performance-related salary, bonuses are linked to the sporting achievements over which the player exerts influence. In football the club pays individual premiums for extra-satisfactory fulfilment of the service-obligation, such as a bonus for a certain amount of season-appearances, points-bonuses, a non-relegation bonus or a championship-bonus.

The employee does not only have the obligation to provide a service, he also has the right in fact to be "employed" by the club, meaning the right to actively participate in the club's football operations.³⁹ This derives from the LPC in connection with § 242 BGB and is part of the general employer's duty of care. The right to be employed by the club is additionally based on the employee's common personal rights which have their origin in the constitution, precisely in art. 2 (1) in connection with art. 1 (1) GG.⁴⁰

Professional football players are entitled to take part in the first-team's training session and may require medical and sports-therapeutic treatment.⁴¹ The player has no claim to be fielded in matches, though.⁴²

In addition to being required to play football and take part in all measures pertaining to the preparation for the competition, the M-LPC also provides for numerous secondary obligations with which the player has to be compliant and

³⁷ C. Wüterich, M. Beucker in: M. Gerlinger, M. Nolte, J. Adolphsen, M. Lehner (eds.), *Sportrecht in der Praxis*, Stuttgart, Kohlhammer, 2012, 138.

³⁸ M. Beucker, C. Wüterich in: M. Stopper, G. Lentze (eds.), *Handbuch Fußball-Recht*, Berlin, Erich Schmidt Verlag, 2012, 382.

³⁹ L. Weber, *Rechtliche Strukturen und Beschäftigungsverhältnisse im Fußballsport*, Hamburg, Dr. Kovac, 2008, 262.

⁴⁰ GG: Grundgesetz (German Constitution).

⁴¹ Participation in amateurs' team training is not sufficient, c.f. OGH from 01.02.2007 – 09 Ob A 121/06v – SpuRt 2007, 161 ff.

⁴² M. Nolte, *Zum Grundrecht auf Teilnahme an einer Europameisterschaft*, Causa Sport, 2008, 193ff.

which serve as enhancement for his main duty. These comprise: medication and treatment by the club's doctor, participation in tours (e.g. to away matches) by certain transportation means, sporting behaviour (fair-play) and prohibition of doping.

Likewise, in every contractual obligation, further ancillary duties in the player's employment relationship originate from the principle that the club's legitimate interests should be taken into consideration as it is in line with § 241 (2) BGB and which are named in the M-LPC, too. These are: representation duties such as public relations work, clothing (outfit), advertising-commitments, regular use of sponsor(ed)-goods, duties of care and loyalty such as careful handling of clothes and equipment, protecting the image of the club, obligation to confidentiality, following a sporting and healthy lifestyle, economic loyalty and sporting integrity (i.e. no sports betting, no acceptance of prize money from third parties, no shares in other clubs).

The M-LPC also contains a provision which authorizes the club to exclusively use and market the player's personality rights (image, name, his spoken word and particularly football-related features) as long as his activity as licensed-player, and not only his privacy, is concerned.⁴³ In the event that the player is willing to use these personality rights for self-marketing purposes, the club's prior approval is required, § 3 a) sent. 6 M-LPC. Moreover, the player commits to providing the club with the lettering of his original autograph *inter alia* for the clubs' merchandising activities, § 3 d) M-LPC.

In the absence of a deviating provision in the LPC, all the revenue pertaining to the economic exploitation of the aforementioned rights belongs to the club, cf. § 3 e) M-LPC.

It is expressly stated in § 3 f) sent. 1 M-LPC that the player's remuneration also compensates the assignment of personality rights. The assignment of personality rights is limited to the duration of the contract, with the exception of the multimedia-based post-exploitation in the form of archived images, § 3 f) sent. 1 & 2 M-LPC. Furthermore, by virtue of § 3 f) sent. 3 M-LPC, the parties agree to a five-year sale-period for the relevant products.⁴⁴

Pursuant to § 3 sent. 1 ArbZG,⁴⁵ the working time is limited to 8 hours per working day. It may be argued whether players of top-Bundesliga clubs actually stay within these limits, especially when one considers training camps and away trips in Germany and abroad (e.g. *UEFA Champions League*, *UEFA Europa League*).

For the time being, the specificity of sports is only given consideration to in one aspect of the ArbZG which is that, by virtue of § 10 No. 7, athletes are exempt from the Sunday work prohibition.

⁴³ § 3 a) sent. 1 M-LPC.

⁴⁴ In terms of § 307 (1) BGB, such long period may be void, however. Of this opinion: L. Weber, *Rechtliche Strukturen und Beschäftigungsverhältnisse im Fußballsport*, Hamburg, Dr. Kovac, 2008, 282.

⁴⁵ ArbZG: Arbeitszeitgesetz (Working hours Act).

2.3 Club's rights and obligations

The club's major obligation is to pay the player's salary, § 4 M-LPC.

Ancillary duties, which are also specified in § 4 M-LPC, comprise: provision of experts for properly structured training and games; maintenance of training-facilities, match-venues, changing rooms and sanitary-facilities as stipulated by the technical standards of *DFB/Ligaverband*; provision of sports-medical/therapeutical treatment, and the sufficient supplying of sportswear and equipment.

In addition, the club must release the player as assessor in the *DFB* judicial-bodies; is obliged to use the services of a licensed players' agent and notify the accident-insurance of any accidents suffered by the player.

Finally, upon the expressed demand of the player, the club must provide the latter with the upcoming training schedule (subject to potential amendments) and with the governing *DFB/Ligaverband* association-law (statutes, rules, regulations etc.) in its currently applicable and binding version.

2.4 The end of the employment relationship

2.4.1 Fixed-term contract

As it is common practice in professional football, the M-LPC also acts on the assumption that the employment relationship is concluded on a fixed-term basis and the setting of the concrete limitation (e.g. years, seasons) is subject to the parties' autonomy, § 10 No. 2 sent. 1 M-LPC.

The legitimacy of the limitation is to be determined on the basis of § 14 (1) and (4) TzBFG.⁴⁶ It points out that, in principle, an effective limitation of an employment relationship requires the existence of a material reason, unless the term does not exceed two years, § 14 (2) TzBFG.

Material reasons in this sense may be the characteristics and constraints of work in a particular sector. In football there is a number of scenarios which, under the actual conditions of every individual case, potentially fulfil this requirement, e.g. the proper wish of the player himself (e.g. career plans),⁴⁷ the physical wear together with decreasing skills of the player,⁴⁸ the sporting situation of the club⁴⁹ and the entertainment factor of the audience.⁵⁰

Another material reason, which goes along with the decreasing skills of the player, is the performance-related element which is inherent to a team-athlete's

⁴⁶ TzBFG: Teilzeit- und Befristungsgesetz (Act on Part-Time Work and Fixed-Term Employment).

⁴⁷ A. Imping, *Die arbeitsrechtliche Stellung des Fußballspielers zwischen Verein und Verbänden*, vol. 1, Dahlem, 1996, 114.

⁴⁸ T. Hausch, *Zulässigkeit der Befristung von Lizenzspielerverträgen – ein Tummelfeld von Begründungsversuchen*, SpuRt, 2003, 104.

⁴⁹ F. Rybak, *Das Rechtsverhältnis zwischen dem Lizenzfußballspieler und seinem Verein*, Frankfurt a.M., Peter Lang, 1999, 197 f.

⁵⁰ N. Oberthür, *Das Transfersystem im Lizenzfußball*, Frankfurt a.M., Peter Lang, 2002, 68f.

employment relationship. Supporters of that reason argue that it is considerably easier to limit the contract on the basis of physical wear (e.g. at an advanced age) than trying to enforce a just cause termination of the contract on the basis of mal-performance due to lack of success.⁵¹

After five years, a fixed-term employment contract with a duration of longer than five years can ordinarily be terminated by the employer with statutory notice, § 15 (4) TzBFG. In the event that the employment relationship is being implicitly continued upon the expiry of the original term, the employment contract is deemed to have been prolonged indefinitely, § 15 (5) TzBFG.

The parties are also free to establish an employment relationship subject to conditions precedent. By means of a ‘relegation-clause’ for instance, the employment contract ends, as soon as the club is relegated to an inferior league (e.g. from 1. *Bundesliga* to 2. *Bundesliga*). Such a provision requires a material reason as well. In this case it is the players interest in resolving the contract in order to seek a better one in a better (non-relegated) club.⁵²

2.4.2 Termination for just cause

Apart from the expiration of the agreed term, the employment relationship may also end prematurely upon the termination of the contract for just cause, or, to use the German terminology, for ‘compelling cause’ as provided by § 626 BGB. It is also referred to as “extraordinary dismissal”.

To be valid, an extraordinary dismissal must not only involve a serious cause but also has to be declared within two weeks after of the facts justifying the dismissal are known, § 626 (2) BGB.

The existence of a compelling cause in the terms of § 626 (1) BGB is to be affirmed when two conditions are met: Firstly, at the time of the dismissal, there must have been facts, which generally qualify as compelling cause; and, secondly, a balancing of interest must lead to the result that termination for compelling cause is justified.

Hence, literally § 626 (1) BGB reads:

“The service relationship may be terminated by either party to the contract for a compelling reason without complying with a notice period if facts are present on the basis of which the party giving notice cannot reasonably be expected to continue the service relationship to the end of the notice period or to the agreed end of the service relationship, taking all circumstances of the individual case into account and weighing the interests of both parties to the contract”.

The possibility of an extraordinary dismissal as outlined in § 626 BGB is explicitly mentioned in § 10 No. 2 M-LPC. According to which, the club shall

⁵¹ C.f.: H. Hilpert, *Sportrecht und Sportrechtsprechung im In-und Ausland*, Berlin, De Gruyter Recht, 2007, 184.

⁵² M. Beucker, C. Wüterich in: M. Stopper, G.Lentze (eds.), *Handbuch Fußball-Recht*, Berlin, Erich Schmidt Verlag, 2012, 403.

particularly be authorised to terminate for compelling reason when the player's licence lapses, is revoked, returned or denied. Another compelling reason specified in that provision is the club's relegation from the 2. *Bundesliga* and/or its (disciplinary) relocation to an amateur-league.

However, employment agreements should not contain provisions which increase the right for extraordinary dismissal beyond the statutory borders of § 626 BGB.⁵³ Otherwise they would run the risk of circumventing the notice periods for ordinary dismissals as mandatory stipulated by law in § 622 BGB.⁵⁴

The principle of compelling reason should not be softened by enumerating various scenarios in the contract which supposedly should equal compelling reasons. It is rather the balancing of interests which always has to be taken into consideration by German employment law; even if, in the case in question, several serious causes may be at hand. Prior to declaring extraordinary dismissal of a player as the *ultima ratio*, the club must take into account all the other potential milder methods⁵⁵ (e.g. a warning).

The serious reasons mentioned in the M-LPC enable the club to terminate the contract extraordinarily without the need for a balancing of interest in any individual case. This approach does not always hold up to legal review, however. When a club itself loses its licence or has its licence rejected,⁵⁶ it is not the player who is to blame. Thus, basing the instant termination of the player's contract on the lack of the club's licence to participate in the *Bundesliga* would constitute an illegitimate disclaiming of liability pertaining to one's own business risk.⁵⁷

If it is the player's defaulting behaviour which induces the termination for compelling reason, the club can oblige him to compensate all damages resulting from the premature termination.⁵⁸ The former employer's compensatory damages are to be calculated according to §§ 249 ff. BGB. Thus, by means of the so-called differential-method ("Differenzmethode"), the club should be returned to the position it would have been in, had the employment relationship persisted - meaning that the club may claim the additional costs it incurred for an adequate replacement of the dismissed player.⁵⁹

As far as compensation for lost profits as outlined in § 252 BGB is concerned, it is usually extraordinarily difficult to prove the causality between the player's

⁵³ F. Rybak, *Das Rechtsverhältnis zwischen dem Lizenzfußballspieler und seinem Verein*, Frankfurt a.M., Peter Lang, 1999, 186.

⁵⁴ S. Jungheim, *Vertragsbeendigung bei Arbeitsverträgen von Lizenzfußballspielern*, RdA, 2008, 226 with further references.

⁵⁵ M. Beucker, C. Wüterich in: M. Stopper, G. Lentze (eds.), *Handbuch Fußball-Recht*, Berlin, Erich Schmidt Verlag, 2012, 403.

⁵⁶ This would bear comparison with the case that the club is being relocated to an amateur league, which constitutes a serious cause by virtue of § 10 (2) M-LPC.

⁵⁷ L. Weber, *Rechtliche Strukturen und Beschäftigungsverhältnisse im Fußballsport*, Hamburg, Dr. Kovac, 2008, 316f.

⁵⁸ N. Oberthür, *Das Transfersystem im Lizenzfußball*, Frankfurt a.M., Peter Lang, 2002, 132.

⁵⁹ J. Rüsing, M. Schmölling, *Ersatzansprüche eines Profifußballvereins nach fristloser Kündigung eines vertragsbrüchigen Lizenzspielers*, SpuRt 2001, 54.

leaving and the loss of income.⁶⁰

§ 8 LOS stipulates the consequences of a termination for compelling cause exercised by the player. In such a case, the player is entitled to conclude an employment-contract with another club during the same season in which the premature termination occurred. However, by virtue of § 8 No. 2 (2) in connection with § 4 (1) LOS, he will only receive playing-permission when the change of employers takes place within the two transfer-periods (1st: end of season until 31. Aug.; 2nd: 01 Jan. until 31. Jan.).

There is another significant condition with respect to the player's right to sign a new contract according to § 8 (2) LOS: a new contract with another club may only be concluded when the preceding termination for compelling reason has been legally recognised as effective in an ordinary court by a final judgement or a court settlement.⁶¹ Otherwise, i.e. in case of dispute; the player will not be submitted to the transfer list, c.f. § 4 (6) LOS. The player's right to seek interim measures remains unaffected, however, cf. §§ 935, 940 ZPO.⁶²

2.4.3 Termination without just cause

When an employee does not perform his obligation to render his services at all, the employer can indeed sue him for performance (meaning his (non)participation in the training sessions), a winning judgement would not, however, be enforceable,⁶³ § 888 (3) ZPO. Pursuant to § 613 BGB "*the party under a duty of service must, in case of doubt, render the services in person. The claim to services is, in case of doubt, not transferable.*" Hence, the player's choice of place of work is ranked higher than his contractual loyalty.⁶⁴

A licensed-player can be condemned but cannot be forced to fulfil his existing employment contract. If, in fact, the club chooses to sue the player for performance and the labour court thereupon compels him to perform, the club, by virtue of § 61 (2) ArbGG,⁶⁵ is entitled to file a motion for the player's payment of compensation, should he not resume his work (= training with the team) within a certain period. The amount of compensation is to be determined at the court's discretion but shall not exceed the damage which the club *de facto* has suffered through the player's non-participation in the training.⁶⁶ From the club's perspective,

⁶⁰ J. Rüsing, M. Schmülling, *Ersatzansprüche eines Profifußballvereins nach fristloser Kündigung eines vertragsbrüchigen Lizenzspielers*, SpuRt 2001, 54.

⁶¹ Provided that there has been no amicable termination of the contract upon the occurrence of the serious cause.

⁶² ZPO: Zivilprozessordnung (Code of Civil procedure)

⁶³ M. Schütz, *Arbeitsverweigerung durch Lizenzfußballspieler – die Fälle Jefferson Farfan und Demba Ba*, SpuRt, 2011, 54.

⁶⁴ S. Jungheim, *Vertragsbeendigung bei Arbeitsverträgen von Lizenzfußballspielern*, RdA, 2008, 231 with further references.

⁶⁵ ArbGG: Arbeitsgerichtsgesetz (Labour Court Act).

⁶⁶ M. Schütz, *Rechtliche Folgen der Verletzung vertraglicher Pflichten durch*

estimating such an amount is barely feasible and will most likely fall extremely short of any potential transfer-sum the club could have achieved.⁶⁷

In contrast to the compensation-rule above, the club can claim damages from the player resulting from his failure to perform on the basis of §§ 280, 283 BGB. By virtue of § 283 BGB, the obligee (here: the club) can request damages instead of performance, if the obligor (here: the player) does not have to perform as per § 275 (3) BGB, which reads:

“(...) the obligor may refuse performance if he is to render the performance in person and, when the obstacle to the performance of the obligor is weighed against the interest of the obligee in performance, performance cannot reasonably be required of the obligor”.

Under the circumstances of a termination without just cause, it is arguable whether the weighing of interests in fact brings forth that the performance cannot be reasonably required of the player. But as already stated *supra* (cf. § 613 BGB and § 888 (3) ZPO) the player's performance is not enforceable and that, by *argumentum e contrario*, quasi “entitles” him to refuse performance.

The extent of damages he must pay for that is to be determined by the means of § 249 BGB whereby “a person who is liable in damages must restore the position that would exist if the circumstance obliging him to pay damages had not occurred.” Thus, as to the measurement of damages, there is no difference to the norms pertaining to a termination with just cause when the player is in default. The problem of calculating lost profit (which can be claimed, too) also remains the same.

Further, in employment relationships § 619 a BGB must be taken into account since it stipulates a shifting of the burden of proof by which it is the employer who must prove that the employee is responsible for the breach of duty.

2.5 Disciplinary rules and sanctions

Apart from terminating the contract, clubs also tend to apply other means in order to reprimand a player's (alleged) misbehaviour, the most popular of which being the penalty clause (or liquidated damages).⁶⁸

Under the limits of statutory law, § 6 M-LPC grants the club the right to impose a fine on the player in any single case of the player's breach of the duties defined in §§ 2, 7 and 8 M-LPC all of which cover a considerable percentage of all the player's obligations.⁶⁹

§ 6 (1) sent. 2 M-LPC provides for a fine of up to one month's

Lizenzfußballspieler, Frankfurt a.M., Peter Lang, 2011, 33.

⁶⁷ N. Oberthür, *Das Transfersystem im Lizenzfußball*, Frankfurt a.M., Peter Lang, 2002, 132.

⁶⁸ Cf. M. Schütz, *Arbeitsverweigerung durch Lizenzfußballspieler – die Fälle Jefferson Farfan und Demba Ba*, SpuRt, 2011, 55.

⁶⁹ Exempt: Breaching of ancillary duties pertaining to careful handling of clothes and equipment (§ 2 sent. 2 h M-LPC) and the use of a licensed players-agent in case of employment agency (§ 2 sent. 2 l. M-LPC).

gross-salary.⁷⁰ Multiple penalties may be imposed simultaneously and in parallel, § 6 (2) M-LPC, and additional claims for damages remain unaffected as per § 6 (3) M-LPC.

Penalty clauses conduce to safeguard the fulfilment of the obligations agreed on in the employment agreement. In principle they are permitted and may also be used in pre-formulated conditions as they do appear in the M-LPC.⁷¹ However, as it is required in every standard-form contract containing general terms and conditions (such as the M-LPC), the penalty clause must also be measured against the content control, especially § 307 BGB.

Hence, a clause compelling the player to pay an unreasonably high fine is not effective. The maximum amount of one month's gross-salary, though, will regularly fulfil that requirement deriving from the principle of proportionality.⁷²

The penalty clause also has to comply with the principle of transparency required by § 307 BGB. Consequently, the player must be able to foresee, what manner of conduct will lead to which kind of penalty (reprimand and/or exclusion and/or fine) and which dimension it will have. Under the current version of the M-LPC, however, this is not guaranteed. The penalty is at the club's discretion, vague, and it is unpredictable in that it does not allow the player to relate his duty-breaches to a specific sanction.⁷³

Therefore, the penalty clause in § 6 M-LPC is invalid and would not withstand legal scrutiny.

Moreover, although not literally provided for in the M-LPC, a further common practice for the employer to express his disapproval of the player's conduct is the temporary suspension of the latter. This conflicts with the player's right to be employed (i.e. to - at least - be allowed to participate in the training and preparation for the competition).

Such an objection can be overcome, however, when the (normal) employment is temporarily unacceptable for the club (e.g. a brawl between teammates, a night club visit the day before a match etc.).⁷⁴

⁷⁰ Other fines provided for are 1) reprimand and 2) exclusion from club's events.

⁷¹ BAG, NZA 2009, 370 and NZA 2008, 171; BAG, BB 2004, 1740.

⁷² L. Weber, *Rechtliche Strukturen und Beschäftigungsverhältnisse im Fußballsport*, Hamburg, Dr. Kovac, 2008, 308; If, on the other hand, the penalty clause does not qualify as a pre-formulated condition but as a contractual penalty in terms of § 339 BGB (i.e. has been negotiated in detail by/ between both parties) and is unreasonably high as regards the monetary amount of the fine, this fact per se would not result in the nullity of the clause, since according to § 343 BGB it is possible that the fine will be judicially reduced.

⁷³ E.B. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, Baden-Baden, Nomos, 2004, 209.

⁷⁴ ArbG Solingen from 16.01.1996 – 2 Ga 1/96, SpuRt 1997, 98.

3. *Medical and doping issues*

3.1 *Treatment by club-doctor(s)*

In case of injury or sickness, the player is supposed to see the doctor is specified by the club immediately, § 2 sent. 2 b) M-LPC.

As with all the other provisions in the M-LPC such a clause is subject to content control as outlined in §§ 307 ff. BGB. A provision limiting the free choice of health professional and equal access to care may potentially constitute an unreasonable disadvantage for the player which is prohibited by means of § 310 (4) sent. 2 in connection with § 307 (1) (2) BGB.

The verification of the existence of unreasonable disadvantage implies that there is a reciprocal consideration and evaluation of both parties' interests. The fundamental right of free choice of doctor is constitutionally protected by the general freedom of action stipulated in art. 1 (1) GG. Consequently, in order to limit such a fundamental and personal right through an employment agreement; the employer needs to bring forward overriding interests of his own.⁷⁵

There is no doubt that the club has a legitimate interest in the player being permanently fit, if not at his top-form. Furthermore, often it is only specialised sports doctors who are able to detect a (typical) footballer's injury and initiate the corresponding treatment. On the other hand, the player's body is his greatest and most valuable asset. A wrong medical treatment may have much worse consequences for him than for the club; both from a sporting perspective and financially. He depends much more on being examined by a trusted physician than the club does.⁷⁶

So, if the provision is to be interpreted (and executed) in such a way that the player is not allowed to be treated by an external doctor and is compelled to choose a physician named by the club, his free choice of doctor is therefore being limited, and the clause is invalid entirely. In this context, it must be mentioned however, that § 8 c) M-LPC provides for the treatment by an external doctor by way of exception and only if there are serious grounds.

3.2 *Reclaim of salaries and bonuses upon doping offences*

As per legal qualification, the employment contract between player and club is a service contract where the remuneration (basic-salary) is being paid by the employer for the services rendered by the player irrespective of the occurrence of a certain level of success.

If it turns out that a player has performed his working duties under the

⁷⁵ L. Weber, *Rechtliche Strukturen und Beschäftigungsverhältnisse im Fußballsport*, Hamburg, Dr. Kovac, 2008, 264.

⁷⁶ E.B. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, Baden-Baden, Nomos, 2004, 21; F. Rybak, *Das Rechtsverhältnis zwischen dem Lizenzfußballspieler und seinem Verein*, Frankfurt a.M., Peter Lang, 1999, 103.

influence of doping, it is a matter of mal-performance. But receiving a bad performance from his employee is a part of the employer's risk sphere and does not result in the omission of the legal ground on the basis of which the employee earned his basic-salary (i.e. his participation in training and competition/matches). Consequently, there is no room for a restitution as per § 812 BGB according to which "*a person who obtains something as a result of the performance of another person or otherwise at his expense without legal grounds for doing so is under a duty to make restitution to him*".⁷⁷

This is different, however, when the player has been banned from the competition by the federation due to doping abuse. Then, his future performance becomes impossible and the club can reclaim the basic-salary for the relevant period on the basis of §§ 326 (4) and 346 BGB, provided that there has been advance payment of said salary.⁷⁸

As far as bonuses are concerned, the club may reclaim them in accordance with § 812 (1) sent. 2 (1st alternative) BGB, when, theoretically, the club would be deprived of success (title, championship etc.) due to the player's doping offence. In contrast to the basic-salary, bonuses are predicated and connected to the occurrence of a specified success or achievement (e.g. also the player being the league's top-scorer) and, when these are revoked, the legal grounds for the bonus-payments are omitted *ex post* which means that there is a case of unjust enrichment and the club is entitled to claim for restitution.

3.3 Damages due to doping

The use of prohibited substances by the player constitutes a serious violation of the employment contract. When the player has acted at least negligently, he is liable to pay damages to the club.⁷⁹

With respect to damages due to breach of contract, the employer's claim for damages conforms to the provision of § 280 (1) BGB which stipulates that "*If the obligor breaches a duty arising from the obligation, the obligee may demand damages for the damage caused thereby. This does not apply if the obligor is not responsible for the breach of duty*", irrespective of whether it has terminated the contract with the player or not.⁸⁰ Hence, besides the breach of contract, other requirements for the claim are: the player's responsibility for the breach and that the club in fact incurs damages because of that conduct.

If the player's doping abuse entails a ban by the federation, by which the player's service provision becomes impossible, the club has a claim for the

⁷⁷ V. Reimann, *Doping im Arbeitsverhältnis des Berufssportlers*, Köln, WiKu, 2009, 180 with further references.

⁷⁸ J. Joussen, *Arbeitsrecht und Schuldrechtsreform*, NZA 2001, 745ff.; C. Wallstein, '*Auswirkungen des Schuldrechtsmodernisierungsgesetzes auf das Arbeitsrecht*', DStR 2002, 1490 ff.

⁷⁹ W.D. Walker, *Beweisrechtliche und arbeitsrechtliche Probleme des Dopings*, in: K. Vieweg, *Doping, Realität und Recht*; Berlin, 1998, 157ff.

⁸⁰ E.B. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, Baden-Baden, Nomos, 2004, 192.

so-called damages *in lieu* of performance (“*Schadenersatz statt der Leistung*”) as outlined in §§ 283, 281, 280 BGB. This also applies when the player’s services are only partially unavailable (ban from competition/matches) but the employer has no interest in the other services which still may remain possible (i.e. his participation in training).⁸¹ In the event that this unavailability occurs, it is the positive interest which is to be indemnified, i.e. the employer is to be put in the situation he would have been in if the contract had been fulfilled.

Only if the club terminates the contract prematurely due to the doping abuse, would the player’s liability arise from § 628 (2) BGB which reads:

“If notice of termination is prompted by the conduct of the other party in breach of contract, then the other party is obliged to compensate the damage arising from the dissolution of the service relationship”.

The claims of § 628 (2) BGB and §§ 280 ff. BGB may be lodged simultaneously unless the latter do not refer to damages pertaining to the termination of the employment relationship.⁸² These could be: Extra costs for a substitute player, loss of transfer fee (in the event that there have been advanced negotiations with another club prior to the doping abuse⁸³), useless expenditures (e.g. merchandising products with player’s likeness) etc.

Pursuant to §§ 249 ff. BGB the athlete is liable for all directly and indirectly accrued material damages caused by the doping offence. The club will not have any problems in determining the kind of recoverable positions it wants to claim; it will rather, despite the facilitation of the burden of proof in favour of the aggrieved party provided by § 287 BGB and § 252 BGB, have a hard time to prove that the damages claimed causally attribute to the doping abuse and how they can be quantified.⁸⁴

Apart from the damage claims resulting from the breach of contractual anti-doping obligations, the club may consider tortious claims. By virtue of § 823 (1) BGB for instance, “*a person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this*”. (Financial) Assets per se are not protected by this provision, so it is only the club’s image which may be affected.⁸⁵ For clubs, intangible damages are only indemnifiable if they can be concretely reflected in economic loss.⁸⁶ The problem with this is that such claims will regularly be unsustainable due to insufficient proof since it will be exceptionally difficult for the club to demonstrate (in a convincing

⁸¹ V. Reimann, *Doping im Arbeitsverhältnis des Berufssportlers*, Köln, WiKu, 2009, 189.

⁸² BAG from 22.06.1989, NZA 1990, 106.

⁸³ J. Rüsing, M. Schmülling, *Ersatzansprüche eines Profifußballvereins nach fristloser Kündigung eines vertragsbrüchigen Lizenzspielers*, SpuRt 2001, 57f.

⁸⁴ E.B. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, Baden-Baden, Nomos, 2004, 195ff.

⁸⁵ V. Reimann, *Doping im Arbeitsverhältnis des Berufssportlers*, Köln, WiKu, 2009, 190 with further references.

⁸⁶ W.D. Walker, *Beweisrechtliche und arbeitsrechtliche Probleme des Dopings*, in: K. Vieweg, *Doping, Realität und Recht*; Berlin, 1998, 159.

manner) the causality between the player's doping offence and the potential financial losses based on the defamation caused by that offence.⁸⁷

Another action in tort would be substantiated when the player commits a breach of a statute that is intended to protect another person by which, according to § 823 (2) BGB, he also becomes liable to pay damages. The statute describing fraud is § 263 (1) StGB⁸⁸ and forms just such a protecting statute as it reads as follows:

“Whosoever with the intent of obtaining for himself or a third person an unlawful material benefit damages the property of another by causing or maintaining an error by pretending false facts or by distorting or suppressing true facts shall be liable to imprisonment not exceeding five years or a fine”.

The conduct of a player, who intentionally abuses prohibited substances, can certainly be subsumed under the elements of crime set by § 263 (1) StGB, so that the player's liability for damages is to be affirmed.

4. Transfer of players

4.1 Transfer Rules

Art. 12 GG guarantees the freedom to choose and exercise a profession. As a basic right included in the constitution, it ensures the professional freedom towards the omnipotence and omnipresence of the state.

However, the freedom to choose a profession is not only a subjective right, but also an objective value-declaration by the constitutional legislator; it protects the free development of personality in the area of work and the possibility to create and preserve one's livelihood from one's own labour. Being such a value-declaration, art. 12 GG impacts on labour law; too, by means of §§ 133 (1) BGB⁸⁹ and § 242 BGB.^{90 91}

§§ 134, 138, 242 BGB are sweeping clauses of German Civil Law. The interpretation and practice of these blanket clauses shall be carried out with reference to the basic rights, since, apart from their state-aimed “defence-function”, basic rights deploy an objective scale of values which also affects legal relations between private entities. This is achieved by means of the so-called “basic rights’ horizontal effect”, which indicates that a) the interpretation and application of any private-law rule has to be carried out in light of the basic rights and b) the reciprocal balancing of opposing interests (e.g. athlete vs. club/federation) shall result from practical

⁸⁷ W.D. Walker, *Beweisrechtliche und arbeitsrechtliche Probleme des Dopings*, in: K. Vieweg, *Doping, Realität und Recht*; Berlin, 1998, 158.

⁸⁸ StGB: Strafgesetzbuch (Criminal Code)

⁸⁹ § 138 BGB: “A legal transaction which is contrary to public policy is void.”

⁹⁰ § 242 BGB: “An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.”

⁹¹ Cf. M. Beucker, C. Wüterich in: M. Stopper, G.Lentze (eds.), *Handbuch Fußball-Recht*, Berlin, Erich Schmidt Verlag, 2012, 363.

concordance, i.e. the basic right violated the most should precede the others only if no compromise can be achieved.⁹²

Thus, against the background of the necessary appreciation values, transfer rules which are set by the football federation(s) and limit the professional freedom must be proportionate. This can only be achieved when they conduce to a legitimate purpose and happen to be suited, essential and adequate.⁹³

§ 8 No. 2 LOS states that, in the event of a premature termination by the club, the player may only sign a new contract with a new club in the same season in duly substantiated exceptional cases. That does constitute a limitation of the player's professional freedom. As to the proportionality of such a measure, the *DFB* cannot invoke the prevention of a distortion of competition, since as a general rule the player will not be able to sign a new contract in the winter transfer window of the same season. Such a provision equals a covenant not to compete and normally should entail compensation as per § 110 GewO⁹⁴ in connection with § 74 HGB.⁹⁵ This is not granted by the LOS, though.

If § 8 No. 2 LOS effectively becomes part of the employment contract, either explicitly or by dynamic referral, it would most likely not pass the content control as outlined in §§ 307 ff. BGB.⁹⁶

The establishment and specification of transfer-periods per se, however, do not meet objections pertaining to art. 12 GG. Without these periods, the league would run the risk of continuous changes to the squad of each club which would result in substantial unpredictability and unfairness.⁹⁷

When the club's practice is to put buy-out clauses in the employment contract on a standard basis, this might come into conflict with § 309 No. 6 BGB, which defines one of the prohibited clauses without the possibility of evaluation: *“Even to the extent that a deviation from the statutory provisions is permissible, the following are ineffective in standard business terms:*

(...)

6. (Contractual penalty) a provision by which the user is promised the payment of a contractual penalty in the event of non-acceptance or late acceptance of the performance, payment default or in the event that the other party to the contract frees himself from the contract”.

So, if the alleged buy-out clause in question actually constitutes a liquidated damages clause rather than a withdrawal clause which the player may invoke in full

⁹² M. Nolte, in M. Gerlinger, M. Nolte, J. Adolphsen, M. Lehner (eds.), *Sportrecht in der Praxis*, Stuttgart, Kohlhammer, 2012, 9f.

⁹³ M. Beucker, C. Wüterich in: M. Stopper, G.Lentze (eds.), *Handbuch Fußball-Recht*, Berlin, Erich Schmidt Verlag, 2012, 363.

⁹⁴ GewO: Gewerbeordnung (Trade Regulation Code).

⁹⁵ HGB: Handelsgesetzbuch (Commercial Code).

⁹⁶ J.B. Bauer, M. Diller, *Nachvertragliche Wettbewerbsverbote – Änderungen durch die Schuldrechtsreform*, NJW 2002, 1609.

⁹⁷ M. Beucker, C. Wüterich in: M. Stopper, G.Lentze (eds.), *Handbuch Fußball-Recht*, Berlin, Erich Schmidt Verlag, 2012, 365.

compliance with the contract (i.e. “real” buy-out clause); then the club should refrain from using it in its LPC on a standard basis as the content control would then apply. The result of this would be that the liquidated damages clause is a contractual penalty clause predetermining the damages in case of breach of the contract by which it would not pass the content control due to the provision of § 309 No. 6 BGB.⁹⁸

The original M-LPC accommodates this approach as it states in § 11 (3) that the agreement of transfer compensation between the club and the player is prohibited. Transfer compensation may only be concluded between the clubs.

Contrarily, a real buy-out clause is the agreement of the amount that one party (here: the player) is validly entitled to pay to the other party in order to withdraw from the contract.⁹⁹ There is no case of breach of contract, § 306 No. 6 BGB is not applicable, and the clause remains effective.

4.2 Work permit

Apart from the licence, a professional player, must also have a permission to play in order to appear in the 1. *Bundesliga* or the 2. *Bundesliga* (“Spielerlaubnis”), § 1 (3) M-LPC.

The reason for the co-existence of licence and permission to play is that the licence contains the general authorisation for the use of the *Bundesliga*. It is effective regardless of the affiliation to a club. The licence is granted for an unlimited period and remains valid even after the expiry or the termination of his (last) LPC unless the player does not stay without a contract for more than 30 months, § 3 No. 1 a.) LOS.

The permission to play on the other hand is limited in subject and time. According to § 1 (3) M-LPC it governs the practice of the above mentioned authorisation for a specific club and, by virtue of § 13 No. 5 LOS, lapses with the termination of that contract.

In the event of a transfer within the *Bundesliga*, it is only the permission to play which has to be renewed. In order to receive such a “Spielerlaubnis”, which basically serves like a work permit, the buying club needs to file a corresponding petition with the *Ligaverband/DFL-GmbH* in writing, § 13 No. 1 LOS. The federation will accept the motion if various criteria are met.¹⁰⁰

One of these criteria is the publication of the player in the transfer list.

⁹⁸ When in contrast a liquidated damages clause is not part of the standard contract but was negotiated and agreed between and by the parties, it does not qualify as a standard business term and therefore is not subject to the content control as per § 307 ff. BGB and remains effective. However, the sum agreed by the parties can be reduced by the judging authority, as it is also the case in numerous other jurisdictions.

⁹⁹ M. Gallavotti, *From Webster to Matuzalem: KICKOFF or final whistle?*, Sports Law Bulletin, vol. 04, EPFL, April 2009 - June 2009, 28.

¹⁰⁰ 1) Publication of the player’s name in the transfer list, 2) effective PLC with new club, 3) no further legal commitment (with other clubs) for the duration of the new PLC, physical fitness, 4) valid

Pursuant to § 4 No. 6 d) LOS, the player's inclusion in the transfer list is only possible when the player has no obligation to any other club. Hence, if a termination with or without just cause is in process, the permission to play for the former club only will persist as long as there is no settlement between the parties, or a national court does not provide a final and legally binding verdict on the issue § 9 (2) sent. 1 LOS.¹⁰¹ As per § 9 (2) sent. 3 it is only under these circumstances that the player can be included in the transfer list.

Given the duration of labour court proceedings, the urgency (i.e. only two transfer windows) and the need for legal relief (i.e. normally, the player requires the approval of the former club), the player is entitled to take legal proceedings pertaining to an interim injunction as outlined in §§ 935, 940 ZPO.¹⁰²

4.3 Training compensation systems

In 1999, the Federal Court of Justice (BGH) ruled¹⁰³ that the payments of lump-sums in the amount of 25.000 Deutsche Mark as training compensation upon the transfer of a contract-amateur (football) are inappropriately high and constitute an infringement of the freedom to choose and exercise a profession (art. 12 GG). The freedom of association granted by art. 9 GG does not take effect here and, even if it did, in this case the freedom to choose a career has to prevail as it can be restricted only to avert serious and demonstrable risks for a supremely important community asset.¹⁰⁴

Even the amendment of the regulation pertaining to training compensation (§ 23 a DFB SpO) has been declared null and void- by the higher regional court Oldenburg on similar grounds.¹⁰⁵ After all, the *DFB Bundesgericht* declared the invalidity of § 27 SpO which stipulated lump-sums to be paid to a player's former clubs (of the previous 5 years) upon the conclusion of his licence contract.¹⁰⁶

In order to still reward the smaller club's training-expenses/effort, the *DFB* issued a Governance-Code for the determination of the training compensation on the basis of which the clubs receive payments from a so-called "solidarity-pool"

residence title, 5) player's affirmation to not having received a playing permission for more than 2 clubs and not having played for two or more clubs in competitive matches in the time between 1 July and 30 June of the following year, 6) player's affirmation to not hold any shareholdings or options concerning shares in/of other clubs and league institutions, 7) representation by a licensed players' agent.

¹⁰¹ Termination without just cause does not end the employment relationship. There must be settlement (between the parties or by a state judicial body) pertaining to the end of the contract. In this respect, there is a deviation with respect to the FIFA RSTP. Another difference is that the LOS does not mention/define a 'protected period'.

¹⁰² M. Beucker, C. Wüterich in: M. Stopper, G.Lentze (eds.), *Handbuch Fußball-Recht*, Berlin, Erich Schmidt Verlag, 2012, 365

¹⁰³ BGH, NJW 99, 3552 = SpuRt 1999, 236.

¹⁰⁴ In extenso: H. Hilpert, *Sportrecht und Sportrechtsprechung im In- und Ausland*, Berlin, De Gruyter Recht, 2007, 199 f.

¹⁰⁵ OLG Oldenburg, SpuRt 2005, 164.

¹⁰⁶ Decision of the DFB Bundesgericht of 28.07.2006, SpuRt 2006, 262.

of the *Ligaverband*. According to this system, the releasing clubs receive compensation of between 22.500 and 50.000 Euro.¹⁰⁷

4.4 *Players' Agents*

A broker procures for his client the possibility of concluding a contract. According to § 652 BGB, “a person who promises a brokerage fee for evidence of the opportunity to enter into a contract or for negotiating a contract is obliged to pay the fee only if the contract comes into existence as a result of the evidence or as a result of the negotiation of the broker”.

A players' agent is a broker and upon having procured a successful transfer (contract) he is entitled to receive the promised fee. However, first the obligor regarding the payment of the fee must be determined. If it is the club which commissioned the agent, then solely the §§ 652 BGB, governing the “brokerage contract” applies. If, in contrast, it is the player who assigned the agent, in addition the §§ 296-298 SGB III¹⁰⁸ must be considered.¹⁰⁹

As opposed to the FIFA regulation on players' agents, pursuant to § 297 No. 4 SGB III, directives stipulating that players should use the services of one agent exclusively are legally void.¹¹⁰ Such a conception undermines the specificity of sports though: In football (transfers), the players' agent will only have the club's confidence if he can ascertain the exclusivity with respect to the desired player and there is no possibility of another agent negotiating with another club about the same client. That is why exclusivity-clauses still reflect the day-to-day practice in the world of players' transfers.¹¹¹

By virtue of § 654 BGB, “the claim to a brokerage fee and reimbursement of expenses are excluded if the broker, contrary to the contents of the contract, also worked for the other party”. To what extent clubs, players and agents always comply with this statute remains questionable, especially when it is the club playing the agent a specific amount upon the conclusion of a transfer although the (original) mandate was assigned by the player.

The scenario in which the club pays the commission on behalf of the player although the latter is the agent's actual client also carries potential for conflict from an income tax law related perspective. If one interprets such a brokerage-fee payment as a remuneration of the player under the (new) employment relationship, this amount should be subject to wage income tax.¹¹²

¹⁰⁷ J. Fritzweiler in J. Fritzweiler, B. Pfister, T. Summerer (eds.), *Praxishandbuch Sportrecht*, vol. 3, München, C.H. Beck, 2014, 331.

¹⁰⁸ SGB III: Sozialgesetzbuch, drittes Buch (Third Book of the Social Code)

¹⁰⁹ M. Stopper, in: M. Stopper, G.Lentze (eds.), *Handbuch Fußball-Recht*, Berlin, Erich Schmidt Verlag, 2012, 593.

¹¹⁰ OLG Hamm from 8.1.2010 – 12 U 124/09 – SpuRt 2010, 207f.

¹¹¹ M. Stopper, in: M. Stopper, G.Lentze (eds.), *Handbuch Fußball-Recht*, Berlin, Erich Schmidt Verlag, 2012, 597.

¹¹² J. Rain, in M. Gerlinger, M. Nolte, J. Adolphsen, M. Lehner (eds.), *Sportrecht in der Praxis*, Stuttgart, Kohlhammer, 2012, 129f.

5. Social security principles¹¹³

5.1 Injuries & disability

The statutory accident insurance (SGB VII¹¹⁴) provides cover against work accidents and work-related diseases.

Those accidents and diseases are only covered when they occurred during, or as a consequence of, the work, §§ 8 (1) sent.1, 9 (1) sent. 1 SGB VII. That limitation is justified by the fact that as per § 150 SGB VII this insurance is financed exclusively by the employer and reflects a peculiarity of the employer's fiduciary duty.¹¹⁵

For a licensed football player, injuries during training or matches fall under the category of work-related accidents. However, an injury which the player suffered during his "private" preparation prior to the season does not fulfil the requirement of having occurred in innate connection to the work which substantiates the insurance coverage, even when the player's activity has been explicitly permitted by the club in an off-season training-schedule.¹¹⁶

Upon the new regulation in § 9 (1) SGB VII, typical sport related injuries like meniscus, muscle and tendon sheath damages are covered too.

Regarding the insurance benefits, the provisions pertaining to the industrial injury pension due to the reduction of earning capacity as provided for in § 56 SGB VII are of particular importance for the player as in some cases severe injuries may lead to permanent health damages entailing his inability to work. Concerning the question about whether a disability has been suffered, the decisive point of reference is the general work and earning capability on the whole job-market rather than the performed activity (i.e. professional football) prior to the injury or disease.¹¹⁷

The amount of the industrial injury pension is measured on the basis of the degree of disability (at least 10%) and annual earnings, §§ 56 (2), 57 ff., 81 ff. SGB VII.

5.2 Illness/sickness

Pursuant to § 8 a) (1) sent. 1 M-LPC, the player shall insure himself against illness at his own expense. However, due to his high income (of more than 52.200 Euro in annual salary) a licensed player is exempted from compulsory sickness insurance by § 6 (1) No. 1 SGB V.¹¹⁸ Nevertheless, he is entitled to keep his membership in

¹¹³ As far as insurance is concerned, this section focuses on the statutory provisions. An elaboration on private insurance-solutions for the player would go beyond the scope of this paper.

¹¹⁴ SGB VII: Sozialgesetzbuch, siebentes Buch (Seventh Book of the Social Code)

¹¹⁵ C. Rolfs, *Sport und Sozialversicherung*, Münster, LIT Verlag Dr. W. Hopf, 2014, 63.

¹¹⁶ BSG from 13.11.2012, SGB 2013, 33f.

¹¹⁷ J. Fritzweiler in J. Fritzweiler, B. Pfister, T. Summerer (eds.), *Praxishandbuch Sportrecht*, vol. 3, München, C.H. Beck, 2014, 575.

¹¹⁸ SGB V: Sozialgesetzbuch, fünftes Buch (Fifth Book of the Social Code).

the statutory health insurance according to § 9 (1) SGB V.

Unlike the statutory accident insurance which is paid by the employer only, health insurance is financed in (almost) equal parts by both employers and employees, § 249 (1) SGB V. As of 1.1.2011 the percentage of the employee's relevant income to be paid to the health insurance companies, subject to contributions, is 15,5 %, of which 8,2 % is borne by the employee and the remaining 7,3 % is borne by the employer, § 249 (1) SGB V.

A sporting injury also qualifies as sickness (illness). When it occurs during work (training or match), however, § 11 (5) SGB V stipulates that the provisions pertaining to the statutory accident insurance prevail over those of the statutory health insurance. That is advantageous for the player as the health insurance, in contrast to the statutory accident insurance, does not pay any pensions.¹¹⁹

By virtue of §§ 3 ff. EFZG, a sick player has a claim against his club for continued remuneration up to a period of 6 weeks.¹²⁰ After 6 weeks the player is reliant on sickness benefit. By virtue of § 44 SGB V a person with health insurance is to be granted sickness benefit if the illness requires inpatient treatment in a hospital at the expense of the health insurance company or makes him/her incapable of working (in his last occupation).¹²¹

Sickness benefit amounts to 70% of the regularly earned gross salary (excluding bonuses) but cannot exceed 90% of the net salary, § 47 (1) SGB V. If it is only one illness which is causing the work incapacity, acquisition of sickness benefit is limited to 78 weeks.¹²²

5.3 *Unemployment benefits*

Due to their status as dependent employees, professional football players are also insured against unemployment. The unemployment insurance is regulated in the Third Book of the Social Code (SGB III).

The most significant benefit of the insurance is the unemployment compensation. By virtue of § 136 SGB III, any employee is entitled to receive such when a) he is unemployed, b) has reported himself to the Federal Employment Agency (i.e. the insurance carrier) and c) has completed the qualifying period (the minimum amount of months during the last two years in which compulsory insurance applied, i.e. 12 months).

Further requirements are: the seeking of employment (§ 137 SGB III) and availability of the unemployed, § 138 SGB III. Availability is not possible when the player is unable to pursue his profession (any more) due to a serious injury. In such a case, the player may only count on the benefits of the statutory accident insurance. In contrast, the requirement of availability is not undermined by the

¹¹⁹ C. Rolfs, *Sport und Sozialversicherung*, Münster, LIT Verlag Dr. W. Hopf, 2014, 36.

¹²⁰ Minimum period. The PLC may provide for a longer duration.

¹²¹ BSG from 9.12.1986, BSGE 61, 66.

¹²² C. Rolfs, *Sport und Sozialversicherung*, Münster, LIT Verlag Dr. W. Hopf, 2014, 38.

transfer-regulations in professional football. Irrespective of a missing release by his former club, the licensed player is still available as far as the employment agency is concerned, and is entitled to unemployment compensation.¹²³

Depending on the duration of the previous employment relationship, the unemployment compensation is granted for a period from at least 6 months up to a maximum of 24 months, § 147 SGB III. It adds up to 67% of the last received salary for unemployed with at least one child and 60% of such for childless insurants, § 149 SGB III. The unemployment insurance is financed by the contributions of the employee and the employer in equal proportions (§§ 341 ff. SGB III); and federal funds, § 363 SGB III. Since 2011 the contribution rate is 3% of the remuneration.

5.4 Pension schemes

As per § 1 No. 1 SGB VI, persons who are employed in exchange for payment are mandatorily insured in the statutory pension insurance scheme. In contrast to the health insurance, the players' high salaries do not exempt them from the duty to pay pension insurance.

Apart from providing retirement pensions, the statutory pension insurance grants benefits in the event of invalidity. An earnings capacity pension can be granted to insurants who are unable to work at least 3 (full benefit) or 6 (50%-benefit) hours daily in any job.¹²⁴

In case his severe injury was suffered whilst playing football for his club and that injury impedes him from pursuing any other job for at least 3 (or 6) hours per day, a player may consequently be entitled for benefits from the statutory accident insurance and the statutory pension insurance scheme, cf. §§ 56 ff. SGB VIII and § 43 SGB VI.

In order not to grant the insurant a higher pension in comparison to the salary he received, this "conflict" of laws is being resolved by § 93 SGB VI which also takes into account that the employee contributed to both insurances. In principle, this statute guarantees that the player would receive both the industrial injury and the earnings capacity pension, yet, the latter is not granted entirely when this would cause the exceeding of a certain maximum amount § 93 (3) SGB VI. Thus, the industrial injury pension is increased by a part of the earnings capacity pension.

Currently the pension contribution rate is 18,9 % equally borne by employee and employer, § 168 (1) No. 1 SGB VI.

5.5 Club's insolvency and players' protection

The opening of insolvency proceeding does not at first affect the continuity of the

¹²³ C. Rolfs, *Sport und Sozialversicherung*, Münster, LIT Verlag Dr. W. Hopf, 2014, 90 with further references.

¹²⁴ C. Rolfs, *Sport und Sozialversicherung*, Münster, LIT Verlag Dr. W. Hopf, 2014, 57.

players' employment contracts. This results from § 108 InsO¹²⁵ by which "(...) employment relationships of the debtor shall continue to exist, but to the credit of the insolvency estate".

However, by virtue of § 113 InsO the insolvency administrator is authorised to terminate the employment contract by giving 3 months notice, irrespective of the term-limitation and/or remaining duration of the LPC. The athlete is also entitled to such a termination. In the event that the liquidator terminates the employment contract,¹²⁶ the player has a claim for damages in the amount of earnings lost for the time that the employment contract would still be valid without the insolvency-related dismissal.¹²⁷

Earnings the player received or maliciously omitted after the administrator's termination (but still during the original term of the resigned contract) must be deducted from the player's damages claim, §§ 113 sent. 3 InsO, 615 (2) BGB, 254 BGB.¹²⁸

6. Labour dispute settlement

6.1 Arbitration & courts

Since there is no CBA in Germany's professional football, labour disputes are not arbitrable pursuant to §§ 4, 101, 104 ArbGG which state that arbitration cannot be agreed upon as far as employment disputes are concerned (unless otherwise provided for in a CBA).

Hence, neither the *DFB* nor the *Ligaverband* provide the clubs and players with arbitrating bodies concerning disputes between the latter two. Accordingly, § 9 (1) sent. 1 LOS declaratorily states that ordinary state labour courts are competent for disputes arising from contracts between clubs and players.

6.2 Conciliation

Prior to submitting the labour issue to an ordinary labour court, the LOS provides the parties to the LPC to file for remedy by a conciliation committee with the *Ligaverband*, § 9 (1) sent. 2 LOS.

The committee contains of two deputies, one appointed by the player, the other appointed by the club; and one neutral and independent third person, appointed by both parties. The aim of the conciliation is to establish a legally

¹²⁵ InsO: Insolvenzordnung (Insolvency Code).

¹²⁶ The consequence of the termination of the contract is that the player is entitled to leave the club without the need for a transfer-compensation. Against the background of the fact that transfer-fees constitute a substantial part of a club's revenue, the liquidator will diligently balance the advantages and disadvantages of a termination of such nature.

¹²⁷ B. Pfister in J. Fritzweiler, B. Pfister, T. Summerer (eds.), *Praxishandbuch Sportrecht*, vol. 3, München, C.H. Beck, 2014, 183f.

¹²⁸ The claim for damages only qualifies as an insolvency claim, §§ 113 sent. 3, 38 InsO.

binding settlement. Amongst other objectives, such a settlement may serve as a basis for granting the player the immediate permission to play in the two transfer windows, § 9 (1) sent. 8 LOS.

6.3 Sports special bodies

As part of the player's licensing-procedure, the licensed-player and the *DFB/DFL/Ligaverband* close an arbitration agreement (AA).¹²⁹ All disputes arising from issues pertaining to the player's authorisation to "use" the *Bundesliga* (i.e. his licence) must be submitted to the *Ständiges Schiedsgericht für Lizenzspieler* (permanent arbitration panel for licensed-players), cf. § 1 IAA.

Although this arbitration agreement is not part of the employment relationship per se, the outcome of the proceedings pending with it may often be of paramount importance with respect to the labour issues between the player and his club:

The association's measures regarding the player's admission to the *Bundesliga* have an effect on the player's employment relationship as his suspension may, for example, affect the amount of bonuses (for being fielded, wins, points etc.) he is entitled to receive from his club. Furthermore, the revocation of the licence may justify a dismissal for compelling cause by the club as outlined in § 626 BGB.¹³⁰ Hence, the unjust cancellation of the right of use of the *Bundesliga* can lead to a player's claims for damages against *Ligaverband/DFB/DFL*.

The arbitration panel is also in charge of mitigating unreasonable contractual penalties (*inter alia* a fine of max. 100.000,00 Euro¹³¹) upon its equitable discretion.¹³²

7. Conclusion

It is both the qualification of a licensed-football player as 'employee' and the non-arbitrability of labour disputes which allow statutory labour law to have a substantial impact on the employment relationship between a professional football player and his club.

On the one hand, this is legitimate: the execution of a football player's profession is reliant on the existence of clubs competing in lucrative leagues and championships. Such dependence constitutes the basis for a player being entitled to benefit from the protective purpose of labour law, especially with regard to provisions regulating unfair dismissal and social security. On the other hand, however, the constraint of taking recourse to ordinary labour courts entails severe problems with regard to the specificity of sports, particularly when transfer issues arise: the situation

¹²⁹ Vide Annex II to the player's licence contract with DFB/DFL/Ligaverband.

¹³⁰ § 10 No. 2 M-LPC.

¹³¹ § 3 par. 5 licence contract for players.

¹³² § 1 par. 2 AA.

when a player terminates his contract illicitly prior to its duration features a severe risk for the aggrieved club. A huge amount of a *Bundesliga* club's revenues derive from transfer-sums received from the new club as compensation for terminating his valid contract prematurely. In the case of a termination without just cause, it is arguable whether damages granted by the statutory court would amount to a potential transfer sum. The reason for that is that labour law is rooted in the notion of a disrupted contractual parity which needs to be levelled by limiting the employer's entrepreneurial freedom. With regard to contract termination in professional football however, this disparity takes a significant turn in the players' favour. It is not only that players consult agents for negotiating their employment contracts, but it is also the peculiarities in that market which mean that one cannot speak of the players' "inferiority" any more. The limited number of high-qualified players (for a certain position) for instance is one of these specificities. A club may encounter huge difficulties in terms of finding an adequate substitute for the contract-breaching player within the short time frame. Another aspect is the immense salaries granted to the players. It is questionable whether a labour court will adequately consider a player's remuneration in relation to his rights and obligations when it is to decide about the existence of a compelling cause for termination. All this may result in counterfeiting and undermining the protected purpose of labour law.

Additionally, and irrespective of the possibility of interim measures, both parties to an employment relationship will suffer from the duration of labour disputes in ordinary courts which do not accommodate the rapid pace of professional football (match-frequency, limited transfer-periods etc.) at all.

For the benefit of both sides, and especially in light of the absence of a CBA, there is only one solution which is able to come to terms with the aforementioned peculiarities: A real arbitration court/body for licensed-players and *Bundesliga*-clubs pertaining to their employment disputes featuring equal representation. In any case, this will require statutory labour law to be even more flexible with respect to the characteristics of a professional football player's short career and his subordination to national and international sports federations' rules, regulations, statutes etc.

EMPLOYMENT RELATIONSHIPS AT NATIONAL LEVEL: ITALY

by *Michele Colucci**

SUMMARY: Introduction – 1. The status of footballers – 2. The employment agreement – 3. Players' obligations – 4. Players' rights – 5. Club's obligations – 6. Termination of the contract – 7. Labour disputes in football – 8. Social security – Conclusion

Abstract:

This chapter reviews the footballer employment relationship in Italy. First, the author carefully studies the basic elements of the legal status of the players. Then, he goes on to describe the qualifying traits of the employment relationship of several categories of football player. In such a perspective, the mutual rights and obligations binding footballers and clubs are analysed in the light of the collective bargaining agreements concluded between the relevant parties. Finally, a section will be devoted to the ways and means to terminate the employment contract as well as to the role of the arbitration procedure to solve labour and economic disputes.

Introduction

In Italy the first exhaustive regulation aiming to govern the employment relationship in sport was adopted in 1981.¹

Law 1981/91 contains a set of provisions suited to the specificity of sport,² so derogating from the relevant, general labour legislation which applies to

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¹ Law N. 91 of 23 March 1981. G. Vidiri, "Profili societari ed ordinamentali delle recenti modifiche alla legge 23 marzo 1981 No. 91", *Riv. dir. sport.*, 1997, 3.

² M. Colucci, "Sport in the EU Treaty: in the Name of Specificity Autonomy", "The Future of Sports Law in the European Union: Beyond the EU Reform Treaty and the White Paper", ed.:

all employee relationships.³

In particular, it waives the application of the legislation *on the protection of the freedom and dignity of workers and of trade union freedom and union activity in the workplace*,⁴ and also the rules on public employment service⁵ and those on fixed term contracts for professional sportspeople.⁶

In parallel to these employment rules, the Italian Football Federation (hereafter “FIGC”), enacts the sports rules that complement the provisions on the employment relationship in football. Moreover, that relationship is also governed by the rules agreed in the relevant agreements signed by the leagues of the first, second and third category (respectively, LEGA Serie A, LEGA Serie B, and Lega PRO) on one side, and the footballers’ trade union association (AIC) on the other.⁷

The last collective agreement between those parties for the Italian Serie A was signed on 7 August 2012, valid initially until 30 June 2014 and was recently renewed until 30 June 2015. All references in the present article are made to this collective bargaining agreement (hereafter “CBA”).

For the Italian Serie B – the Italian second division of professional football - the collective agreement was signed in 2011, initially running until 30th June 2014 and also recently renewed.

At club level, remuneration, allowances and other benefits are negotiated individually.

All sports rules refer to and apply the constitutional fundamental principles concerning the freedom to carry out activities, including sporting ones, in order to express individual personality.⁸

In that regard, Art. 1 Law n. 91/81 states that the practice of a sporting activity - *whether individually or as part of a group; as a professional or an amateur; is free*, and cannot be subject to the membership to the Italian Olympic Committee (hereafter “CONI”) and/or to a particular sports association. The membership of a sports association implies the acceptance of its rules, including

Roger Blanpain, *Kluwer Law International*, 2008, 21-36.

³ M. T. Spadafora, “*Diritto del lavoro Sportivo*”, Giappichelli, 2012, 77-87.

⁴ Law No. 300 of 20 May 1970.

⁵ See T. Treu, “*Labour Law in Italy*”, *International Encyclopaedia of Laws*, R. Blanpain ed., Kluwer Law International, 2014.

⁶ In fact, pursuant to this, art. 4 of Law No. 91/81 states that ‘the law on fixed-term contracts is not to be applied to fixed-term employment in sport’: work in sport is carried out both under long-term contracts and fixed-term ones, but this does not justify the application of fixed-term contract regulations to this sector (such as the shift from a fixed-term to an open-ended contract whenever the law is deemed to have been broken).

⁷ The trade union activity focuses on several issues of remuneration; and does not consist of negotiating pay but rather focuses on other issues such as the abolition of constraint, guaranteeing legal assistance, managing a pre-championship training centre for unemployed players, establishing a guarantee fund which protects players in cases of insolvency of the club or the exploitative use of players’ individual images, and also carrying out promotional activities and advertising. There are no trade union delegates representing players within the single clubs, but each club has a players’ representative within the general assembly of the AIC.

⁸ See Articles 2, 3, 4, and 32 of the Italian Constitution.

those which govern the status of athletes: professionals or amateur players⁹ as well as the decisions taken by the sports arbitration tribunals.

1. *The status of footballers*

Article 2 of Law 91/81 defines as *Professionals*¹⁰ those ‘athletes, coaches, technical and sports managers and trainers who carry out a remunerated sporting activity on a continuous basis’. In order to work, and therefore, to play, they need to obtain an authorization from the national sports federations in accordance with their rules and those enacted by CONI.¹¹

Amateur sporting activity is exempted from that authorisation, since this type of sport has different characteristics and has no profit or economic objectives, unlike the professional one.

In fact, amateur sport is practiced for free even though amateur athletes are allowed to receive a series of gratuities/benefits in the form of reimbursements/allowances, which cannot be considered *strictu sensu* as a salary.

According to Article 27 of the FIGC Internal Regulations (hereafter “NOIF”), football players may qualify for one of the following categories: *professionals, non-professionals and youths*’.

‘*Professionals*’ are those players who carry out sporting activities on a continuous basis in exchange for payment. Players are registered with the relevant National Professional League while they are directly employed by a club.¹²

Amateur players are those who play for a club belonging to the National Amateur League (Lega Nazionale Dilettanti). They do not have an employment agreement but rather an economic agreement concerning the reimbursement of their transfer and training costs by the club. Such agreements can also allow for a lump sum which may be up to 25,822 euros (gross) on a yearly basis.¹³

Female players, players who practice ‘five-a-side football’, and all those who carry out recreational activities are also considered as amateurs.

Players between 8 and 15 years old qualify as “Giovani”. They can play for a club which is a member of the professional leagues, or a club which carries out sport and educational activities exclusively in the youth sector. They are bound to their club only for the duration of the sporting season.

A further distinction is made between “Giovani dilettanti” and “Giovani di serie”.

⁹ This is strongly underlined by I. Marani Toro, “*Problematica della legge 91/1981*”, *Riv. dir. sport.*, 1983, special edition, 13. On this subject, see G. De Silvestri, “*Le qualificazioni giuridiche dello sport e nello sport*”, *Riv. dir. sport.*, 1992, 283.

¹⁰ G. Giugni, “*La qualificazione di atleta professionista*”, *Riv. dir. sport.*, 1986, 166.

¹¹ G. Martinelli, “*Lavoro autonomo e subordinato nell’attività dilettantistica*”, *Riv. dir. sport.*, 1993, 13.

¹² Article 3 of Law No. 91/81 states that the activity performed by the athlete is considered as “work under an employment contract”.

¹³ Art. 94 Ter NOIF.

The former are players aged 14-18 and may become members of a club of the National Amateur League by acquiring ‘young amateur’ status. Players qualifying as “Giovani dilettanti” then become ‘non-professional’ once they reach the age of 18 years.

‘*Giovani di serie*’, however, are ‘Giovani’ of 14 years of age who are registered with a professional club. They are obliged to train and to play for the club until the age of 19.

All players who are *under* 16 years old can only play for a club within the region where they have their residence.

1.2 *Player Membership and its limitations*

According to Art. 39 of the NOIF, players shall be registered with FIGC through their club before 30 April of each year. However, *Giovani* and *Giovani di Serie* can also be registered after this deadline.

Players and clubs’ representatives must duly sign the relevant application form and send it to their league by registered letter.

Footballers are not allowed to be employed by more than one club at the same time. In the case that a footballer is employed by more than one club, only the first employment agreement is valid.

Players residing in Italy may be signed by a club as long as they have never been members of a foreign federation. However, the FIGC President can authorize the registration of players from foreign federations in those cases where the ‘international transfer’ is allowed by the original federation, information is provided on the ‘professional’ or ‘non-professional’ qualities of the player, and the relevant rules are observed.

Clubs of Serie A (first category) can register foreign players without any limitation as long as they are EU (or European Economic Area (EEA)) citizens. In this case, proof of citizenship must be attached to the application for registration.

The same clubs can employ no more than five players (two of which must be ‘assimilated players’) who are (or were) members of foreign federations, if the players are non-EU citizens (or non-EEA). However, only three of these players may be used in official competitions at national level.

Clubs participating in the second category championship (Serie B) are allowed to employ and to register only one non-EU citizen footballer.

‘Assimilated players’ are those who come from foreign federations (members of UEFA) which have been registered with the FIGC for five consecutive years.

Italian Players, even those who are (or were) members of foreign federations, are not subject to the above restrictions, as long as:

- they have maintained Italian citizenship without interruption,
- their parents are Italian citizens and were born in Italy,
- they have stable residence in Italy and they have not been called up by national or league teams outside Italy.

Amateur clubs can accept, and use on the pitch, only one non EU foreign footballer before 31st December of each year, or one single female player (if women's football is a feature of the club), who are (or were) from foreign federations on the condition that their papers comply with existing state laws on immigration, admission and stay in Italy.

2. *The employment agreement*

By way of derogation from the general principles of contract law, a formal written agreement governing the employment relationship in football is always required, otherwise the agreement is considered as null and void.¹⁴ The written form is necessary in order to prove the existence of the agreement itself and to afford a minimum level of protection to the parties of the employment relationship.¹⁵

However, according to Art. 2126 civil code, the lack of a written employment agreement does not exclude its legal binding effects on the parties for the period it was *bona fide* implemented.

Article 4, paragraph 1, of Law 1981/91 provides that “*every athlete's employment agreement must be drafted in accordance with the standard contract prepared by the relevant national sports association and the representatives of the interested parties*”.

In this case, the Employment Standard Agreement (hereafter “ESA”) is the fixed framework of rules and clauses agreed by the parties during the collective bargaining procedure and it gives the legal framework that needs to be fleshed out with content in the negotiating stage of each individual relationship.

Pursuant to Art. 2 of the CBA, the footballer and the club's representative must sign the Employment Agreement.

An unsigned employment agreement is considered to be null and void. The club has the obligation to file the employment agreement with the League; the latter will send it to the Football Association for final approval.¹⁶

Such a provision is of great significance because it gives the sports associations (the league and the federation) important powers: they decide on the content of the standard contract in the collective bargaining process, they subsequently check every single contract, and verify that all legal and regulatory requirements have been met.

If the club does not lodge the agreement within ten days of its signature, the footballer can do so directly within sixty days from the same date.

Moreover the FIGC shall inform every footballer about the approval or

¹⁴ V. Frattarolo, “*Il rapporto di lavoro sportivo*”, Giuffrè, 2004, 38-61; G. Vidiri, “*Sulla forma scritta del contratto di lavoro*”, *Giust. civ.* I, 1993, 2839; F. Caringella, “*Brevi considerazioni in tema di forma del contratto di lavoro sportivo*”, *Riv. dir. sport.*, 1994, 686; C. M. Dalmasso, “*Il contratto di lavoro professionistico sportivo alla luce della L. 23 marzo 1981 No. 91*”, *Giur. merito*, IV, 1982, 230.

¹⁵ M. Sanino & F. Verde, *Il diritto sportivo*, CEDAM, 2008, 191.

¹⁶ Art. 3 CBA.

non-approval of his employment agreement without delay. If the federation has not given its approval by the thirtieth day after the filing, or within any shorter period envisaged by the regulations issued annually by the FIGC, the employment agreement will be considered as approved.

The club shall pay compensation to the footballer in case of non approval from the FIGC for any reasons which were not dependent on the will or actions of the footballer or his agent. The amount of compensation shall be determined by the FIGC Arbitration Body, on the footballer's request, by taking in due account the facts and the circumstances of the case, but also any other contract or economic agreement signed by the player with a new club in the meantime.

Of course, the parties may also agree in writing about the amount of compensation in the case of non-approval of the agreement.

By signing the ESA, the parties commit themselves to comply with the terms of the Collective Agreement (Art. 3 ESA), the rules of the Statutes and the by-laws of the football association but also with any decisions issued against them by the FIGC arbitration and disciplinary bodies according to Art. 27 of the FIGC statutes.¹⁷

Any infringement of the above provision may lead to disciplinary sanctions which are foreseen in the FIGC statutes and regulations (art. 5 ESA).

3. *Players' obligations*

3.1. *Technical instructions, obligations and rules of conduct*

The Player undertakes to provide his services to the Club's teams for the length of the employment contract.¹⁸

In particular, pursuant to art. 10 CBA, the footballer shall provide his sports services to the club and he shall follow the technical instructions in order to achieve the best sporting results. The footballer shall have no right to interfere in the club's technical, managerial and business decisions.

The footballer must also be loyal to the club and shall avoid any behaviour – both on and off the pitch - that could be detrimental to the club's image.

In that regard, it is clear that in the football world the extent of managerial power is more invasive and intrusive than in other ordinary employment relationships. The stark difference is given by the nature of the professional football activity which is coupled with huge financial interests and enormous public expectations. In this context, the social practice of athletes relinquishing their freedom and privacy right, conceding to the employer the faculty of controlling aspects of his private life linked to sporting performance, seems quite normal and justified.

Accordingly, instructions concerning players' behaviour outside the pitch and the daily training activities are lawfully applicable only if they are justified by

¹⁷ Art. 27 of the FIGC Statutes.

¹⁸ Art. 1 ESA.

requirements related to professional performance. A football player who does not fulfil his contractual obligations towards his club can be sanctioned, depending on the gravity of the infringement, with: a written warning, a fine and a pay cut given by the arbitration panel, a suspension from training or pre-championship preparation with the first team, or with the termination of the contract.

3.2 Limits on carrying out other activities not related to football

The collective bargaining agreement also contains a specific provision limiting somewhat other activities of footballers which may not be directly linked to the game of football.¹⁹

A case in point may be non-competition agreements or those deals limiting the footballer's professional freedom after the contract's expiration. Such clauses must be considered as being null and void (Art. 2.2. CBA). Conversely, so-called 'option agreements' in favour of both clubs and footballers are admitted. However, their clauses have to necessarily meet two conditions: first, specific economic consideration should be recognised in favour of the party that grants the option; second, the total length of the employment agreement should not exceed the maximum duration envisaged by the law.

For the entire length of the contract, unless explicitly authorised by the club owner, the participation of the professional footballer in other sporting activities and also professional or business activity is forbidden.

If the club refuses to authorise a player to undertake such activities, the player may lodge a complaint with the arbitration body on the incompatibility of the activity at stake.

3.3 Health and duty of care

The player has a right, but also an obligation, to take care of his psychological and -physical health since he has to perform the sporting activity at his best level. Therefore, he shall abstain from any activity which could put his safety and his top psycho-physical condition at risk.²⁰

In that regard, both club and player are required to strictly observe the relevant sports and ordinary rules on the protection of health and on doping.

The player shall subject himself to systematic and preventive sampling and medical checks, including blood/urine samples and controls, ordered by the club, CONI (the national Olympic committee) and the FIGC for implementing anti-doping tests and for the better care of his health.

¹⁹ Art. 8 CBA.

²⁰ See Art. 9 CBA.

4. *Players' rights*

4.1 *Right to have an education*

Art. 6 CBA contains one of the most innovative and useful provisions in the football world.

Pursuant to such a provision, the club shall promote and support any initiative to improve and develop the footballer's education and wider culture. The Football Association itself, in agreement with the A.I.C., shall indicate the conditions which the club must observe, which are compatible with the requirements of the sporting activities and of the club itself, to facilitate the attendance at educational and training courses and preparation for examinations for those footballers who intend to pursue their studies or obtain a professional qualification.

4.2 *Right to train*

Players have the right to train and to take part in the training sessions and in pre-season preparation with the first team (Art. 7.1 CBA)

Nevertheless, following the interpretation that the FIGC, Lega A and AIC gave to such a provision; clubs are entitled to organise different training sessions justified by technical and tactical reasons, such as training sessions for players taking into account their role on the pitch; they can also foresee pre-match sessions exclusively for those player who are playing in a specific match during the national or the international championship.²¹

The right to train can be seen as an obligation whereas the player, except in the event of verified illness or injury, must participate in all training sessions and at the sports facilities indicated by the club.

In the event of away games or training camps, the footballer must avail of adequate means of transport, established and paid for by the club, which must also provide the footballer with full board.

4.3 *Health protection*

Footballers who are not covered by insurance cannot carry out any sporting activities.

Even in the case of illness or injury the footballer is entitled to receive the remuneration agreed in the contract, until it expires while the club can benefit of any health insurance policy in that regard.²²

This provision also applies when the injury has occurred during matches or training sessions for national teams.

The club will reimburse the expenses for health and pharmaceutical care, and those for any surgical operations and periods in hospital or in nursing homes;

²¹ See at www.assocalciatori.it "normativa".

²² Art. 14 CBA.

not covered by the national health service.

In particular, the club shall insure the footballer with a leading insurance company against injuries and illnesses.

Clubs which do not fulfil their insurance obligations as agreed on with the AIC, will be subject to disciplinary measures and obliged to pay compensation for any damages suffered by the footballer or by those entitled through him (art. 16 CBA).²³

If the footballer does not wish to avail himself of the health care proposed by the club, he shall duly notify the club about his decision and, above all, shall produce all relevant medical documentation

The incapacity and unfitness can result from the footballer's own fault but it may also be consequence of events which cannot be ascribed to him.

In the event of illness or injury outside the workplace, the footballer shall immediately notify the club and provide the medical certificate attesting to the inability to play within 3 (three) days.

It is important to point out that if the footballer's incapacity as a result of illness or injury, or his unfitness lasts for more than 6 months, the club can ask the Arbitration Body to decide about the termination of the employment agreement or the cutting in half of the remuneration either until the end of the state of incapacity or until the end of the employment agreement.

If the illness or injury is so serious as to incapacitate/disable him from playing for the remainder of his sporting career, the club may ask the Arbitration Body to decide about the immediate termination of the employment agreement. If the illness or the impairment of the footballer's physical conditions is due to the footballer's own gross negligence, the general rules governing breach of contract apply. Accordingly, whatever the duration of the illness or impairment is, the club may request the reduction of the compensation or, in the most serious cases, the termination of the contract. (Art 15 CBA)

4.4 *Rest, holidays and special leave.*

The footballer has the right to one day of rest each week, generally within the first

²³ In the event of an accident outside the framework of the activity carried out for the club to which he belongs, the footballer shall promptly notify the club in writing so as to allow the latter to fulfil its formal obligations with the insurance company, within the terms laid down in law or contractually (Art. 16.6. CBA).

In the event of an injury suffered in the framework of the activity carried out for the club to which he belongs, the responsibility for making the report and all other subsequent obligations provided for in the policy and/or in law, required by the footballer or those entitled through him to obtain the indemnities for the basic insurance and for the integrative insurance, are the responsibility of the club which will therefore be responsible for all omissions in the matter (ART. 16.7).

The footballer shall also be obliged to submit himself to an official medical examination, at the club's request for the purposes of drawing up what are known as asset insurance policies in the club's favour (Art. 16.8).

two days of the week.²⁴

The footballer has also the right to an annual period of rest of four weeks, including holidays and weekly rest days.

The club will choose the annual rest period and shall reimburse the travel costs to the players if they are called up during such a period.

Finally, the footballer is also entitled to a paid leave for marriage of at least five consecutive days.²⁵

5. Club's obligations

The most important obligation of a club vis-à-vis its players is to remunerate them for their services according to the provisions of both the ESA and the CBA.²⁶

The amount of the remuneration must be expressed in gross terms but the parties are free to also indicate the net terms; it shall be indicated for each sports season and shall refer to any emolument, compensation or allowance to which the footballer is entitled.²⁷

Clubs can agree with their signed footballers:

- a) a fixed compensation which shall be paid in monthly instalments of identical amounts and may not be reduced or suspended unilaterally; or
- b) a compensation composed of a fixed part and a variable part linked to the achievement of individual – sporting and not sporting – results²⁸ – or team results (this second part being the “Variable Part”).²⁹ The Variable Part of the compensation shall be paid in accordance with the procedures established in the Contract or in the Other Deeds.

As for the bonus linked to the team's results, the club's representative and the duly mandated players' representatives, representing at least 3 footballers, shall sign an agreement on that matter.

The amount of the fixed part varies according to the championship and/or the international competition in which the club participates or will participate.

The variable part cannot exceed the fixed part when the latter is above a certain threshold (400,000.00 Euros gross per season).

In the event of a delay of over one month in the payment of the

²⁴ Art. 18 CBA.

²⁵ The period for enjoyment of the leave shall begin on the day before the wedding but, taking account of the requirements of the competitive activities, it may be granted or completed during the thirty days following the wedding.

²⁶ Art. 2 ESA.

²⁷ Art. 5 CBA.

²⁸ Art. 4.1. CBA states that parties remain free to determine the nature and context of such results.

²⁹ The individual or team sports results may be represented by way of example:

- a) *as regards the team results*: by the achievement of places in the classification, by the winning of titles, by the right to take part in European Cups and by remaining in the same division;
- b) *as regards the individual results*: by the number of appearances, by the number of goals scored, by the number of goals conceded.

remuneration, the footballer shall be entitled to monetary reassessment plus legal interest, to be calculated on the net amount, starting from the first day after the one on which the payment was due.

6. Termination of the contract

Each party is entitled to terminate the contract of employment unilaterally for *just cause*,³⁰ applying the relevant provisions of the collective bargaining agreement or by mutual consensus.

The sporting activities are excluded from the scope of application of the general rules dealing with individual dismissals for disciplinary reasons. Indeed, the provisions of article 7 of Law 604/66 provide for a cumbersome and long procedure which would unreasonably extend the length of the judicial case in sports justice, and thereby jeopardize the organization of sports events.³¹ However, those ordinary rules do apply within the sports domain to all matters that are not technical or sports-related.

In principle, every sports club deals with breaches of contract, whenever the sports-related offences do not fall within the sports federation's responsibility.

In reality, the sports clubs³² no longer have any disciplinary power to

³⁰ It occurs when a fact or situation arises such that the employment relationship cannot be continued even temporarily. 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.

³¹ The basis of the employer's managerial authority is to be found in Art. 2106 of the Civil Code, whose provision was subsequently incorporated into the workers' statute, but hedged 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, the offences for which each of these sanctions may be applied, and the procedures for appealing against them, must be made known to employees by being posted 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 defense; 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 responsabilità degli atleti*", *Riv. dir. sport.*, 1985, 389.

³² 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.

issue sanctions which go beyond a verbal reproach, while the federations decide on all other measures. Art. 12 CBA provision entitles the footballer to ask for damages and/or the termination of the contract when the club does not fulfil its contractual obligations.

If the club does not allow the player to take part in training sessions and matches, the footballer should give written notice to the club and ask it to comply with the employment agreement.³³ If the Club does not comply spontaneously within three days of receipt of the notice, the footballer can refer the matter to the Arbitration Body in order to obtain either his reinstatement or the termination of the contract. In both cases, the footballer is entitled to receive compensation for the damages suffered in the measure of not less than 20% (twenty percent) of the fixed part of his gross annual compensation.

If, after the decision of the Arbitration Body for the reinstatement of the footballer, the club does not comply within five days of receipt of the decision; the footballer will be entitled to obtain the termination of the employment agreement from the Arbitration Body and compensation for damages incurred.

The compensation will be equal to the remuneration allowed to the footballer for the rest of the sporting season.

According to Art. 13 CBA, the omission of payment of the salary, even for one month, may lead to the termination of the contract upon condition that the player has given written notice to the club and a copy to the league, and that 40 days (20 + 20) have elapsed from the moment the salary was due.

In the event that the club fails to meet the time limits established in the CBA, the player may ask for the termination of the agreement to the Arbitration Body.

If the termination of the employment agreement is granted, the footballer shall receive compensation – on a monthly basis - equal to the fixed part of the remuneration for the number of months remaining before the legal expiration of the agreement or before the date of entry into force of a new employment agreement with another club.

Moreover, he may also be entitled to have a lump sum, determined by the Arbitration Body which takes account of the amount of any variable part of the remuneration as well as the collective bonuses (Art. 13.7 CBA).

Of course, the termination of the contract shall also imply the termination of other deeds which the parties may have concluded in relation to their professional relationship.

As already mentioned, the club can also for the termination of the employment relationship when the player is declared as unfit and unable to play for more than six months (art. 15.4 CBA) and also when the player has been found

³³ In any case in which the footballer is excluded from preparation and/or training with the first team, even preventively, the club's obligation to provide the footballer with suitable equipment for athletic preparation and make available an environment in keeping with his professional dignity under art. 7.1, par. 1, shall remain in force, unless it has been expressly waived by the footballer in writing.

guilty of a criminal offence in Italy or abroad (art. 11.5 CBA).

Pursuant to Art. 11 CBA, footballers who have failed to fulfil their obligations under the employment agreements and the FIGC regulations are subject to the following sanctions:

- a) written warning;
- b) fine;
- c) reduction of pay;
- d) temporary exclusion from training sessions and pre- championship preparation with the first team;
- e) termination of the Contract.

The written warning is given directly by the club within 20 days from the date it became aware of the relevant facts.

The fine shall consist of a contractual penalty, the amount of which shall not exceed 25% of one twelfth of the fixed part only of their gross annual remuneration. In the event of the accumulation of several breaches of the agreement committed during the same month, the fine shall not exceed 50% of one twelfth of their gross annual compensation (fixed part) (art. 11.3 CBA).

In any case, reduction of the compensation shall be of a compensatory nature 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.

Pursuant to art. 11.4 CBA, in the event of a player's disqualification by a national or an international Sports Justice body, the club may propose a reduction of up to 50% of the gross remuneration for the period corresponding to the length of the disqualification. The Arbitration Body shall take into account:

- a) the fixed part of the remuneration;
- b) the nature of the offence anti-regulatory conduct occurring and the damages caused to the Club.

For doping offences, including cases other than those resulting in a disqualification, the reduction of the compensation may also affect the Variable Part of the compensation (art. 11.4 iii), CBA).

7. Labour disputes in football

In football, both players and clubs may defer their disputes related to the employment relationship to an Arbitration Body.

This is in line with the relevant national legislation, art. 806 and following of the Code of Civil Procedure, which allows the parties to refer their labour disputes to arbitration only in those cases established by collective agreement, provided that there is no prejudice to the parties' ability to have recourse to litigation and that the arbitration award can be challenged before a court.

In the so-called 'ritual arbitration' (the procedure duly provided for by the Italian Code of Civil Procedure which includes the possibility for the parties involved to lodge an appeal with the Ordinary Court of Appeal) the arbitration

proceeding ends with an award which, once endorsed by a civil court of first-instance in labour matters, becomes enforceable.

The so-called ‘Non-ritual arbitration’, which basically represents a contract between the parties involved, is allowed only in cases provided for by law or by collective agreements. It is not regulated by law but only by the parties. The arbitration award does not have the nature of a court decision but it is rather a private agreement. In football, the arbitration procedure falls under this category (art. 1.5 of annex to CBA)

Article 4, paragraph 5 of Law No. 91/81 states that the employment agreement in sport may contain an arbitration clause deferring disputes related to the implementation of the contract between the sports club and the player to an arbitration panel. The clause itself must contain the names of the arbitrators or establish the number of arbitrators and the procedures for appointing them.

In football, the collective bargaining agreement and the employment standard agreement make reference to such a clause.

In fact, Art. 21 CBA clarifies that, by signing the employment agreement, the parties undertake – on the basis of their registration to a club and, therefore, to the sports association – to accept the jurisdiction and the awards of the Arbitration Body without any reservation.

In light of this, Art. 4 ESA provides that all disputes regarding the interpretation, execution or termination of the contract or of the other deeds, as well as all disputes that relate in any way to the relationship between the club and the player, shall be referred for settlement to the Arbitration Board which will decide according to the relevant provision foreseen in the relevant regulations attached to the Collective Bargaining Agreement.

Such regulations contain detailed provisions concerning the appointment of arbitrators. Two out of the three are appointed by the parties while the chairman is appointed by the two already appointed arbitrators. The parties may also decide to appoint a single arbitrator.

Arbitrators must sign a confidentiality note and shall avoid any situation threatening their impartiality and independence (art. 4 of Annex).

The regulations, of course, contain the procedural steps and formalities to be fulfilled with regard to the complaints and the replies, as well as the production of documents and memorials.

It is interesting to note that in the last decade the Arbitration Body has not dealt with any major dispute because of the rigorous tax control and audit by the relevant FIGC bodies as well as to the difficulty to appoint a complete panel of arbitrators.

8. *Social security*

In accordance with the provisions established under Article 9 of Law No. 91/1981, the rules on compulsory insurance for disability, old-age and survivor’s pensions,

apply to sports professionals, namely to professional football players and coaches of Serie A, B, and Lega PRO.³⁴

The social security system in football is managed by INPS (the national pension scheme body) through a dedicated fund and it has been significantly modified over the years in the context of general compulsory insurance reform in the Italian scenario.³⁵

In view of this, both old-age pension and seniority pension systems have now been unified in a new seniority pension regime for those workers to whom only the contribution-based method of pension calculation is applicable.

The main point of such a reform is the introduction of a pension scheme based on the contribution method which is intended as the payment of a given number of daily contributions over the time span considered: annual contributory cover is acquired by paying a number of daily contributions.³⁶

In fact, new terms and conditions regarding the requirements related to the years of contribution and the minimum retirement age, as well as to the applicability of pre-established cut-off dates, in accordance with the entitlement and eligibility requirements for an old-age pension, have been implemented.

In particular, the players should pay “contributions” to the insurance body for 5200 working days i.e. at least 16 years and 8 months over a period of 20 years from the first payment. The amount of the pension they are entitled to in 2014 should not be less than 447.61 multiplied by a coefficient of 1.5.³⁷

Then, the minimum retirement age is in principle 66 years old, which could be 70 or 63 years depending on the amount of contributions they had paid.³⁸

Finally, taking into due account the specificity of the footballers’ activity and, in particular, the short-term nature of their playing career, they are allowed to go on early retirement provided that they have met the relevant requirements concerning the payment of the insurance for a given number of years.³⁹

³⁴ Law No. 366 of 14 June 1973, in *Official Journal* No. 173 of 9 July 1973.

³⁵ See Law No. 335 of 8 August 1995, in *Official Journal* No. 190 of 16 August 1995 and Legislative Decree No. 503 of 30 December 1992, in *Official Journal* No. 305 of 30 December 1992. For a comprehensive overview of the pension scheme applied to football players see Assocalciatori, “Pension services for Sports Professionals” at www.assocalciatori.it/enpals/file_scarica_ok/Manuale%20pensione%20-%20English%20version1.pdf (visited on 13 August 2014).

³⁶ Those players that, by 31 December 1995, already had a more than 18 years of contributions can benefit of the so-called “pensione retributiva” which is composed of two parts, A and B. Part “A” takes into account the best 540 daily wage payments credited over the years; on the contrary part “B” takes in to account the best 2080 daily wage payments. The contributions accrued up to 31/12/92 are considered.

For those players that by 31 December 1995 had acquired less than 18 years of contributions, a mix regime based on both seniority and contribution system applies.

³⁷ D.L. 24 January 2012 N. 1, so-called Decreto “Salva Italia”, art. 24, para. 7.

³⁸ As of January 2013 pensions are linked to life expectations. Therefore, the above-mentioned minimum retirement age (66, 70 or 63) may be increased by 3 months in the future.

³⁹ These requirements are fully explained in detail in the “Pension services for Sports Professionals” available at www.assocalciatori.it/enpals/file_scarica_ok/Manuale%20pensione%20-%20English%20version1.pdf.

Conclusion

The multi-layered level system (State Law, sports association rules, collective bargaining agreements), which characterizes the Italian football apparently works quite well.

This is very important if we consider that football is the major sport in Italy and its huge cash flow partially cover the expenses of many other minor sports.

Football is a truly global industry, where professional footballers are not workers as the others because of the specificity of the sector, the short period of their professional activity, and the attention they receive by media and supporters.

Moreover, clubs invest a lot of money in acquiring the players' services hoping to receive a profit in both sporting and economic terms (TV rights, sponsors, marketing, and merchandising).

Both clubs and players have specific rights and obligations, which have been enshrined in the collective bargaining agreement currently in force. It is the result of years of lively negotiations which led to very good results for both clubs and players.

In particular, players have their fundamental rights as workers finally recognized (right to play, work and train, and social security) while clubs can rely on more guarantees concerning the players' services.

In fact, the analysis of the relevant rules applying to professional football brings us to the conclusion that the stakeholders are quite satisfied with the current regulatory system and its implementation by the sports association.

**EMPLOYMENT RELATIONSHIPS AT NATIONAL LEVEL:
JAPAN**

by *Takuya Yamazaki**

SUMMARY: Introduction – 1. Employment regulation and football structures – 2. Individual employment relations in professional football – 3. Doping issues – 4. Transfer of players – 5. Social security principles – 6. Labour dispute settlement

Introduction

The Japan Professional Football League was established in 1993 (“J-League”)¹, so its history is still relatively young. However, the J-League has expanded rapidly in a very short time – from a mere 10 team one division format at its inception to a 51 team three division format in 2014 (1st division (“J1”) – 18 teams; 2nd division (“J2”) – 22 teams; and 3rd division, established in 2014 (“J3”) – 11 teams) – to become Asia’s most high-profile, developed league. The J-League constitutes a relatively large labour market, with over 1,000 Japanese players registered plus a number of foreign players. In principle, J1 and J2 clubs are subject to a foreign player quota, under which they may register three foreign players plus an Asian player – who is a citizen of a country in the Asian Football Confederation (“AFC”)². (J3 is subject to a stricter foreign player quota. Please refer to 1.1.6 below.)

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Further information about Takuya, his lectures and achievements can be found at: www.field-r.com/en/people.

¹ The J-League website in English is available at: www.j-league.or.jp/eng.

² The AFC website in English is available at: www.the-afc.com/en.

1. *Employment regulation and football structures*

1.1 *Sources of law and approaches (including public law, private law, and employment law)*

1.1.1 *Introduction*

In Japan there are no special laws, such as labour law regulations, for professional sports people like footballers. In fact even as the law has expanded to the sports world with the enactment of Japan's Basic Act on Sport ("BAS")³ in 2011, there are no regulations therein that mention the legal status of professional sports people. As a result, there has long been controversy in the law about how professional sports players, like footballers, should be treated in relation to Japan's general labour law regulations.

1.1.2 *Professional footballers as 'workers'*

One thing that has long been debated in Japanese professional sport, is whether it can be said that professional athletes, like footballers, are 'workers' under the related Japanese labour law and legislation?

For instance, it is not doubted that parties such as professional golfers and athletes, who are independent and lead professional lives based on revenue from prize money and sponsorship, are 'sole-proprietors'. However, what is the situation when professional athletes, such as baseball and football players that belong to professional clubs and provide services under the orders of these clubs (including for training and match participation)?

Are the contracts between these players and clubs not considered 'employment contracts' under the Civil Code (articles 623–631)⁴ or 'labour contracts' under the Labour Contracts Act ("LCA")?⁵ In other words the issue is whether the legal status of these professional athletes is that of 'workers'?

The merit of debating this issue is the following point: does labour law in Japan (including, the Labour Standards Act ("LSA"),⁶ the Labour Union Act ("LUA")⁷ and Industrial Accident Compensation Insurance Act ("IACIA")⁸ apply to professional baseball and football players?

In relation to this point, there have been arguments among sports law experts about whether, in general, such a professional player contract is an

³ *Basic Act on Sports*, law no. 78 of 2011.

⁴ *Civil Code*, law no. 89 of 1896 and amendment law no. 78 of 2006.

⁵ *Labour Contracts Act*, law no. 128 of 2007.

⁶ *Labour Standards Act*, law no. 49 of 1947 and amendment law no. 147 of 2004.

⁷ *Labour Union Act*, law no. 174 of 1949 and amendment law no. 87 of 2005.

⁸ *Industrial Accident Compensation Insurance Act*, law no. 50 of 1947 and amendment law no. 111 of 2007.

employment contract for ‘workers’ or a *service contract* for ‘sole proprietors’. However it has to be noted that there is a difference between the definition of the term ‘worker’ in the LUA and ‘worker’ in the LSA and the IACIA. Due to the more extensive interpretation afforded to ‘worker’ in the former case, it becomes necessary to reconsider the application of the term for each piece of legislation, respectively.

1.1.3 ‘Workers’ under the LUA and professional footballers

First, ‘workers’ under article 3 of the LUA are defined as, “*those persons who live on their wages, salaries, or other equivalent income, regardless of the kind of occupation.*”

In 2011 the Japan-Pro Footballers Association (“JPFA”)⁹ acquired certification as a labour union from the Tokyo Metropolitan Government Labour Relations Commission (“TMGLRC”).¹⁰ Therefore, at the very least there is no doubt that these players are regarded as ‘workers’ under the LUA.

In fact, when the Japan Professional Baseball Players Association (“JPBPA”)¹¹ held its strike in 2004 the Nippon Professional Baseball (the national baseball league; “NPB”)¹² clubs asserted that the players were not classified as ‘workers’ under the LUA. However, this assertion was rejected when the Tokyo District Court confirmed that professional baseball players under the Act were ‘workers’.¹³ Furthermore, when the NPB did not hold negotiations in good faith with the JPBPA in March 2002, the association claimed legal redress against unfair labour practices based on the LUA to the TMGLRC. In the proceedings, the commission went through the procedure on the basis that the players were ‘workers’ (settlement was reached between the parties in March 2004).¹⁴

1.1.4 ‘Workers’ under the LSA and the IACIA and professional sports players and athletes

A ‘worker’ under article 9 of the LSA is defined as, “*a person who is employed at an enterprise or place of business and receives wages, regardless of the kind of occupation.*” This definition of ‘worker’ is also the same in the IACIA and the Minimum Wages Act.¹⁵ Correspondingly, in determining whether or not the term

⁹ The JPFA website in Japanese is available at: www.j-pfa.or.jp.

¹⁰ The TMGLRC website in English is available at: www.torou.metro.tokyo.jp/lang/en/index.html.

¹¹ The JPBPA website in Japanese is available at: <http://jpbpa.net>.

¹² The NPB website in English is available at: www.npb.or.jp/eng/.

¹³ Tokyo District Court judgment for preliminary injunction, 3 Sep. 2004; Tokyo High Court judgment for preliminary injunction, 8 Sep. 2004 (please see Keiji Kawai, ‘A Consideration of the Japan Professional Baseball Players Association’s Strike – the Legal Rights of Professional Baseball Players’, *Legal Classroom*, no. 291, 2004 (Tokyo: Yuhikaku Publishing Co., Ltd.), 4.

¹⁴ *Ibid.*

¹⁵ *Minimum Wages Act*, law no. 137 of 1959.

‘worker’ applies in these cases, in general an assessment of various factors needs to be made (including, if there is freedom to accept or decline the work, and also if commands are given in relation to the work?).

From this perspective, it seems as though there is no reason for professional footballers to be excluded from the term ‘worker’ under the LSA. However, those players have not been treated as ‘workers’ in the sense that it is defined under the LSA. Please note that although to date there have been no specific court judgments on this point, it is still possible that in the future a court may judge professional footballers to be ‘workers’ under the Act.

Up until now, the main reason that those players are not treated as ‘workers’ as defined by the LSA, is because the Act’s chief purpose is to provide regulations for industrial workers (including for working hours) and not to control specialist professions such as football players. Therefore, it is widely believed that it is out of place to apply this Act to professional athletes, like footballers, as ‘workers’.

However, at present it has to be noted that as work arrangements diversify the amount of regulations for specialist professions is increasing, even within the LSA. Therefore, it is quite possible that these regulations and the Act will apply in some part to professional sports players.

1.1.5 Treatment under the tax law

Under Japanese tax law professional footballers are not treated as ‘workers’ but as ‘sole proprietors’. In other words, for tax purposes the compensation such players receive from their clubs is treated as business not employment income.

On these grounds, there is the assertion that sports players will not be ‘workers’ under labour law. However, whether an employee in a certain profession is classified as a ‘worker’ – just like the fact that this differs from the definitions of ‘workers’ under both the LUA and the LSA – must also be determined in light of the intent and purpose of each piece of legislation. It follows therefore that just because someone is not treated as a ‘worker’ under tax law, they cannot be considered as such by other laws. This point became apparent from the court judgment that stipulates professional baseball players are ‘workers’ under the LUA.¹⁶

1.1.6 The legal status of foreign footballers

In principle players without Japanese citizenship are considered as foreign players, who are restricted by the foreign player quota. However according to article 69 of the JFA Basic Regulations each team can exclude one player from the foreign quota if this player was born in Japan and satisfies either of the categories listed below:

(1) a person who is completing or has completed their compulsory education as

¹⁶ Tokyo District Court judgment for preliminary injunction, 3 Sep. 2004.

defined under article 4 of the Basic Education Act at a school defined under article 1 of the School Education Act (“SEA”);¹⁷ or

- (2) a person who has graduated from a high school or a university, which are defined under article 1 of the SEA.

There are concerns about whether the restrictions in the said foreign player quota are reasonable in relation to the principle of equality stipulated under article 14 of the Constitution of Japan.¹⁸ However, a case concerning the legality of these restrictions has yet to be brought in Japan.

Below are the restrictions for foreign players at Japanese clubs in J1 and J2.

- Each team can only sign contracts with a maximum of three foreign players.
- However, by way of exception, teams can also sign contracts with:
 - 1. Players under twenty who are on ‘C’ professional contracts (maximum annual salary of 4.6 million JPY; around 34,400 EUR). (Please refer to 2.1 below for more details on this.)
 - 2. Players who are citizens of AFC countries (restricted to one such player [“Asia Quota”]).
 - 3. Players who are citizens of J-league partner countries (e.g. Thailand, Vietnam, Myanmar, Cambodia, Singapore and Indonesia) (this is not restricted to one such player as opposed to 2 [“Partner Quota”]).
- Team’s foreign quota must not exceed five players.
- In an official game a maximum of three foreign quota registered players can play. The Asia Quota is counted separately.

Regarding J3, each team can only sign contracts with a maximum of two foreign players plus one Partner Quota player.

1.2 The national football structure in Japan

1.2.1 Japan Football Association (“JFA”)

In Japan the JFA¹⁹ is the governing football association (“FA”); it is a member of FIFA and the AFC, as well as the East Asian Football Federation (“EAFF”).²⁰ Under the auspices of the JFA, there are also nine large regional FAs (Hokkaido, Tohoku, Kanto, Hokushinetsu, Tokai, Kanto, Chugoku, Shikoku and Kyushu) and 47 prefectural FAs to govern football domestically. The JFA is also responsible for administering the J-League, the amateur leagues and the women’s leagues (all covered below). In 2013 1,454,199 people were registered with the JFA as football stakeholders (including players, managers & coaches, referees, instructors and officials).

¹⁷ *School Education Act*, law no. 26 of 1947 and amendment law no. 98.

¹⁸ The *Constitution of Japan* website in English is available at: http://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html.

¹⁹ The JFA website in English is available at: www.jfa.or.jp/eng/index.html.

²⁰ The EAFF website in English is available at: www.eaff.com.

1.2.2 J-League

The J-League was established in 1993. It currently consists of 51 clubs: 18 in J1; 22 in J2; and 11 in J3, which came into being 2014. The official league season for the first teams of the said clubs follows the so-called summer format – starting in early March until late November/early December.

1.2.3 Amateur league

The amateur league in Japan is run as a pyramid structure, with the Japan Football League²¹ at the top, followed by the nine regional leagues and the various prefectural leagues.

1.2.4 Women's league

The women's league is run nationally on a two division 26 team basis: the 1st division is called the Nadeshiko League²² with 10 teams; and the 2nd division is called the Challenge League with 16 teams. Below the national league there are the nine regional leagues and the various prefectural leagues. On the whole most players are amateur, however there are a small number of footballers with professional contracts.

1.2.5 Futsal league

In addition, there is also a national futsal league called the F-League with 12 teams.²³ Most of the players are amateur, but the existence of some players on professional contracts effectively makes it a semi-professional league.

2. Individual employment relations in professional football

2.1 Players' contracts in practice and legal issues

In general the contract that is entered into between players and clubs in Japanese professional football is a standard player contract formulated by the JFA ("JFA Standard Contract"). (It is sometimes the case that side contracts with separate conditions are entered into between the parties.)

There are three types of player contracts in Japan: 'Professional A Contract' ("Pro A"); 'Professional B Contract' ("Pro B"); and 'Professional C Contract' ("Pro C"). In principle, all rookie players start on the Pro C contracts, which have a maximum basic annual salary of 4.6 million JPY (excluding

²¹ The Japan Football League website in Japanese is available at: www.jfl.or.jp/jfl-pc/view/s.php?a=1.

²² The Nadeshiko League website in Japanese is available at: www.nadeshikoleague.jp.

²³ The F-League website is available in Japanese at: www.fleague.jp.

consumption tax; around 34,400 EUR). (This limit is to prevent high salary bidding wars by clubs to sign rookie players.)

If rookies play in official matches for a prescribed amount of time it is possible for them to then enter into Pro A or Pro B contracts (the prescribed amount of time in official matches is: 450 minutes in J1; 900 minutes in J2; and 1,350 minutes in J3).

Many players go on to enter into Pro A contracts that do not have a cap on the annual salary. However, in cases where clubs cannot enter into Pro A contracts with players – such as where J2 and J3 clubs are in bad financial condition or where a club has exceeded the number of Pro A contract footballers that it can register (the limit is 25 players) – these clubs will then sign Pro B contracts, which like Pro C contracts have a maximum annual salary of 4.6 million JPY, with players.

Although the JPFA acquired the legal status of a labour union only relatively recently in 2011, there is still no collective bargaining agreement in existence for football in Japan (the JPFA was established in 1996 but until 2011 it was not a labour union for 15 years). Therefore, the current content of the JFA Standard Contract was not drafted based on labour negotiations with the JPFA.

Moreover, there is the problem that the JFA Standard Contract does not meet the minimum requirements, as stipulated by FIFA in its circular no. 1171, for standard player contracts.²⁴ (In particular the minimum requirements have not been guaranteed: (a) concerning players' image rights; and (b) in relation to the provisions dealing with injuries to ensure that players have the right to seek second or third opinions from specialist medical practitioners in case there are differing opinions between the club and the player.)

2.2 Parties to the player contract

The player contract is entered into by the player and the club. In the case of entering into a professional player contract, if the player's agent participates in the contract negotiations the agent must also sign the contract.

2.3 Terms incorporated into the player contract – the player's duties/obligations

In the player contract there are three main types of provisions that stipulate the player's obligations.

A) Provisions concerning the player's work (activities) obligations

This includes the obligation to play in matches determined by the club, and to participate in other activities, such as training, as a player for the club he belongs to.

B) Provisions concerning compliance obligations and prohibitions

²⁴ FIFA circular no. 1171, *Professional Football Player Contracts Minimum Requirements* (Zurich: FIFA, 24 Nov. 2008), this is available at: www.fifa.com/mm/document/affederation/administration/97/29/01/circularno.1171-professional-football-player-contract-minimum-requirements.pdf.

This includes: the compliance with regulations stipulated by football governing bodies, such as the JFA's Basic Regulations and the J-League Regulations; various prohibitions such as not participating in other sports matches, not disclosing internal club matters to outside parties, not using prohibited substances, and not participating in misconduct or criminal activity.

C) *Provisions concerning the player's playing condition*

This includes a guarantee that the player will perform to the best of his ability and the obligation to attend health and medical checks.

2.4 *Terms incorporated into the player contract – the club's duties/obligations*

In the player contract there are three main types of provisions that stipulate the club's obligations.

A) *Provisions for payment obligations*

The amounts the club must pay the player are mainly set out in the following categories: basic (annual) salary; bonuses based on factors such as the player's appearances in matches, match results (i.e. win or draw), the club's final league position (i.e. champions or other achievements); goal payments; bonuses for being selected for the Japan national team; bonuses for being selected in the J-League's Best XI; and other incentives based on results and performances. Furthermore, clubs often pay a player who signs his first contract with or who transfers to the club an 'allowance' to cover his initial costs, such as for new furniture (the limit for these allowances is set at 5 million JPY (around 36,000 EUR) in the 'Basic Allowance Regulations' formulated by the J-League's board of directors).

Up until 2013 in player contracts the aforesaid basic salary and incentive payments were stipulated inclusive of consumption tax. However, as Japanese consumption tax was increased from 5% to 8% in 2014, along with the government's mandate, these payments are now stated in the player contracts as exclusive of consumption tax. (For example, the Pro C contract previously stated the maximum annual salary, inclusive of 5% consumption tax, as 4.8 million JPY. However, this amount is presently stated as 4.6 million JPY exclusive of consumption tax.)

B) *Provisions for payment of costs for matches*

In order for players to play in matches it is stipulated in the player contract that the club shall bear the relevant transportation and accommodation costs.

C) *Other provisions*

Depending on the player, it may also be incorporated into his contract that the club shall provide him with additional benefits, including, the provision of housing and/or a car, and the payment of moving costs and insurance premiums. In particular for a foreign player there will often be specific provisions in the player contract for the club to provide interpretation and family support, as well as a certain number of return air tickets between Japan and the player's home country.

2.5 Terms incorporated into the player contract – miscellaneous

2.5.1 The contractual term and the player's status after expiry of the term

The term of the player contract will depend on whether it is a single or multiple year contract (in practice the usual contractual term is from 1 February to 31 January the following year).

It is logical to think that when the player's contract expires, he will become a free agent that is able to negotiate and enter into a contract with any club. However, this logic was not always the case in the J-League with domestic transfers, because for a very long period the league barred unattached players from transferring freely to other Japanese clubs. Even if a player's contract had expired the J-League adopted a system (the domestic transfer fee system) whereby the player's former club could demand a transfer fee from a new club in Japan. This effectively restricted the transfer of the player after the expiration of his contract.

In 2009 the J-League, in line with FIFA's regulations on international player transfers, finally abolished the long-criticised domestic transfer fee system. This liberalised the transfer situation for players following the expiration of their contracts; they could now join clubs without a transfer fee. (Please note that the J-League, since 2001 in line with FIFA regulations, recognised and permitted international transfers for unattached players. However, the league did not extend this leniency to Japan as it still restricted domestic transfers even from 2001 onwards.)

2.5.2 Paid holiday

Article 6 of the JFA Standard Contract stipulates:

“Following the conclusion of the championship season, the Player is entitled to take at least two weeks paid holiday. Provided, however, that the Player shall use this holiday for the purpose of rest and recuperation.”

2.5.3 Termination

The player contract contains two respective articles stipulating the situations where the club and the player may terminate the contract during its term.

In the case of termination by the club, it may terminate the contract due to the player's conduct (e.g. when the player breaches the contract or the club's regulations) or when the player is permanently incapacitated from playing (e.g. through illness or injury). In practice there are many cases where players have their contracts terminated due to their misconduct. Also, in practice, a player (please note, this occurs mostly with foreign players) who has his contract terminated during its term by the club will be paid the consideration remaining under the contract (i.e. up until the contract's expiry date).

In the case of termination by the player, he may terminate the contract for reasons, including when the club is late in paying his salary or when the club without just cause does not allow the player to participate in official matches. However, such problems rarely occur in Japan (the late salary payment problems that ravage many other countries are almost non-existent in Japan).

2.5.4 *Illness or injury*

Article 7 of the JFA Standard Contract stipulates that when the player becomes ill or injured while performing his duties under contract (e.g. in an official match or training), the club shall bear all the related costs, including medical, for this.

2.5.6 *Image rights*

The player's image rights are fully controlled and administered by the club; the player is not able to freely exploit these rights (article 8 of the JFA Standard Contract). This does not comply with the aforesaid FIFA circular no. 1171 (entitled: "Professional Football Player Minimum Contract Requirements"), which stipulates:

"As a recommendation and principle the individual player may exploit his rights by himself (if not conflicting with clubs' sponsors or partners) whilst the Club may exploit the Players' image rights as part of a group and/or the whole squad."

However, in practice it is common for Japanese clubs that exploit a player's image rights for purposes such as merchandising, to pay the player a prescribed royalty for this.

2.5.7 *Sanctions*

According to article 11 of the JFA Standard Contract, a club may impose a sanction on a player if he is cautioned or sent off in a match (and receives a match suspension as a result), or if he breaches the club's disciplinary regulations or code of ethics. For each such offence the player commits the club may impose a fine – the amount to be determined by the club – which may not exceed 50% of a twelfth of the player's basic annual salary. Also, depending on the club in question, there are cases where more details about the types of misconduct and fines are stipulated in separate contracts or in the club's regulations.

3. *Doping issues*

In Japan there has been no special statutory legislation in relation to doping, with anti-doping activities taking the form of internal regulations within each sports association or organisation. However, the use of substances prohibited by anti-doping regulations can, depending on types of substances, violate criminal legislation

such as the Stimulants Control Act²⁵ and the Cannabis Control Act,²⁶ and thus be subject to corresponding criminal sanctions. Nevertheless, according to the principle of culpability in relation to criminal sanctions, parties cannot be punished without at least being negligent.

Although the associations of the major Olympic sports in Japan have joined the Japan Anti-Doping Agency (“JADA”),²⁷ there are doping-control cases carried out under the rules of professional sports organisations that are not JADA affiliated.

Until 2008 the J-League was not affiliated with JADA and also operated its own doping controls based on its independent doping rules. The Kazuki Ganaha incident, which occurred in 2007 – thus far the most significant doping case in Japanese football – was dealt with under this system.

In this dispute the J-League club Kawasaki Frontale player Kazuki Ganaha demanded the revocation of a league imposed six match suspension for an alleged breach of doping rules. Initially Ganaha’s desire was to have the arbitration held at the Japan Sports Arbitration Agency (“JSAA”)²⁸ but the J-League rejected this and announced that the case must be heard at the Switzerland-based Court of Arbitration for Sport (“CAS”).²⁹ Therefore the player had no other option but to file for CAS arbitration. In the end Ganaha’s case was accepted by CAS, which ruled that the J-League imposed suspension should be revoked.³⁰

Nevertheless, for the CAS arbitration Ganaha bore a total of 34 million JPY in costs (around 247,000 EUR), which included expenses for translation, interpretation and expert witness statements.

Had the J-League accepted arbitration at the JSAA such massive costs would not have arose. Moreover, the J-League drew stinging criticism from the mass media for its stubborn insistence on the CAS being the forum for the arbitration.

Ganaha’s alleged misconduct was recognised based on the 2007 World Anti-Doping Agency (“WADA”)³¹ Code.³² However, the sanction imposed on the player was based on the sanctioning regime stipulated in the ‘J-League Anti-Doping Regulations’ not the WADA Code (please note that had Ganaha been sanctioned under the WADA Code, he would have, in principle, been subject to a two-year suspension).

Following the Ganaha Incident the J-League became affiliated with JADA in January 2009 and changed its sanctioning regime in accordance with the WADA

²⁵ *Stimulants Control Act*, law no. 252 of 1951 and amendment law no. 94 of 2006.

²⁶ *Cannabis Control Act*, law no. 124 of 1948 and amendment law no. 160 of 1999.

²⁷ The JADA website is available in Japanese at: www.playtruejapan.org.

²⁸ The JSAA website is available in Japanese at: www.jsaa.jp.

²⁹ The CAS website is available in English at: www.tas-cas.org/news.

³⁰ CAS judgment, 26 May 2008, CAS 2008/A/1452, available at: <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/1452.pdf>.

³¹ The WADA website is available in English at: www.wada-ama.org.

³² The WADA Code is available at: www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/WADA_Anti-Doping_CODE_2009_EN.pdf.

Code. Thus, it is recognised under article 13.2 of the JADA Code³³ that a player subject to a doping violation has the right to appeal this to either the CAS or the JSAA. These specific provisions are stated below:

– For appeals to the CAS, article 13.2.1 states:

“In cases arising from Competition in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to the CAS in accordance with the provisions applicable before such court.”

– For appeals to JSAA, article 13.2.2 states:

“In cases involving National-Level Athletes, as defined by each National Anti-Doping Organisation, that do not have a right to appeal under article 13.2.1, the decision may be appealed to Japan Sports Arbitration Agency.”

4. Transfer of players

4.1 Transfer rules

In 1995 the European Court of Justice delivered the landmark Bosman ruling which literally shook the football world, especially in relation to the transfer of players.³⁴ In line with the Bosman ruling FIFA reformed its rules and regulations in 2001, which provided the basis worldwide for the freedom of players to transfer.

Even in Japan the rules were liberalised in line with the FIFA rules concerning international transfers. Therefore players from Japanese clubs whose contracts had expired could transfer for free to clubs in foreign countries. This reform was a massive blow for the J-League clubs that had collected large transfer fees since Hidetoshi Nakata’s 1998 transfer to AC Perugia in Italy’s Serie A.

Even though the JFA liberalised matters concerning international transfers, it did not adopt the FIFA rules regarding domestic transfers until much later. Thus, even after a player’s contract expired, domestic transfers for a long period still attracted fees based on a prescribed system of calculation, whereas there was no fee to sign for a foreign team.

In reaction to this the JPFA sought the support of FIFPro (the world football players’ union)³⁵ to remedy this inequitable domestic transfer situation. Consequently, the JPFA’s negotiations continued with the J-League, which led in 2009 to the long-overdue abolition of the domestic transfer fee system.³⁶

Nevertheless, despite the JFA’s abolition of this system, for domestic transfers it now applies a training compensation fee which is more than twice that stipulated in the FIFA circular no. 826 (31 October 2002).³⁷ This in turn has had

³³ The JADA Code is available in English and Japanese at: www.anti-doping.or.jp/downloads_code.php#jada_code.

³⁴ ECJ, judgment of 15 Dec. 1995, Case C-415/93, ECR 1995, I-4921.

³⁵ The FIFPro website is available in English at: www.fifpro.org.

³⁶ Yamazaki, *Professional Baseball and Football Players’ Rights and the Role of Lawyers in Japan*. 65.

³⁷ FIFA circular no. 826 on: ‘Revised FIFA Regulations for the Status and Transfer of Players:

the unfortunate consequence of creating a large obstacle to the domestic transfers of young players (under 23). The JPFA is currently demanding that this training compensation amount, which is in contravention of the FIFA rules, be remedied.

4.2 *Players' Agents*

In Japan the JFA in 2008 established regulations on players' agents ("JFA Players' Agents Regulations") based on the FIFA Players' Agents Regulations. (There is no legislation governing such agents at the national and local government levels in Japan.)

The JFA Players' Agents Regulations mainly cover the three following matters:

- A) the licence restrictions of agents;
- B) the legal obligations and prohibitions of agents; and
- C) disciplinary proceedings.

Regarding A), the parties that can act as players' agents are restricted to people that are licensed by the relevant national football association (e.g. JFA) or legally authorised practising lawyers (articles 3 and 4 of the JFA Players' Agents Regulations). (Please note that according to the article 4.1 of the FIFA Players' Agents Regulations the "*parents, siblings or spouse of the player*" are also exempt from the regulations regarding acting as an agent for a player, which are not stipulated in the JFA Players' Agents Regulations.)

Regarding B), the regulations cover the agents' obligations to comply with the code of professional conduct (article 9 of the JFA Players' Agents Regulations); and also the agents' reporting and written document submission obligations (including the obligation to submit agent contracts; article 19(6) of the FIFA regulations and article 15(5) of the JFA regulations). Furthermore, the term of players' agents' contracts are restricted to a maximum of two years (article 19(3) of the FIFA regulations and article 15(3) of the JFA regulations).

There are no regulations relating to players agents' remuneration. However it is recognised that where the players' agent and the player cannot reach agreement on the amount of remuneration to be paid, the players' agent is entitled to remuneration equivalent to three (3) percent of the player's basic income as stipulated in his contract (article 20(4) or the FIFA regulations and article 16(3) of the JFA regulations). (Please note that in practice, there many cases in the agent's contract with the player, where this remuneration is stipulated as between five (5) percent to ten (10) percent.)

Regarding C), in relation to activities carried out by JFA licenced players' agents in Japan the JFA is the competent body to impose disciplinary sanctions if required; for such activities conducted outside Japan (e.g. for the rest of the world)

the JFA shall cooperate with FIFA to determine the jurisdiction for the imposition of disciplinary sanctions.

In accordance with article 24(1) of the JFA Players' Agent Regulations, the JFA Arbitration Committee is the body charged with resolving domestic disputes related to the activities of players' agents.

5. *Social security principles*

5.1 *Illness, injuries and invalidity*

As afore-mentioned in section 1.1.4, Japanese professional footballers are not treated as 'workers' under the IACIA, so if they are injured or fall ill whilst carrying outside their activities as footballers they are not eligible to claim industrial accident compensation insurance.

5.2 *Unemployment insurance*

As Japanese professional footballers are not considered as 'workers' under the Employment Insurance Act,³⁸ they are treated differently to regular 'workers' and cannot therefore receive unemployment insurance when they lose their jobs.

5.3 *Pension schemes/career funds*

Under the Welfare Pension Insurance Act³⁹ Japanese professional footballers are not classed as 'workers'. Thus, these footballers are treated differently to regular 'workers' in that they cannot claim welfare pension insurance upon reaching the requisite pensionable age.

In Japan the situation remains that all citizens, including sole proprietors/individual business operators, are eligible to receive the national pension insurance. At present there is no specific pension scheme in existence for footballers. The only related initiative in place for these players is the lump sum payment scheme that the JPFA operates for its player members when they retire from the game.

5.4 *Insolvency of clubs and protection of players*

According to an interpretation of the Japanese bankruptcy law, a player may be regarded as a 'worker' and should be entitled to the right to a claim on the estate of his insolvent club. This right to claim would be in priority to the rights of general creditors.

³⁸ *Employment Insurance Act*, law no. 116 of 1974 and amendment law no. 30 of 2007.

³⁹ *Welfare Pension Insurance Act*, law no. 105 of 1952 and amendment law no. 96 of 2014.

6. *Labour dispute settlement*

Disputes in relation to contracts or transfers involving affiliated clubs or registered individuals under the auspices of the JFA (e.g. a dispute between a player and his club concerning the club's unilateral termination of his contract) are to be resolved through a dispute resolution conciliation process analogous to mediation by the JFA Arbitration Committee (article 42 of the JFA Basic Regulations) – one of the JFA's judicial organs, which is independent to the JFA Executive Committee.⁴⁰

The cost of applying for this conciliation process is 100,000 JPY (around 730 EUR) (article 9(3) of the JFA Conciliation Regulations). In order for a settlement from this process to take effect, all parties to the dispute must agree to the settlement or the judgment proposals formulated by the conciliators (articles 17 and 18 of the JFA Conciliation Regulations). However, if no agreement can be reached on a settlement by the parties the conciliation process will break down (article 20 of the JFA Conciliation Regulations). In other words, this dispute resolution process is not arbitration; it is merely a conciliation process.

Nevertheless, this conciliation process does not apply to disputes in the J-League (article 6 of the JFA Conciliation Regulations and article 42 of the JFA Basic Regulations) – a separate dispute resolution process is stipulated for the J-League. Basically, the J-League regulations state that regarding disputes in relation to contracts or transfers involving J-League clubs or players if the parties to the dispute pay a fee of 100,000 JPY, they may apply for this dispute to be 'decided by the J-League chairman'. (Article 137 of the J-League Regulations and the J-League Arbitration Committee Regulations. Please note that the 'chairman' represents the J-League and he is selected by the clubs; the players play no part at all in this selection.)

This is in effect an arbitration procedure, in which it is possible for the parties in dispute to agree upon a settlement (article 140 of the J-League Regulations and article 14 of the J-League Arbitration Committee Regulations). However, this procedure differs from the JFA conciliation process in that if the parties in dispute do not agree on a settlement the arbitration does not close and the chairman will decide the final outcome.

Furthermore, it is the chairman who appoints the members of the consultative committee (named the Arbitration Committee) with nobody from the players' side being involved in the committee at all. Therefore, it cannot be said in any way that the decisions handed down by this committee are administered by a fair, impartial third party body.

In other words, the disputes in the J-League (e.g. contract and transfer disputes) are dealt with by a so-called arbitration committee that cannot guarantee independence or impartiality. In essence, this cannot be described as arbitration

⁴⁰ An organisational chart of the JFA is available in English at: www.jfa.jp/eng/about_jfa/organization/jfa_structure.

because it is simply a procedure whereby the chairman – not a judicial organ – decides the outcome.

Most Japanese professional footballers belong to the J-League, so in terms of resolving disputes they cannot use the ‘JFA conciliation process’ and are merely stuck with J-League mandated ‘chairman decision procedure’. To put it plainly, because the players cannot be involved in appointing the Arbitration Committee members, there are grave doubts over this body’s ability to guarantee impartiality in the J-League’s dispute resolution process. The chairman’s decision making powers are enshrined in article 165 of the J-League Regulations, which states:

“In the J-League the decisions of the Chairman are final and binding in full on all related parties, individuals and organisations that belong to the J-League. Accordingly, no objections or grievances whatsoever to the decisions of the Chairman may be brought by third parties to a court of law or other such related institutions.”

In relation to contractual disputes, in the FIFA circular no. 1129 (28 December 2007) FIFA obliges all its constituent associations to establish fair and impartial national dispute resolution chambers (“NDRC”).⁴¹ The members of these chambers should be composed of an equal number of player and club representatives to guarantee fair proceedings. However, it is obvious that the J-League’s Arbitration Committee violates the provisions of this FIFA circular. Accordingly, the JPFA is currently demanding that the JFA establish an NDRC in line with this FIFA circular.

⁴¹ FIFA circular no. 1129, ‘National Dispute Resolution Chamber (NDRC) Standard Regulations, Standard Electoral Code and Standard Cooperative Agreement’ (Zurich: FIFA, 28 Dec. 2007), this is available at: www.fifa.com/mm/document/affederation/administration/circular_1129_en_33849.pdf.

EMPLOYMENT RELATIONSHIPS AT NATIONAL LEVEL: MÉXICO

by *Ricardo De Buen Rodríguez**

SUMMARY: 1. Introduction – 2. Employment regulation and football structures – 3. Individual employment relations in professional football – 4. Medical and doping issues – 5. Transfer of players – 6. Social security principles (unemployment and pensions) – 7. Labour dispute settlement – Conclusion

1. *Introduction*

The professional athletes who provide their services in Mexico and among them professional Football players, had to wait a considerable time until the Labour Law integrated them as such into our legislation, in order that they could be protected by it.

Globally, experts began to consider a regulation that clarifies the concept of professional athlete, at the end of the first quarter of the previous century. Likewise, Mariano Albor says “*the first attempt to regulate by specific rules the athlete’s quality is constituted by the regulations issued by the Olympic Congress of Prague in 1925, with ideas expressed in negative terms. In accordance with that resolution, non-amateur athletes are:*

- (a) *Anyone who is, or has been, knowing the cause, professional in his or her sport or in any other.*
- (b) *Anyone who has received compensation for lost wages concept* “¹

In Mexico, the specific chapter on professional athletes was not created until the reform of Mexico’s Federal Labour Law (hereinafter “FLL”), which was done in 1970 (with a new FLL in December 2012).

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¹ Albor Salcedo, Mariano; “*Deporte y Derecho*”; (México, ed. Trillas, 1989); 243.

Previously, on August 18, 1931, when Pascual Ortiz Rubio was President of Mexico, he enacted the first FLL, although it did not have a special chapter reserved for professional athletes.

As it may be seen, there are some types of employment that deserve a special distinction. However, regarding the issue that concerns us, in 1931 professional athletes did not appear within these distinctions, since they were not even considered as employees, with civil laws applying to them as a result. In this regard, Carlos Reynoso Castillo says, "*in the absence of a direct reference to the professional athletes being subject to the labour legislation, these type of relationships were governed by the Civil Code*".² This is understandable since professional sport at that time did not have the boom that began in our country and all around the World in the 1960s. There is a phenomenon not exclusive to Mexico, reinforcing this; what the Spanish author José Cabrera Bazán expressed during the aforementioned decade, referring to his country, the sense that "*as far as legal norms are concerned, it is clear that sports employment contracts, and especially professional football players' contracts, have existed and exist in our country and in many others, in a state apart from the general regulation of the employment contract*".³

Despite various attempts to incorporate the athletes into the protection of labour regulations, it is not until 1968, on the occasion of the First International Congress of Sports Law, held from June 26th to 30th of that year, under the protection of the Olympic Games held in Mexico City, that the subject acquired strength; to the degree that the FLL of 1970, takes as a basis some of the positions expressed in that International Congress.

Mario de la Cueva, regarding the transcendent encounter recalls that "*athletes and philosophers, sociologists, doctors and lawyers, talked for the first time about the ethical, sociological, medical and legal problems of amateur and professional athletes*".⁴

In the Congress there were a diversity of supported opinions; some in favour of considering professional athletes as employees, others denying the origin of such a claim and others still supporting the need to create an autonomous law which regulates the sport and its performers in a particular way. Hereafter we will present two examples of the sustained positions:

- a) Miguel Cantón Moller gave a presentation before the Congress called "Employment Relationship in Sports".⁵

² Reynoso Castillo, Carlos; "*Los Regímenes Laborales Especiales*"; (Colección Libros de Texto); (México, Universidad Autónoma Metropolitana, Unidad Atzacapozalco, otoño de 1992); 47.

³ Cabrera Bazán, José; "*El Contrato de Trabajo Deportivo (Un estudio sobre la Relación Contractual de los Futbolistas Profesionales)*"; (Estudios de Trabajo y Previsión); (Madrid, Instituto de Estudios Políticos, 1961); 11.

⁴ De La Cueva, Mario; "*El Nuevo Derecho Mexicano del Trabajo*", Tomo I; (México, D.F., ed. Porrúa, 1990); 545.

⁵ Autores Varios; "*Memoria del Primer Congreso Internacional de derecho del Deporte*"; (México, D.F., junio 26 a 30 de 1968); 647. 652.

In this presentation, he highlighted the lack of a specific regulation that existed on the subject by saying that: “*with the development of peoples and among other relationships that have arisen, professional athletes and institutions or organizations in which they serve have appeared; but there has not yet appeared a legislation which properly regulates these relationships. Due to this, a controversy that has been and is still alive and in which would appear to be two perfectly delimited fields, has emerged*”.⁶

The two groups that Cantón Moller referred to were those who argued, on one hand, that there is an employment relationship as such between athletes and the organizations in which they serve; and those that argued that there is no employment relationship to be regulated, but that it is about purely civil contracts.⁷

As it may be seen, Cantón Moller did not mention the third category, which is that of those who seek an autonomous branch from the others.

Talking about the case of Mexico, he referred to the recent professionalism in sports, which started with the Jai-Alai, boxing, baseball, and more recently football players. Other examples mentioned by him are the horse racing riders, car racers and some basketball teams.⁸

In terms of his personal opinion, it is very clear that he was in favour of the consideration of the athlete as employee, since he considers that it meets all the requirements that make up the employment relationship, such as: the activity provision by the player, the consideration that they are paid for such activity and the fact that they are subjected to the direction and dependence of the club, “*since obviously, when signing to play in service of a club, [one] cannot simultaneously provide similar services to another*”.⁹ It must be pointed out that exclusivity in the provision of the services of an employee to his employer had great strength at that time as a criterion to determine the existence of an employment relationship. However, it’s an out-dated criterion.

b) On the other hand, we can appreciate a different position, presented by Dr. Agricol de Bianchetti, Chairman of the Sports Studies Institute of Argentina, in his presentation called “The Sports Contract”.¹⁰

Said expert proposed, in short, that special and autonomous regulation be enforced for the relationships emerging inside sporting practice; outside of the enforcement of civil, labour law, and other branches of the legal practice.

To decouple the sports related from the labour related, he pointed out that “*when we consider the sports contract to possess a labour significance we are located outside of the sphere of its enforcement, since this legal figure enshrines the subjection of the athlete to the association which possesses the prerogative to regulate the exercise of the activity, within the legal principles of inexcusable*

⁶ Ibid., 647.

⁷ Loc. cit.

⁸ Ibid., 648.

⁹ Ibid., 450.

¹⁰ Ibid., 637-644.

observance. The situation that the Sports Association takes is not that of the entrepreneur, employer or labour law employer; the contracting Association is only interested in obtaining the triumph of its representation through the realization of sporting performance". Finally, the Argentine author concluded by arguing that sport offers the most varied problems of legal order, and therefore, makes the emergence of a new branch of Law possible: Sports Law.¹¹

There is no doubt that the Congress had a great influence on those in charge of writing the act. In the FLL statement of purpose, sent by President Gustavo Díaz Ordaz to Mexico's Congress of the Union, on December 9, 1968, the views that supported the integration of the professional athlete as an employee are collected. A comment to the statement of purpose which appears in a version of the FLL, published by the Secretariat of Labour and Social Welfare claims that "while writing the project, various sectors of professional athletes of the Mexican Republic, after noting the difficult circumstances that they were going through, asked to include a chapter that regulates their relationships with companies or clubs".¹²

The statement of purpose was incisive: "It is undeniable that athletes who provide services to a company or club, that are subjected to the discipline and management of the club or company, and receive compensation from them, are employees".¹³

The Law of 1970, enacted by President Gustavo Díaz Ordáz, which came into force on May 1st, 1970, presents for the first time a chapter dedicated to professional athletes, within Title VI of "Special Employment".

It is important to highlight that the chapter on professional athletes has not been, until now, modified, and maintains the complete text of the Law of 1970, even in the 2012 FLL reform.

2. *Employment regulation and football structures*

2.1 *Sources of law and approaches*

In México the only two sources of law that apply to the professional football players as workers are the Federal Constitution and the FLL.

2.2 *Specific laws on sport and football*

There is a Federal Sports Law that regulates the organization of sport in México in general, but without any implication regarding football players as workers.

Even the Statutes of the Mexican Football Federation (hereinafter referred to as the "FMF"), recognize the application of the FLL.

¹¹ Ibid., 643.

¹² Secretaria Del Trabajo Y Previsión Social; '*Ley Federal del Trabajo*'; (México, 1970); 55.

¹³ Ibid., 55-56.

Football players, like every worker, have the right to form a Union.

Nowadays, the Union called “Futbolistas Agremiados de México” exists; it is a labour union of national nature, which has obtained its labour union registry and has the legal capacity to represent the professional Football players of Mexico.

Although said Union exists legally, nowadays it is not active, even though the registry obtained by the Union allows it to act at the precise moment that their members decide, thus performing its internal requirements and complying with the law.

2.3 Football structures

The FMF is the maximum authority in the field of professional and amateur football practice.

There is not a specific kind of association to manage football clubs. They are normally owned by private companies or by individuals.

2.4 Professionals

As mentioned above, the integration in Mexico of professional athletes, including Football players, to the Labour Law has been a relatively recent issue. In our legislation, this has only been the case for more or less 44 years.

Needless to say that an “athlete” is a person who practices and performs a sport. A football player is someone who practices and performs football.

It is very important to make the distinction between professional and amateur athletes, since the subjects of our study are the first ones, leaving aside the latter category.

Talking about the Sports Congress, Mario de la Cueva stated that “*It is said that in some of the presentations and interventions, the amateur athlete is [someone] who loves sport and practices it for love, for personal satisfaction; and if he attends competitions and Olympics is in order to show its degree of perfection and that he is the best. On the contrary, a professional athlete is the man that also equally loves sports, has realized that his physical and mental skills induce him to that activity, but he cannot devote himself to it, because he needs to live and if he provides his best energies to an industrial or commercial company, where work exhausts his resistance, he would not have time or physical strength to prepare enough. In those conditions an alternative is offered him: to waive devoting his life to sports and sacrifice his vocation, or join a club or company; similarly to what a Symphony Orchestra musician or a comedy author does*”.¹⁴

Nowadays almost all theorists of labour law are in agreement that professional athletes are employees. Most of the similar legislation has adopted this opinion.

¹⁴ De La Cueva, Mario; op. cit.; 546-547.

Mariano Albor, when talking about the subject, mentions: “*As we shall see when studying sport in its relationships with the labour law, the athlete was enclosed by the civil legislation, which accentuated his insularity and assigned him a professional role and the right to exercise the freedom of contract*”.

“*Obviously, agitation to create a regime for athletes was strengthened by the doctrine at a scientific level, which complied with the guidelines for the private flows of service provision, and reinforced the reality of the employers who hired them following the old custom of denaturing the essence of the strictly labour relationships*”.¹⁵

As we mentioned before, there are theorists who claim that professional athletes have a sui-generis nature and that therefore, they should be governed neither by Civil nor by Labour Law, but by a special legislation: Sports Law.

This is the case for Dr. Agricol de Bianchetti, whose position was expressed in the First International Congress of Sports Law, already listed before. Importantly, considering the subject of this chapter, said presenter, then Chairman of the Sports Studies Institute in Argentina, considered that the athlete-association relationship cannot be labour related.¹⁶

For us it is very clear, according to reality and to our legislation, that it has been appropriate and more than anything coherent, to consider professional athletes and in particular professional football players as employees. The reason is very simple, professional football players provide a service, they do it in a very personal way, they are subordinated and receive their salaries.

a) Service Provision:

There is no doubt that the activity that a professional football player develops is a service. The purpose of his activity, in short, is to provide recreation to the public and profits to the employer club.

b) Personal character:

As stated earlier, the service provided by a professional football player is very personal. It is impossible to provide it through a third party. “Nobody could imagine, for example, that the provision to which Diego Armando Maradona is obliged be accomplished by any other person; Napoli Football Club and the Argentinean team would angrily reject any possibility of impersonation or replacement. The first thing of note, then, is that the concept of personal employment exists unambiguously”.¹⁷

Sports are activities that become highly specialized when there are people who come to a level that is difficult to achieve for others, it is quite clear that these people’s service is only granted personally.

c) Subordination:

The subordination in the case of professional athletes and especially football

¹⁵ Albor, Mariano; op. cit; 247-248.

¹⁶ Autores Varios; ‘*Memoria del Primer Congreso Internacional de derecho del Deporte*’; (México, D.F., junio 26 a 30 de 1968); 637- 644.

¹⁷ Pasco Cosmopolis, Mario; “*Derecho Laboral y Fútbol*” en Revista “*Análisis Laboral*”; (Perú, Mayo 1990); 4.

players is also clear. The players must be subjected to very severe discipline, are obliged to attend a specific work place according to a certain schedule, and in special situations such as pre-season training, are available to the employer for an extended period, in which they must receive orders to the extent of indicating what they should eat or at what time they must go to sleep.

In accordance with what Mario Pasco tells us, their arguments regarding the subordination are very clear: *“The employer has the ability to make permanent rules of compulsory behaviour (regulatory power), to give specific instructions to be fulfilled or complied with (directive power) and to apply sanctions in case of non-compliance (disciplinary power). Do these characteristics exist in the case of a professional athlete?”*

“Sure they do! And in a radical way. There is subordination greater than the ordinary. The athlete is subjected to behaviour rules imposed not only by his employer, but by higher authorities, for instance: FIFA, National Football Federation or Association; his benefit is subjected to more rules”.

“[they] receive orders from the captain of the team, the physical trainer, the physician and physical therapists, the coach, the managers, etc.”¹⁸

d) Remuneration:

Certainly, remuneration must exist. The high salaries that some football players earn are known. The large contracts of millions of dollars are public knowledge. However, we must not forget that professional football players are not just famous people who earn a lot of money. There are professional football players in the first division and even more so in lower divisions that, despite being professionals, receive non-profitable salaries.

2.5 Amateurs

The amateur players are those that certainly do not have any employment relationship with their clubs by virtue of the fact that they execute their sporting activity for the sole purpose of enjoy and competition, without them depending economically on such activity, and certainly not in exchange for any salary. In addition, the fact of obeying orders on behalf of their club or in particular their coach, only responds to a moral obligation, and not to a legal obligation.

2.6 Semi-professional, Self-employed, Autonomous workers and Voluntary work

There are not specific provisions regarding semi-professional, self-employed, autonomous players, and voluntary work in the Mexican Legislation.

2.7 Discrimination law and equal treatment

The FLL contains the general prohibition to make any distinction among all employees

¹⁸ Loc. cit.

on the basis of gender, age, ethnic origin or other factors.

3. *Individual employment relations in professional football*

3.1 *Essential elements and legal qualification*

It is important to remember that in FLL the chapter on “Professional Athletes” is the tenth within Title VI which corresponds to ‘Special Employees’; therefore it is important that we analyse what we mean when we mention that there are employees with special chapters. In general our FLL should follow the guidelines of the Constitution and must apply them without distinction to all subjects of a labour relationship. However, our FLL has acknowledged that within the employees’ universe to which it must be applied, there are some who develop activities so special and often different to the ones of the majority, that they deserve, only because of the nature of that activity, a specific regulation which certainly must respect the General Principles of the Labour Law and the minimum guarantees that should correspond to all employees.

Many of the special provisions imply greater protection to the employer and if there is any advantage of the employees, this only originates from the nature of the service provision, which makes such advantage very relative. An example of a protection to the employer is the duration of the employment relationship of the athletes, since, as it will be seen further on, multiple modalities can be fixed for a certain time. On the other hand, if we apply the general provisions of the Law; in the case of a professional football player, it would imply that hiring was for an undetermined period of time.

3.2 *The employment contract*

It is completely clear, that the main subjects of any employment relationship are the employee and the employer. In the case that concerns us, the first article (art. 292) of the professional athletes chapter, says:

“Article 292. The provisions of this chapter apply to professional athletes, such as football, baseball, fronton players, box, wrestlers and others similar”.

The article, in this case determines to which type of employees special provisions apply, it does not mention the employers as it is not necessary, since the nature of the employer can be any of those that the law lists generally. The only flaw is that it is not a provision that defines the concept of a professional athlete, but it is simply an expository precept.

What is very clear in article 292, is that special provisions should only be applied to the players. Those excluded, and consequently governed by the General Labour Regulations, are people such as coaches, assistants, physical trainers, handymen, etc., inasmuch as the fact that it appear “and others similar” certainly refers to other similar players of other sports that are not listed.

Despite the clarity of the provision, there are some people who have wanted to take another approach and claim that the phrase “and others similar” goes beyond players and that could it be considered that it applies to the coaches. Although we do not agree with the approach, given the clarity of the legal drafting, which leaves no doubt in the sense that it is only referred to players, we consider this approach to be interesting.

Such an approach was managed by the Club de Fútbol America, S.A. de C.V. (America Football Club), answering the lawsuit of dismissal that was filed by its former coach,¹⁹ trying to justify that the contract for determined time that both had subscribed to was valid, since it should supposedly be covered by the applicable provisions for professional athletes which allow for the temporary nature of employment contracts.

Hereafter we reproduce one part of the quoted reply:

*“To determine if the employment relationship that the petitioner established as Coach with my represented party is regulated or not by the provisions of this Chapter, first it is necessary to determine what must be understood by Professional Athlete and if we start from that base, following the guidelines of the statement of purpose of the Federal Law of Labour of 1970, as well as the criteria of various treatise authors. Therefore it must be understood as someone who devotes his physical ability and possibilities in any sports specialty, for the achievement of immediate financial compensation and that, for surviving, depends on the exercise or practice of such specialty, according to what Lic. *^{TN} JUAN B. CLIMENT BELTRAN points out in his text entitled “FEDERAL LAW OF LABOR COMMENTARIES AND JURISPRUDENCES” and it is undeniable that within that definition it comprises the coaches, as in the case of the petitioner, since it is undisputed that his recruitment was due, not so much to his physical capacity, as it is to his possibilities in football sports specialty, possibilities arising from the experience he acquired when he was as a player, as well as in various occasions that he has performed as a Coach, not only in the country”, but elsewhere in the world, as it was in Spain, in the Netherlands and as he now is attempting to be engaged in a different country, circumstances that are known by public opinion, a reason why it is not necessary to prove it”.*²⁰

We believe that the reproduced arguments are not enough and are also opposed to the spirit of the FLL. Coaches, strictly speaking, do not practice football; they direct its practice. In addition, we insist that the text of the FLL, according to the way it was drafted with the words “and others similar”, refers to other sports, without varying the “players”, so it cannot refer to other similar employees to the players.

Oscar Ermida, quoting Barbagelata mentioned in this regard that “*It is enough to hereby add that Barbagelata himself highlighted the extent to which*

¹⁹ Ver Leo Beenhakker vs. Club de Fútbol América, S.A. de C.V.; Junta Especial Cuatro de la Local de Conciliación y Arbitraje del Distrito Federal; expediente 977/95.

²⁰ Ibidem.

the “star player” could evade any subordination with respect to the contracting club; in which case, once such a reality had been determined, it could be assumed that the situation escaped from the scope of Labour Law. Without these exceptional situations, valid conclusions could be drawn for common professional athletes”.²¹

We don't agree on the distinction made by Barbagelata. While a footballer star can have certain prerogatives, no matter how much money he earns, he still is an employee, since the subordination cannot disappear. Finally he has to go to train and to the matches, as well as the training camps and to obey the coach in a general way. Famous players like Rafael Márquez, Javier Hernández or otherwise, are also sanctioned in the event that they fail to comply with their teams. If a player earns a lot of money, it is expected that his employer will gain more; otherwise it would be illogical that he pays him so much money.

Albor, quoting Gerhard Vinnai, says “...that he oriented the football studies with such intelligence that his concepts can become extensive to sports negotiation in general; with respect to the football institution, he has claimed that his provision of service depends on many factors:”

“The sale of sports shows presupposes a technical device. It is based on capital in the form of expenditure for a stadium, outdoors and indoors places of training, as well as the headquarters of a bureaucratic management. The use of this device is linked to the purchase and sale of guards, gardeners, administrative assistants, cashiers workforce, cleaning, office and organization staff.

“The obtaining of benefits in the soccer market depends, at first line, on the sporting successes of the teams' clubs. These, in turn, are linked to the obtaining of appropriate employees; to the acquisition of talents for a trainer's team that can maintain, and where possible, increase their productive capacity”.²²

In addition to the clubs, we think that the FMF is the employer of the professional players that are selected to the national teams and, therefore, it creates a different employment relationship to the one that exists with the player and his club. No legal provision leads us to conclude otherwise. When selected players represent their country, they are also under the orders of the Federation, so they are subordinated to the Federation. This implies that while the players are providing the Federation with their services, the responsibility for the employment relationship and all liabilities that may arise from the same is said Federation, although in practice this does not happen. We think that, given the sporadic way in which the players are integrated into the team, it would be ideal to enter into employment contracts per event, in order to provide security to both the players and the Federation; but from our point of view, the one that legally could be the most affected by the lack of such contracts would be the Federation itself, by virtue of the fact that the agreement on article 293 of the FLL, if it the duration of the employment relationship not expressly stipulated, it would be considered to be indefinite.

²¹ Ermida Uriarte, Oscar; “Doctrina Laboral Uruguaya sobre el Futbolista Profesional” en Revista “Análisis Laboral”; (Perú, Mayo 1990); 4.

²² op. cit., 234.

The FLL regulates the temporary nature of the hiring of professional athletes in its article 293, which is reproduced below:

Article 293. Employment relationships can be for a certain time, indefinitely, for one or more seasons, or for the celebration of one or more events or functions. In the absence of expressed provisions, the relationship will be for indefinite time. If the term expires or the season concludes, a new duration term or mode is not stipulated, and the employee continues to provide his services, the relationship will continue indefinitely.

It should be noted that if the term or the season expires without having fixed a new mode and the player continues to provide his services, the contract will be considered to last for indefinite time.

The most common thing in a football related environment is that the players are hired on the basis of seasons. It might be considered that this approach threatens employment stability; however, we consider that given the nature of the sports competition, it is justified to allow the non-application of such stability.

3.3 *Players' rights and obligations*

Article 298 of FLL states the following:

Article 298. Professional athletes have the following obligations:

- I. To be subject to the club or company's discipline;*
- II. To attend the preparation and training practices in the place and time stated by the company or club and to concentrate for the events or shows.*
- III. To conduct the trips for the events or shows according to the club or company's arrangements. The transportation, accommodation and diet expenses will be met on behalf of the company or club, and*
- IV. To respect the local, national and international norms that govern sports practice.*

Likewise, Article 299 of FLL states the following regarding the athletes:

Art. 299. Any verbal or physical mistreatment to the event's judges or referees, to the same team and the rival players is forbidden for professional athletes.

In sports that involve a personal struggle, the adversaries must abstain from conducting any action that is forbidden by the norms.

Article 298, fraction I submits the player to to the club's discipline, which is the same as performing the service under the employer's direction or of his representative, to whose authority all the club's players must submit regarding the work. It is logical that discipline is an inherent part of sport and, therefore, everyone who practices the sport must respect it.

Article 298, fraction II and III of FLL considers that the trips and pre-match preparations are part of the manner, time and place agreed to perform the work. Incidentally, the subject of pre-match preparations is a very interesting topic among football players as most of the time it means to be available at the employer's disposition for weeks, and even months non-stop, which is an unusual situation for the majority of the employees.

We think that if it is true that a salary may be agreed for a season or event, and that it includes work of indeterminate time. It is also true that if the legal maximum of 8 hours per day is exceeded, the players would be entitled to claim extra hours, as the legal maximum work time derives from a constitutional norm.

The proper respect by the players of the local, national and international rules that govern the practice of sports is justified.

With regard to the content of Article 299, we consider that it contains solely good wishes, as all of us who have played sports, especially football, or who have been spectators, know the way in which the game develops in the field. It is nevertheless important to avoid verbal and physical violence as much as possible, because if we do not avoid it, this would go against the very spirit of the game.

3.4 *Club's rights and obligations.*

The text of Article 300 of the FLL is the following :

Article 300. The special obligations of the employers are as follows:

I. To organize and maintain a medical service to perform periodic evaluations, and;

II. To give the employees one day off per week. The arrangements outlined in held in Article 71, clause 2 are not applicable to professional athletes.

The first paragraph is a right in favour of the employee, as they require permanent attention given their intense physical activity. Of course the fact that they fulfil said obligation does not imply that they are excluded from registering the football players in the obligatory regime of Mexico's Social Security System.

As for the second paragraph, on the one hand, the constitutional mandate of giving the employee at least one day off for every six working days is put into practice and on the other hand it states that there is no obligation that the weekly day off be given on Sunday nor that they receive payment of the Sunday bonus, which is the case given in Article 71 of FLL for common workers.

The text of Article 301 of the FLL, which forbids employers from demanding from the athletes an excessive effort, seems to us unnecessary as any employer, regardless of the class, must do so.

3.5 *Remuneration*

Special provisions concerning salaries are comprised in the following articles of the FLL:

Article 294. The salary may be stipulated per unit of time, for one or more events or shows, or for one or more seasons.

Article 297. The provision, which stipulates different salaries for the same employment, on the basis of the category of events or shows, of the teams or of the players; does not breach the principle of equality of salaries.

The first article talks about the ways to negotiate the payment of the

salary. Said article goes together with the fact that, in the case of professional football players, temporary recruitment is allowed and it focuses on the respective salary payment for the different ways to qualify the temporary nature of engagements. Modes referred to in article 294 do not go beyond from those fixed by the article 83 of the FLL, which allows any way to negotiate a salary.

It is very common, and permitted by the Law, to agree the payment of a sum for the signature of the contract from the club to the player; or that fixed sums are agreed per season in addition to the payment of their monthly salary.

On the other hand, there is a payment of what are called “bonuses” and they are paid for varied reasons which have to do with personal performance and with the team players collective performance. Sometimes they are paid per goal scored, some others per match won and occasionally by the achievement of a championship. In these cases the productivity has measurement parameters that are very easy to quantify, something that is not so easy in other types of companies.

Another custom within football clubs is to fine players for a wide variety of reasons. This is completely illegal and acts against the regulations that protect the salary. Article 107 of Mexico’s FLL is clear in that case:

Art. 107. The imposition of fines on the employees is prohibited regardless of its cause or concept.

3.6 Working time

Apart from the specific obligations that we mentioned before, in the specific obligations of players and clubs, there is not other specific rule regarding working time.

3.7 Sanctions and the end of the employment relationship

Sport sanctions are legal. However sanctions such as salary reduction or others that affect the player’s essential labour rights are prohibited.

Regarding specific causes for termination, Article 303 of the FLL, has the following text:

Article 303. Termination of the employment relationship may be due to special causes such as:

- I. Severe indiscipline or repeated disciplinary faults; and,*
- II. The loss of faculties.*

The first cause is common in sports. However it is not clear what the meaning of “repeated” is.

The second part is also not very clear. Because it does not set any parameters to measure the performance of a player in order to determine what faculty loss is necessary to become a cause for termination.

4. *Medical and doping issues*

The FMF has an anti-doping code that follows all the WADA Code principles. No specific public regulations regarding anti-doping rules for football players exist.

5. *Transfer of players*

Mexico's FLL foresees transfers, but the way it treats them is not necessarily coherent with the legal labour system in Mexico as a whole. It is important to highlight that the current legal text has been an advance in comparison with the previous texts. "It is convenient to highlight that the arrangements are beneficial for the professional athletes as they now have to be satisfied, as if they are not, the transfer can be cancelled, which did not happen before: the player was only told that there was no example of the contract by which the players' services were transferred. This resulted in several criticisms that even compared the transfers with the slave market".²³

The specific articles that regulate the subject of the transfers in Mexico's FLL are the following:

Article 295. Professional athletes shall not be transferred to another company or club without their approval.

Article 296. The transfer bonus of any player will be subjected to the following rules:

I. The company or club will indicate to the professional players the rules or clauses that govern it;

II. The amount of the bonus will be determined by an agreement between the athlete and the company or club and the category of the events or functions shall be taken into account as well as the category of the teams, the professional athlete's category and his seniority in the company or club, and;

III. The share of the professional athlete in the bonus will be at least twenty five per cent. If the percentage agreed is less than twenty five per cent, it will be raised by five per cent for every year of service until it reaches at least fifty per cent.

- a) The legal text states that the athletes cannot be transferred to another company or club without their approval.
- b) Secondly, it contains an important rule: If a club receives any amount of money from another club for the transfer of a player, the player has the right to participate in that payment, earning a percentage set by the above-mentioned article. In some cases the player may get more than 50 per cent of the amount paid for him.

²³ Canton Moller, Octavio y ot; "Derecho del Trabajo Deportivo"; (México, Editorial Yukalpeten, S.A., 1975, 19.

6. *Social security principles (unemployment and pensions)*

All football players, as with almost all employees working in Mexico, have the right to be part of the social security system in which the employer, the employee and the government contribute.

However, almost no Mexican club respects this rule. In practice at the end, the players do not normally have any retirement plan or protection.

There are not specific social security rules or regulations applicable to professional football players.

7. *Labour dispute settlement*

The disputes between the Players as employees and the Clubs have only two ways to be solved in Mexico.

The first way is to settle the dispute, as with any other employee, in the public labour courts.

The second way is the FMF Dispute Resolutions Chamber. Public law does not recognize this Chamber, however, it solves many disputes, and all its resolutions are subject to an appeal in front of the Court for Arbitration for Sport.

Conclusion

In almost all the countries in the world with professional football players, the development and the specificity of the labour relationship between the players and the clubs have lead to a change in each country's legislation in order to adapt to the new reality.

In the case of Mexico, it was one on the first countries in the world to have specific labour legislation in relation to those players. However, at this time, it is necessary to make some changes to adapt to the globalization of the business of football. Changes regarding the transfers of players and other specific topics are necessary. Meanwhile, the current system is okay to give minimum legal guarantees to all the stakeholders.

EMPLOYMENT RELATIONSHIPS AT NATIONAL LEVEL: THE NETHERLANDS

by *Wil van Megen**

SUMMARY: Introduction – 1. The relevant legislation – 2. The status of play – 3. Employment law – 4. Social security – 5. Labour Dispute settlement – Conclusion

Introduction

According to the Bosman ruling a professional football player is a worker just like any other worker. Regular labour law applies although there are of course some specificities that might produce complications. These are laid down in several regulations within the sport itself. In this chapter we will see how this works in practice.

1. The relevant legislation

The relationship between a professional player and a club is based on one side on association law and on the other side on employment law. There are no specific laws on sport that regulate this relationship.

1.1 Association law

In the sports pyramid model the player is bound by association law to the club as well as directly to the national association and its regulations, including UEFA and FIFA regulations regarding employment and disciplinary matters.

Pyramid of football governance:

1. FIFA
2. FIFA's Confederations: UEFA/ Conmebol/CAF/Concacaf/AFC/OFC
3. National Football Associations
4. National Leagues
5. Football Clubs¹

* FIFPro's Legal Director and lawyer at MHZ-advocaten.

¹ <http://amo.uvt.nl/show.cgi?fid=129334>.

Through the FA regulations and the membership of the FA UEFA and FIFA Regulations (RSTP) also directly apply to the player. Sometimes the relevant articles are explicitly copied in the FA Regulations but others directly apply from the FIFA Regulations. The association regulations require that the relationship between a professional player and a club is an employment relationship.²

1.2 Regulations from the federation/UEFA/FIFA: recommendation or binding?

KNVB is member of the FIFA. Article 13 a of the FIFA Statutes says that members have to comply with Statutes, Regulations, directives and decisions of FIFA bodies. Article 7 section 1 paragraph a of the Statutes of the KNVB (KNVB Statuten) stipulates that members of the KNVB (the clubs and the players) have to comply with the Statutes and the regulations of the KNVB. In national cases the arbitration committee considers the FIFA Regulations of greater importance. In the arbitration case Samaras/Heerenveen³ the committee didn't give the FIFA Regulations direct effect, but noticed that the Regulations have 'reflex action' and are applicable in national cases despite the fact that the national federation didn't make rules about it. Article 5 of the FIFA Regulations: By the act of registering, a player agrees to abide by the statutes and regulations of FIFA, the confederations and the associations.

2. The status of players

Professional players are either semi-professionals or full professionals. The status of players is regulated in article 8 of the Collective Bargaining Agreement for professional football (CBA).⁴ The employers can be professional football organizations with a legal entity (NV, BV, Stichting, vereniging), amateur organizations or organizations closely linked to amateur clubs that are in compliance with the relevant regulations of the FA.

3. Employment law

3.1 The employment contract

Professional football in the Netherlands commenced in 1954. The players were paid for their services but the status of the relationship was unclear until 1967 when player Theo Laseroms started a court case in order to establish a labour relationship between club and player.⁵ The Court ruled that the relationship qualified as a labour agreement as the three main requirements were met:

² Art. 53 Professional Football Regulations.

³ Arbitragecommissie KNVB 2 februari 2006, nr. 1100 (Samaras/Heerenveen).

⁴ CAO voor Contractspelers Betaald Voetbal Nederland (2010-2014).

⁵ Kantonrechter Rotterdam, 5 april 1967, NJ 1967, 418 (Laseroms/Sparta).

- subordination
- the obligation to pay wages to the worker
- the obligation for the worker to perform.

There is no distinction between workers or employees.

After the Laseroms case it was evident that there was an employment relationship for all professional players in the country. It is not possible for players to be self-employed or autonomous in any form. Nowadays the main part of labour law is regulated in book 7 of the Civil Code.

By way of referrals in the relevant chapters, some other parts of the Civil Code can also be applied in labour law.

For instance it is possible to stipulate a dissolutive condition in a regular contract. A dissolutive condition in a labour contract is only valid when it is objectively determinable and if it's not contrary to the stipulations that are mentioned in Book 7 of the Civil Code regarding labour law. The consequence of the fulfilment of such conditions will be that the contract ends automatically. The Supreme Court stated in the case *Mungra/Van Meir*⁶ that a dissolutive condition is only valid when the stipulated event can be determined in an objective way, is independent of the intentions of parties and is independent of the subjective evaluation of the parties.

The arbitration committee of the KNVB stated that a dissolutive condition which stipulated that the player's contract would be terminated automatically if the club played for two years in the first league after relegation is not compatible with the closed dismissal system.⁷

3.2 *Form of the contract*

According to the regulations and the CBA a contract between player and club must be in writing.⁸

All aspects of the relationship between the player and the club must be regulated in one contract.⁹

However, if one of the parties can prove there is full agreement on the labour conditions but the contract is not signed it is considered to be a labour contract.¹⁰ After signing, the contract must be registered with the FA.

For the two professional leagues in the country there is a mandatory standard contract with minimum requirements.¹¹ It is possible to deviate from the contract only in the case that it is beneficial for the player and does not interfere with FA regulations, the law or the CBA.

⁶ HR 6 maart 1992, NJ 1992, 509 (*Mungra/Van Meir*).

⁷ Arbitragecommissie KNVB 11 augustus 2003, nr. 978 (*Sparta/Bouchiba*).

⁸ CAO voor Contractspelers Betaald Voetbal Nederland art. 4(2).

⁹ Arbitragecommissie KNVB 8 augustus 2003, nr. 944 (*AZ/Moens*).

¹⁰ Arbitragecommissie KNVB 10 mei 2001, nr. 833 (*Olyslager/FC Twente*).

¹¹ Art. 53 (1) Reglement Betaald Voetbal, art 4 (2) CAO voor Contractspelers Betaald Voetbal Nederland 2010-2014 (CBA: www.vvcs.nl/cao-2010-2014).

On the third level of football there is the Top-klasse. Although this league is formally brought under the amateur section of the FA there are a quite a lot of players with a professional contract. The FA developed a special standard contract for this league. The club can sign a player if the club offers at least a 12 hour working week and for at least the minimum wage. Every contract must expire on the 30th June in the last year of the contract.¹² Later on we will see that the status of a professional player in an amateur league can be important for the position of the player.

3.3 *Semi-professionals*

The special rules for semi-professionals are set out in art. 8 of the CBA. Employees under 23 with a part time contract are entitled to receive a salary of at least 55.5% of the national minimum wage for his age.¹³ If this player has trained with the first squad during more than 13 weeks over the season he is entitled to receive 100% of the minimum wage for his age. Players over 23 years old are entitled to receive at least the minimum wage.

A club in the top league needs to have at least 18 players receiving the minimum wage. In the second league this is a number of at least 16 players. Both numbers include players on loan.

3.4 *Working time*

The general working time legislation applies to professional sport. There is a more specific regulation in article 7 of the CBA. A full time job means 40 hours a week on average calculated over a timeframe of 26 weeks. Working time includes the time a player is available for training and matches as well as the time for medical care and the time to prepare.

For matches and training camps abroad this rule applies as well. Domestic travel time and travel time abroad regarding playing matches qualifies as working time but is fixed on an average. The average number of travel hours for all players involved in professional football is two hours per week. Travel time abroad will be fixed after consultation of the players' council.

3.5 *Termination of the agreement*

All relevant regulations state that a football contract is for a fixed term and terminates on 30 June of the year of the last contract. Because of this contracts do not contain a clause for premature termination. Probation periods are not allowed in the contract, however, contracts can be prematurely terminated by mutual agreement or for just cause. Termination can be done unilaterally by one of the parties with immediate

¹² Art. 4 Uitvoering-/Wijzigingsbesluit Topklasse en Contractspelers in het Amateuervoetbal.

¹³ Art. 8 (2a) CBA.

effect or with a term of notice. In case of just cause it is possible to ask for a short track procedure with the FA's Arbitration Committee in order to request a termination of the contract.

When the parties agree on the terms of termination this can be done by a written agreement or by a formal decision. Sometimes the latter way facilitates the possibility to sign for a new club as the regulations sometimes require termination in this way in order to be able to sign a contract during the season.

Termination for just cause does not occur very much. Most termination cases are about players who can sign for a new club but are blocked by their current employer. There have not been cases in which a player unilaterally terminates the contract like in the Webster case.¹⁴ The reason for this might be that even outside of the protected period it is very uncertain what the outcome of a case regarding compensation and sporting sanctions will be.

In practice it proves to be much safer for both parties if the Arbitration Committee of the FA is addressed with a request for termination. In case the request is denied the agreement remains valid without legal consequences.

If the requesting party does not get what it wants i.e. if the amount of compensation is set too high by the Committee; the request for termination can be withdrawn. For top players it appears to be difficult to have their contracts dissolved in this way. Criteria for the Arbitration Committee are the financial and sporting improvement of the player: both have to be significant enough in the eyes of the panel. In practice this has given rise to some peculiar rulings. In one case¹⁵ the Committee ruled that the ranking of the new club in the English Premier League was not substantial enough to qualify for sporting improvement as the current club in the Dutch Eredivisie had the same ranking there as the new club in England. Other significant cases in which dissolution of the contract was rejected were the case of the De Boer-brothers when they wanted to go to Barcelona¹⁶ and the case of Alfonso Alves moving from Heerenveen to AZ.¹⁷ More recently there were cases of players who wanted to move to another club in the country. Both Dost¹⁸ and Suarez¹⁹ were not successful. In a number of occasions the result of the arbitration was that the clubs still reached a new agreement on better conditions for the transferring club.

For non-top players it appears somewhat less difficult to move (Hofstede²⁰, Bakens²¹). In their cases the Committee established the amount of compensation

¹⁴ Arbitration 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.

¹⁵ Arbitragecommissie KNVB 2 februari 2006, nr. 1100 (Samaras/Heerenveen).

¹⁶ Arbitragecommissie KNVB 30 juli 1998, nr. 702 (Frank en Ronald de Boer/Ajax).

¹⁷ Arbitragecommissie KNVB 23 januari 2008, nr. 1188 (AZ/Heerenveen).

¹⁸ Arbitragecommissie KNVB 31 januari 2011, nr. 1302 (Dost/Heerenveen).

¹⁹ Arbitragecommissie KNVB 8 augustus 2007, nr. 1164 (Suarez/FC Groningen).

²⁰ Arbitragecommissie KNVB 15 juli 2005, nr. 1075 (Hofstede/VVV Venlo).

²¹ Arbitragecommissie KNVB 8 augustus 2007, nr. 1165 (Bakens/RKC Waalwijk).

to be paid more or less on the basis of the residual value of the contract although some criteria leading to higher amounts were added.

There has been only one case regarding a buyout clause in the contract.²² The dispute there was if the offer to pay the amount stipulated in the contract was sufficient ground for the termination of the relationship or if the club still had to consent.

3.6 *Unilateral options*

The national labour legislation has no provisions for unilateral options but general contract law does. The question is whether unilateral options fit in the labour law system or not. Up till now there has been only one case regarding the validity of such option: the Trabelsi-case.²³

In this case the unilateral option was accepted by the panel. The panel found that a unilateral option is compatible with the so called closed system of dismissal law. The Arbitration Committee based its ruling on Dutch contract law in combination with labour law. Afterwards this ruling was criticized a lot. The majority opinion is that unilateral options cannot be upheld. Since then there have been no cases involving the same subject. Looking at the case law of the FIFA DRC and CAS it is very risky for a Dutch club to invoke a unilateral option. On many occasions both CAS and the FIFA DRC expressed that unilateral options are not valid, at least that the margins to have a valid option clause are extremely small.²⁴

3.7 *Other issues*

Another part of employment law is regulated in administrative laws such as the law on Minimum Wages.²⁵ Of course this law applies to football contracts. According to article 2 (1) of the law the full time working employee has the right to earn at least the minimum wage, which will be set by law. The employee is also entitled to receive a holiday allowance. This amount of money contains at least 8% of the annual basic income.²⁶

An important part of the rules on dismissal is regulated in a special provision outside of the Civil Code dating from 1945²⁷ (but this is expected to be integrated in the Civil Code in 2015). For labour regulations in professional football there are two important other legal sources to be regarded. These are the regulations of the national federation KNVB and the collective bargaining agreement, CBA, between the two labour unions in football, VVCS and ProProf on one side and the association

²² Arbitragecommissie KNVB 5 juni 1996, nr. 560 (Vonk/RKC Waalwijk).

²³ Arbitragecommissie KNVB 6 juni 2004, nr. 1022 (Ajax/Trabelsi).

²⁴ Arbitration CAS 2005/A/983 & 984 (Club Atlético Peñarol v. Carlos Heber Bueno Suárez, Christian Gabriel Rodríguez Barrotti & Paris Saint-Germain).

²⁵ Wet Minimumloon en Minimumvakantiebijslag (WMM).

²⁶ Art. 15 WMM.

²⁷ Buitengewoon Besluit Arbeidsverhoudingen 1945 (BBA).

of professional football clubs FBO on the other side. It is noteworthy to state that the FBO does not represent the two leagues but directly represents all the professional clubs in the country.

3.8 *The Collective Bargaining Agreement(CBA)*

The Collective Bargaining Agreement is concluded between the two players unions in the country and the organization for employers in Dutch Professional Football. This organization for professional clubs is not the same as the combination of the two professional leagues but is a separate entity. All parties involved are qualified to conclude this CBA. The FA is not taking part in the negotiations but will check whether the content of the CBA is in conformity with the FA regulations.

On European level there is an autonomous agreement regarding the Minimum Requirements for Standard Contracts (MRSC).²⁸ As the standard from the Dutch CBA exceeds these requirements there is no application of the MRSC. In the CBA we see different issues being regulated, such as:

- general obligations of both parties;
- the start and the end of the agreement;
- salary requirements;
- holidays;
- health insurance;
- illness and injury;
- pension matters and loans.

In article 6 par. 1 of the CBA it is arranged that the football contract has a fixed term character and that every contract expires at the end of a football season. This is in conformity with the regulations of the FA.

The obligation to have fixed term agreements causes a conflict with national law as far as there are multiple contracts exceeding a duration of more than three years in total. This is the result of the EU Council Directive 1999/70 of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP for fixed term labour agreements.²⁹

Deviation from this effect is only allowed by CBA . The Council Directive invites the social partners at all appropriate levels to negotiate agreements to modernise the organisation of work, including flexible working arrangements, with the aim of making undertakings productive and competitive and achieving the required balance between flexibility and security.

According to art. 7: 668a of the Civil Code such agreement will automatically turn into a contract for indefinite time. In the new Dutch labour law ('Wet Werk en Zekerheid') the term of three years resulting in a contract for

²⁸ Agreement regarding the minimum requirements for standard players contracts in the professional football sector in the European Union and the rest of UEFA Territory, http://ec.europa.eu/commission_2010-2014/and/or/headlines/news/2012/04/20120419_en.htm.

²⁹ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31999L0070>.

indefinite time will be reduced to 24 months.³⁰ This rule is not compatible with some industries. That is why the legislator made it possible to have exceptions: under power of a CBA or decisions made by a governmental authority in a branch, it is possible to diverge from the main rule in the Civil code.³¹ In the new setting the Minister of Social Affairs has to agree with this by Royal Decree.

In a recent ruling concerning a football referee, an appeal court decided that a permanent exclusion from Council Directive 1999/70 is against EU-law principles.³²

Because of the season structure in football the social partners agreed on an exemption of the law in the CBA. In exchange for giving up the effect of indefinite time contracts clubs and players changed the regulation into a compensation arrangement.

This arrangement implies that if a player who has been with the club for at least five years and did not earn more than a certain maximum salary has been given notice by the club in due time, the contract expires at the end of the contractual term. The player in question is entitled to receive a financial compensation of half a monthly salary per year of service with the club. If no due notice has been given before 1 October the contract will be continued for another year under the same conditions as the previous year.

The CBA gives substantial protection to football contracts for players. In case of illness and injury 100% of the salary during the full term of the contract is guaranteed.³³ It is not possible to terminate a contract prematurely because of, or during, injury and illness.

In case of the insolvency of an employer the national implementation of the Council Directive on Insolvency guarantees payment of the outstanding salary during a maximum of three months for the full 100%. The same applies to the term of notice which by way of law is one month. Outstanding pension schemes and holiday payments are included in this guarantee as far as they do not exceed a one year period.³⁴

A CBA that is concluded by representative parties in a certain branch of industry can obtain a special status from the government. The minister of Social Affairs can declare a CBA or parts of it generally binding for the whole branch of industry. In football this is customary. From the moment of declaration all parties within this branch are fully bound to the relevant CBA regulations regardless whether they are affiliated to the parties that concluded the CBA or not. Where the status of general binding ends at the expiry date of the CBA, the contract is continued

³⁰ Art. 7:668a lid 1 sub a Civil Code (new).

³¹ Art. 7:668a lid 8 Civil Code (new).

³² Rechtbank Midden-Nederland 18 december 2013, JAR 2014/43 (Gerritsen/KNVB).

³³ Art. 13 (5) CBA 2010-2014.

³⁴ Art. 61-66 Werkloosheidswet and Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer.

between the social partners until there is a new CBA or one of the parties gives notice for termination.

3.9 Players' Council

Article 18 of the CBA entitles the club and players to install a Players' Council. In practice all clubs have a Council of three players elected by their peers. Normally, the team captain is in the Council. The powers and duties have to be arranged in a separate regulation, they can differ from club to club but in general the Player's Council negotiates the collective bonuses, health and safety issues and internal disciplinary matters.

3.10 Central Players' Council³⁵

At national level within the professional football sector of the FA there is a Central Players' Council established by the players. On a specific number of matters the FA Professional Football Board and the FA's General Assembly are obligated to ask the advice of the Central Players' Council before deciding on the issue. When the association, for example, wants to expand or decrease activities which are associated with professional football, the board and the general assembly need to ask the advice from the Council in writing. The Council also has a right to advice regarding the establishment of the budget of the FA. On some areas the Council even has a right of consent. In case the board and the general assembly want to change the rules concerning the signing or termination of labour contracts, duties and rights of the players relating to labour contracts or the changing of matters regarding the Central Players' Council, the board and the assembly need the written approval of the Council. If there is an FA decision regarding the changing of rules where approval is required but the Council didn't consent, the decision is considered null and void.

The Central Players' Council can be compared with works councils in regular companies. An undertaking is obligated to constitute a works council when there are 50 employees working for it.³⁶ The rights of the Central Players' Council are comparable with the entitlements the workers councils have by law i.e. the right to advice³⁷ and the right of consent³⁸ on specified issues regarding the profession. The Players' Council has also to be consulted when the License Committee intends to withdraw a club's license.³⁹

³⁵ Art. 25-31 Reglement Betaald Voetbal.

³⁶ Art. 2 (1) Wet op de Ondernemingsraden (WOR).

³⁷ Art. 25 WOR.

³⁸ Art. 27 WOR.

³⁹ Art. 12 Licentiereglement KNVB.

3.11 Sports Regulations

Regulations that deal with football contracts can be found in the Regulations of the FA, UEFA and FIFA.⁴⁰ Relevant subjects are:

- (minimum)duration of the contract: ‘end of the season’;⁴¹
- a maximum duration for contracts with minors of three years.⁴²

There is no provision for the maximum of five years according to article 18 (2) FIFA Regulations.

The maximum duration is a contract for life. However, workers can request termination after 5 years. On a national level there previously was no limitation for contracts of minors. In the Leandro case⁴³ the player had a five year contract signed just before his 18th birthday. The player left after three years of his contract to the Portuguese club FC Porto stating that according to FIFA rules he was free to do so. The club asked for a declaration from the national Arbitration Committee implying that such a contract was valid according to national law. Although the Arbitration Committee decided conformingly it did not help the club as later on CAS decided that the FIFA rule prevailed. Later on the regulations were modified in conformity with FIFA regulations. In the current regulations the three year maximum for minors is included.

The FIFA regulation of a maximum of three clubs for a player per season⁴⁴ now also applies in the Netherlands.⁴⁵ However, in the event that one of these clubs goes into liquidation this club will not be taken into account for this rule and a player will be allowed to move to another club during the season.

The FIFA rule that the validity of a contract may not be made subject to a successful medical examination and/or the grant of a work permit⁴⁶ is also included in the national regulations.⁴⁷

3.12 Players on loan

The FA regulations as well as the CBA provide provisions for players on loan. A written agreement is required and needs the written consent of the player.⁴⁸ The loan must be registered with the FA within a week. The minimum duration for a loan period is the term between two registration periods. During the loan the employment agreement with the first club remains intact. This club is responsible for the execution of all obligations deriving from this contract. The loaning club is

⁴⁰ www.knfb.nl/watdoenwe/spelregelsenreglementen.

⁴¹ Art. 53 (6) Reglement Betaald Voetbal.

⁴² Art. 53 (3) Reglement Betaald Voetbal.

⁴³ Arbitragecommissie KNVB 22 juni 2005, nr. 1065 (PSV/Leandro do Bonfin).

⁴⁴ Art. 5 (3) FIFA Regulations.

⁴⁵ Art. 6 (3) Reglement Overschrijvingsbepalingen Betaald Voetbal.

⁴⁶ Art. 18 (4) FIFA Regulations.

⁴⁷ Art. 53 (2) Reglement Betaald Voetbal.

⁴⁸ Art. 54 Reglement Betaald Voetbal and art. 26 of the CBA.

obliged to insure the player for all risks he was insured for with the first club. The loaning club has to safeguard the first club from liability in case of claims regarding injuries in the sense of art 7: 658 of the Civil Code.

3.13 Suspension by the FA and by the club

Players can have disciplinary sanctions from the FA in case of misbehaviour in matches, when they receive a red card or a certain number of yellow cards leading to a suspension. Although the player is not eligible to play he is entitled to receive his basic remuneration for this period. However he can be excluded from match bonuses. If the club suspends a player the player is also entitled to receive his regular salary. This is the result of a Supreme Court ruling.⁴⁹ The court regards suspension a matter at the risk and responsibility of the employer. In the upcoming year this principle will be codified in the new labour law.

3.14 Disciplinary rules and sanctions

The labour law allows the employer to fine a worker,⁵⁰ however, there are certain limitations. First of all, the employment contract must mention the relevant conditions for a fine and the amount of the fine has to be specified in the agreement which must be in writing.

The agreement shall precisely state the purpose of the fine. They may not directly or indirectly serve the personal benefit of the employer.

For workers who receive more than the minimum wage the fine can be higher than the legal standard which is set at a maximum of half a day's payment. This has to be agreed on in writing. The court has the power to mitigate such a fine at any time.

3.15 Training alone

On several occasions the Arbitration Committee had to decide in cases where players were excluded from playing and training for non-sporting reasons.

It is well established case law that exclusion of players from training is not allowed.⁵¹ Because of the nature of football it is eminent that a player must have the opportunity to keep himself fit and to practice with other players. However, it is possible to keep players out of the playing team even for non-sporting reasons. The decision on who will play is for the manager and not for a judge, although the decision in a Swiss case (Barea-Xamax)⁵² might indicate otherwise. The approach

⁴⁹ HR 21 maart 2003, JAR 2003/91 (Van der Gulik/Vissers & Partners).

⁵⁰ Art. 7:650 BW.

⁵¹ Arbitragecommissie KNVB 15 augustus 1997, nr. 629 (Hesp/AZ), Arbitragecommissie KNVB 14 februari 1996, nr 550 (Witschge/Feyenoord).

⁵² Swiss Bundesgericht, 28 April 2011, 4A_53/2011 (Barea/Xamax).

of the court in this case might lead to a solution for players who refuse to sign a newly offered contract with the club and are excluded from playing for this reason.

3.16 FA registration of first time professionals and unemployed players

According to FIFA Regulations⁵³ players may only be registered during one of the two annual registration periods fixed by the relevant association. As an exception to this rule, a professional whose contract has expired prior to the end of a registration period may be registered outside that registration period. Associations are authorized to register such professionals provided due consideration is given to the sporting integrity of the relevant competition

In the Netherlands a request for registration has to be made before 16 June. If the request is accepted the player is eligible to play from 1 August.⁵⁴ Unemployed players and first time professionals can join a team at any time during the season until the 1st Friday in March. This is to secure the integrity of the competition.⁵⁵

Professional players becoming unemployed during the season, i.e. because their club is liquidated can sign for other professional clubs during the season but may have problems to sign with an amateur club, even if they can sign a professional contract.

Recently we saw some examples of professional players who wanted to move to an amateur club during the season. First of all there was FC Haarlem that went into administration and later on liquidation. The club had professional players, amateur players and professional players on loan. The loan players could be reregistered with their old club and the amateurs were free to join amateur clubs or professional clubs. According to the interpretation of the FA the professional players were not allowed to sign for amateur clubs because there was no regulatory possibility according the registration rules of the federation. In a two-instance procedure before a state court it was decided that the FA was mistaken in interpreting the regulations in this way. Article 10 of the Registration rules of the federation offers a possibility to register players to another club, but there have to be extraordinary circumstances. The liquidation of the club is an extraordinary circumstance. In principle it is not possible to reregister outside the normal transfer periods. The federation referred to distortion of competition if the players joined an amateur club during the season, but the court didn't share that opinion. The court stated in its ruling that a professional player has a certain interest in playing, to keep up his shape and to put himself in the spotlight for professional clubs for the new season. By playing for an amateur club these interests can be fulfilled.⁵⁶

Unemployed players do not have to wait for the new transfer window in

⁵³ Art. 6(1) RSTP.

⁵⁴ Art. 7 Reglement Overschrijvingsbepalingen Amateurvoetbal.

⁵⁵ European Court of Justice 13 April 2000, Case C-176/96 (Lethonen).

⁵⁶ Rechtbank Utrecht 11 maart 2010, LJN BL7307.

order to sign a contract with a new club. It is possible for an unemployed professional player to register with a club if he meets certain requirements: he needs to have an employment contract that is sufficient to terminate his unemployment benefit completely and remuneration not lower than the minimum wage.⁵⁷

Professional players who play for an amateur league club can sign a contract with a professional club in the mid-winter transfer window only when their contract is terminated by the Arbitration Committee.

4 *Social security*

4.1 *Unemployment*

After the expiry of the contract or its premature termination, a player is entitled to receive unemployment benefit unless he is seriously culpable in respect of his unemployment.⁵⁸ The latter provides a relatively high standard for the authorities which is hardly ever met. Only when a player is dismissed with immediate effect for a just cause will the benefit be refused.

It must be considered that clubs will rather be tempted to “sell” a player instead of dismissing him.

The duration and level of the benefit is strictly related to the age of the worker and number of years he has had a job. This is not limited to football activities. The level is 75% of the salary during the first two months and 70% for the successive months.⁵⁹ There is a limitation for the maximum salary to be calculated. For 2014 the maximum amount for one workday in unemployment is 197 euro.⁶⁰

The unemployed worker has an obligation to seek employment.⁶¹ During the first six months of unemployment the player is free to apply only for jobs in professional football which are compatible with his skills and knowledge.

After that period, he is obliged to broaden his range.⁶² From that moment on he has to apply for and accept all jobs offered. Not complying with these duties will lead to withdrawal of the benefit.⁶³

In order to help players with their applications within or outside the world of football the Dutch Players Union VVCS started an application service for their members in 2005. This prevents punitive sanctions for the players. In combination with the yearly tournaments for players out of contract this often leads to a successful step in a new career.

⁵⁷ Art. 7(1) WMM, art. 8(1) CBA.

⁵⁸ Art. 24 (1a) Werkloosheidswet.

⁵⁹ Art. 47 (1) Werkloosheidswet.

⁶⁰ Dagloonbesluit werknemersverzekeringen (22 mei 2013), Staatscourant 19 november 2013, nr. 32425, Staatscourant 7 november 2013, nr. 31007.

⁶¹ Art. 24 (1b) Werkloosheidswet.

⁶² Art. 24 (3) Werkloosheidswet.

⁶³ Art. 27 (1) Werkloosheidswet.

4.2 Health Insurance

As players are employees they fall under the social security system for illness. The employer is obliged to pay the employee's salary for a maximum period 104 weeks. The payment can be reduced to 70% of the salary but never lower than the Minimum Wage. In the event that an employer does not make enough effort to reintegrate the employee, he can be forced to pay an extra 52 weeks by the Social Security Authority.⁶⁴ In case the contract expires and the player is still not able to perform because of illness he falls under the state regulation for illness.⁶⁵ This benefit has a maximum limit of 70% of the legal maximum daily wage.

After 104 or 156 weeks of illness the employee will have a medical examination in order to see if he qualifies for a disability benefit.⁶⁶ According to the system it will be checked what someone with his medical limitations can earn compared to a similar person without these limitations.

In practice it is very difficult to qualify. If the employee passes the test he is entitled to a benefit that relates to the amount he is supposed to earn. Again this is limited to the maximum of 70% of the legal maximum daily wage. Of course it is possible to have additional private insurance.

Article 13 of the CBA gives some further regulations for medical treatment. The player has the obligation to be treated by the club doctor in the case that he is injured. The player is allowed to involve other medical services in consultation with the club doctor. The costs of this treatment are for the player unless otherwise agreed. There is an obligation for the employer to pay the player 100% of his basic salary during the full period of illness.

4.3 Doping

The FA has Doping Regulations which are in compliance with the WADA Code.⁶⁷ There have been only a few doping cases mostly related to social drugs especially cannabis. Although the Minimum Requirements on Player Contracts indicate that doping is an issue between the Social Partners like it is in the US, there is no provision for it in the CBA.

4.4 Career Fund and Pension Scheme

In Dutch football there is a mandatory scheme for a bridging fund for professional players who pay in a percentage of their gross earnings to form their own individual pension fund. Contributions are free of tax and social insurance premiums. Payment of bridging benefits begins directly after the player's professional career ends and

⁶⁴ UWV.

⁶⁵ Ziektewet.

⁶⁶ WIA.

⁶⁷ www.knfb.nl/watdoenwe/dopingbeleid.

continues for a number of years.⁶⁸

The scheme was set up in 1972 by players' union VVCS. The independent organization CFK is the administrator of the scheme. This scheme is designed to provide a basic income for players during their transition into a second career after football. CFK falls under the supervision of the national financial markets.

Contributions out of gross earnings are free of tax and social insurance premiums.

The amount and duration of the benefits depends on the individual fund balance.

The balance held in a bridging pension fund need not be entered as capital in Box III on income tax returns.

4.5 Old age pension

Alongside the bridging benefit scheme players also have a basic pension scheme. This provides for an income on retirement. The players are also entitled to receive the state pension for old age.

The obligation for players to participate in the fund is regulated in the CBA.⁶⁹ Under circumstances dispensation is possible. All contributions to the fund are paid by the players. The employers are obliged to pay the contributions out of the player's salary directly to the fund and they can be sanctioned for not doing this.

4.6 Agents

The domestic rules regarding agents are regulated in the Regulations for Players' Agents.⁷⁰

This regulation is in conformity with the FIFA Regulations.⁷¹ Agents are natural persons and they need to have a license issued by the FA.

Players and clubs are obliged to verify that an agent has a license before an agreement is signed or when an agent is enabled to deliver services regarding labour agreements or transfers. The license is has to be renewed every five years.

The regulations contain a prohibition on activities regarding players under sixteen.⁷²

The agent is obliged to take care that his name and signature are in every contract that is concluded through his activities. Also, the remuneration the agent receives has to be stated in the contract and as well as the identity of the party

⁶⁸ www.cfk.nl.

⁶⁹ Art. 24 CBA.

⁷⁰ Reglement Spelersmakelaars.

⁷¹ Regulations Players' Agents (2008), www.fifa.com/aboutfifa/organisation/footballgovernance/playeragents/regulation.html.

⁷² Art. 8 (1d) Reglement Spelersmakelaars.

paying him.⁷³

A contract with a player must be in writing and cannot exceed a period of two years. Prolongation of the contract must be explicitly negotiated.⁷⁴

The agent has to comply with all relevant legislation including the law regarding Employment Agencies and Recruitment.⁷⁵

If a club has concluded a player's contract as a result of the agents activities, it is the club that has to pay the agent according to the WAADI. The minimum fee is 3% of the player's annual remuneration including the pro rata sign-on fee.⁷⁶

The player's contract will be registered with the FA if it meets all requirements regarding the relevant law and the regulations of FIFA, UEFA and the FA.⁷⁷

All disputes have to be settled by the arbitration tribunal of the FA.⁷⁸

The obligation for a club to pay the fee for the player's agent has been confirmed in a recent decision of the Arbitration Committee⁷⁹ as well as the prohibition for an agent to have an interest in the player's upcoming transfers.⁸⁰

In the case between player Sillah and ADO Den Haag, the Arbitration Committee confirmed that someone who is not a licensed agent himself cannot operate independently on behalf of the agent. The player was not bound to the agreement concluded by someone who was employed by an agent but was not an agent himself.⁸¹

It is expected that in 2015 new regulations on intermediaries will come into force and that FIFA will leave the supervision on agents to the national FA's.

Agents fall under the Disciplinary rules of the FA. The Appeals Committee of the FA recently sanctioned an agent who was involved in the transfer of players under 16 years.⁸²

4.7 *Training, education and solidarity contributions*

Regarding the training compensation, there are two separate regulations in place. The first one is the General Regulations for Transfers, Training Education and Solidarity contributions.⁸³ The second one is the Regulations on Training and Education especially for professional football.⁸⁴

⁷³ Art. 8 (1f, 11) Reglement Spelersmakelaars.

⁷⁴ Art. 9 (2) Reglement Spelersmakelaars.

⁷⁵ Wet Allocatie Arbeidskrachten door Intermediairs (WAADI).

⁷⁶ Art. 9(6) Reglement Spelersmakelaars.

⁷⁷ Art. 9(9) Reglement Spelersmakelaars.

⁷⁸ Art. 12 Reglement Spelersmakelaars.

⁷⁹ Arbitragecommissie KNVB 27 maart 2013, nr. 1362 (World Soccer Consult/AZ).

⁸⁰ Art. 7 Reglement Spelersmakelaars.

⁸¹ Arbitragecommissie KNVB 28 juli 2006, nr. 1112 (ADO Den Haag/Sillah).

⁸² Commissie van Beroep, 29 augustus 2011 (Postema).

⁸³ Reglement Overschrijvingsbepalingen Algemeen, Opleidingsvergoeding en Solidariteitsbijdrage.

⁸⁴ Reglement Opleidingen.

The General Regulations for Transfers, Training Education and Solidarity explains when training compensation and solidarity contributions are due in the event of a player moving to another club.

The years taken into account for calculation of training compensation are the ones between 9 and 22 years. The maximum number of years to be taken into account is twelve. The solidarity contribution is 5% of the transfer amount paid to the former club and has to be distributed by the new club amongst the training clubs for each of the years the player was between 12 and 23 years old. Article 12 describes when training compensation is due for three different categories of players. Once training compensation is paid it excludes further compensation over the same period. The amount of compensation is Euro 1.355 per year.⁸⁵

Article 14 regulates the distribution of the 5% solidarity contribution between the training clubs. It is more or less similar to the FIFA-system.

4.8 The Regulations on Training and Education

In this Regulation a pool system for training costs is introduced in case a young player transfers domestically from a professional club to another professional club regardless of whether the player is an amateur or not. After the registration of the transfer with the FA the training club is entitled to receive compensation from the pool-system. If a payment from this system has been paid the right to claim compensation from the general regulations falls due.

The written request for compensation must be addressed to the FA within 30 days after the registration of the transfer. Decisions can be appealed with the Pool Committee by all clubs involved.

Decisions of the Pool Committee cannot be appealed; however, a regular court has marginal discretion to judge on such decisions.

All employees fall under the national health insurance plan. Also here additional private insurances are a possibility.

4.9 Residence permit and work permit

The Dutch Government has a restrictive policy regarding foreign workers.

This is done with the idea that Dutch workers should be given priority in the Dutch labour market. Because of the specific nature of sport the Minister of Social Affairs developed a special policy which, for professional football, has been created in consultation with the social partners.

For workers coming from the EU-countries, the European Economic Area (EEA) and Switzerland there is free movement of workers. This is also the case for the partners of these workers even if they do not have this status. They do not need a work permit but other workers do require one.

Because of the restrictive policy a work permit will be denied if there is a

⁸⁵ Level 2013.

priority supply of workers in the Dutch labour market. The Netherlands have a quite clear regulation in place. Other than in the case of most European countries it cannot be predicted with a high degree of certainty whether a work permit will be granted or not.

The regulation is published on the website of the Ministry.⁸⁶

The general framework is for all professional sports. A permit can only be issued in case of the highest level of the sport involved.

The remuneration of the athlete must be in accordance with the appropriate level for the top 20% of athletes in the relevant sport. The athlete must have a performance level at least equal to the top level in the Netherlands. The second league in football is also regarded as the top level.

For professional football there are some additional conditions. The guaranteed remuneration of the player must be at least 150% of the average remuneration in the top league (Eredivisie) in the previous season including premiums that depend on the result of the club asking for the work permit in the relevant season.⁸⁷ For players in the category 18-20 years the compliant remuneration is at least 75% of the aforementioned amount. Normally permits for players under 18 will be rejected.

For both categories it is mandatory that the player has played in a competition at least as strong as the Dutch competition or that he has proven to have similar qualities evidenced by participation in international championships. The permit is valid for the duration of the contract with a maximum duration of three years.

A player who has played for five years with a work permit is able to transfer to any other club of his choice without the need of a permit.

There is no limitation on the number of foreign players in a club or team. For players with a residence permit coming from a country falling under a treaty with the EU the European Court of Justice ruled in the Kolpak –case⁸⁸ that they cannot be discriminated against. Also the Simutenkov case illustrates that workers cannot be discriminated on the grounds of their nationality.⁸⁹ The general rules on equal treatment prohibit a limitation for other players as well on the basis of nationality. In the Kanu case⁹⁰ the Arbitration Committee decided that no distinction could be made between domestic players and non-EU players.

From 1 April 2014 there is a new procedure combining the residence permit procedure with the work permit procedure.⁹¹ The procedure starts with a

⁸⁶ Regeling van de Minister van Sociale Zaken en Werkgelegenheid van 16 december 2013, 2013-0000165091, tot vaststelling van de Regeling uitvoering Wet arbeid vreemdelingen naar aanleiding van de herziening van de Wet arbeid vreemdelingen en enkele andere wijzigingen <https://zoek.officielebekendmakingen.nl/stcrt-2013-35848.html>.

⁸⁷ Current level for 2014-2015 = 529.000.

⁸⁸ European Court of Justice 8 may, case C-438/00 (Deutscher Handballbund eV / Maros Kolpak).

⁸⁹ HvJEG, 12 april 2005, zaak C-265/03, Igor Simutenkov tegen Ministerio de Educacion y Cultura, Real Federacion Espanola de Futbol.

⁹⁰ Arbitragecommissie 9 juli 1996, nr. 568 (Kanu/Ajax).

⁹¹ www.werk.nl/werk_nl/werkgever/meerweten/werkvergunning/aanvragen-werkvergunning-bij-ind.

request to the immigration authorities who will contact the department of the Ministry of Social Affairs for advice. The department will check if the legal requirements are met and will report to the immigration authorities who will decide accordingly.

5. *Labour Dispute settlement*

Within professional football there is a mandatory system in which there is one competent body.⁹² This is the Arbitration Committee of the FA. It is a one instance arbitration body fulfilling the requirements of arbitration under the New York Convention. Members of the panel are nominated by players' and club organizations. The chairpersons are nominated by the FA.

The system has no possibility to appeal⁹³ and also there is no real option to address civil courts although recently one player succeeded in circumventing this system.⁹⁴ However, it is not clear if decisions can be appealed before CAS. There have been no cases from the Netherlands that went to the FIFA DRC.

Decisions of the Arbitration Committee normally are enforced through association law principles. It is also possible to do it in conformity with the arbitration laws and the New York Convention.

In football there are a few other bodies with judicial powers. These are the License Committee and the Pool Committee. The License Committee decides on matters regarding club licensing and the Pool Committee decides on matters regarding training compensation.

Conclusions

Although at first sight the relationship between a player and his club looks like complicated patch work, in practice it proves to be not too difficult. Most of the time regular national laws can be applied to solve the different issues. This allows us to follow the conclusions of the Belgian court in the recent Dahmane-case: the relationship between a professional player and his club? Nothing special!⁹⁵

⁹² Art. 1(1) Arbitragereglement.

⁹³ Art. 74 (2) Arbitragereglement.

⁹⁴ Rechtbank Almelo 22-11-2011 ECLI:NL:RBALM:2011:BU5849; Gerechtshof Arnhem-Leeuwarden 13-08-2013 ECLI:NL:GHARL:2013:6000.

⁹⁵ Arbeidshof Antwerpen, Afdeling Hasselt, 6 mei 2014 (Dahmane–Racing Genk).

EMPLOYMENT RELATIONSHIPS AT NATIONAL LEVEL: PORTUGAL

by Rui Botica Santos*

SUMMARY: 1. Introduction – 2. Employment regulation and football structures – 3. Individual employment relations in professional football – 4. Medical and doping issues – 5. Transfer of players – 6. Social security principles (unemployment and pensions) – 7. Labour Dispute settlement – 8. The Portuguese Court of Arbitration for Sport – 9. Conclusion

Abstract:

An insight into the legal mechanisms governing employment issues in Portuguese football. This article provides an overview of how the Portuguese football regulations treat professional, semi-professional and amateur footballers. It covers the contents and prerequisites of a valid employment contract, the duties and obligations of clubs and players, the professional ethics and conduct rules to which footballers are subject, termination of contracts and the consequences and disciplinary issues, including dispute resolution mechanisms. This article sheds light on these issues and concludes with an assessment of the way forward for and the future of Portuguese football sports disputes.

1. Introduction

During the last decade, Portuguese football has made a major contribution to the Portuguese economy. Portugal's top three clubs, FC Benfica, FC Porto, and Sporting Lisbon continue to produce and export some of the world's top football talents, which can largely be accounted for by their excellent academies and good scouting systems.

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There seems to be no end in sight to this amazing flow of talent, and after the emergence of Cristiano Ronaldo, the country is will soon witness yet another golden generation of players, with the likes of William Carvalho, Bruma, Carlos Mané, and even young foreign players like Lazar Markovic, Eliaquim Mangala and Rodrigo, who are attracting interest from top European clubs in Spain and England.

Like all industries, the Portuguese football industry is governed by rules and regulations. The sport has been able to thrive and maintain its stability as a result of the various stakeholders pooling their resources and agreeing to a set of rules and regulations. We shall consider how footballers in Portugal are governed by the law, their duties and expectations *vis-à-vis* the clubs and the remedies available to them, when conflicts arise in the course of employment.

2. *Employment regulation and football structures*

2.1 *Sources of law and approaches*

The Portuguese Employment Law system is complex, to the extent that its historical evolution is marked by a proliferation of miscellaneous legislation. There are therefore many provisions scattered in various items of legislation that apply to sportspersons and their employers.

There are, in any event, various specificities or particularities of sports employment Law, which require a specific legal framework. We therefore consider that a sport employment contract is a special type of employment contract to which the standard legal provisions governing individual employment contracts cannot be applied immediately and automatically. There is a need for a structured relationship between the traditional and classic protection of sports employees and the protection of the specificities and particularities of sports competitions.

There are various laws which govern employment issues in Portugal. Like any other employee, professional footballers working as such in Portugal are first and foremost protected by, and are entitled to enjoy, certain fundamental rights as provided for by the Portuguese Constitution (the “Constitution”).

These rights include:

- (a) protection of the intimacy of private life;
- (b) honour; and
- (c) the teleological aspect of the right to one’s own image. The collateral aspects of these rights can be governed by ordinary legislation.

The Constitution aside, there are other regulations and legal instruments, which we shall consider in detail in the latter parts, which also play a role in governing sports in Portugal. These are:

- a) the Employment Code;
- b) *the Convenção Colectiva de Trabalho* (the “Collective Bargaining Agreement”);
- c) *the Lei de Bases da Actividade Física e do Desporto* (the “Law of Physical Activity and Sport”);

- d) *the Lei de Bases do Sistema Desportivo* (the “Basic Law of the Sports System”);
- e) *the Regulamento do Estatuto, da Categoria, da Inscrição e Transferência de Jogadores* (the “FPF Transfer Regulations”); and
- f) *the Regime Jurídico do Contrato de Trabalho do Praticante Desportivo Profissional* (the “Law on Professional Sports Employment Contracts”).

2.2 *The football structures*

The body in charge of Portuguese football is the Federação Portuguesa de Futebol (the “FPF”). Among other things, the FPF is charged with registering all professional contracts made between clubs and players, thereby entitling players to play. The FPF therefore plays a major role in the international transfer of players by issuing International Transfer Certificates.

According to article 17.1 of the FPF Statutes,¹ various other bodies are recognized as subordinate organs to the FPF, and/or as affiliated to the FPF in the running of Portuguese football. These bodies are the Liga Portuguesa de Futebol Profissional (the “Liga”), the Sindicato dos Jogadores Profissionais de Futebol (the “Professional Football Players Union”, the Associação Nacional de Treinadores de Futebol (the “National Association of Football Coaches”), the Associação Portuguesa de Árbitros de Futebol (the “Portuguese Association of Football Referees”) and the Players’ Agents Union.

According to article 5.1 of the statutes of the Liga, the Liga promotes and protects the interests of the Portuguese professional football clubs, while at the same time running and regulating the professional leagues organized within the ambit of the FPF.

The Professional Football Players Union was established with the principal objective of abolishing temporary restrictions imposed on employees by employers, the provision of legal advice, the establishment of a salary guarantee fund for players whose employers become insolvent, protection of workers from any abuses of their image rights, and life insurance, *inter alia*. Although not established on principles similar to the Professional Football Players Union, the National Association of Football Coaches, the Portuguese Association of Football Referees and the Players’ Agents Union champion the protection and promotion of the coaches’, referees’ and agent’s rights.

2.3 *Special legal measures and regulations on sport and football*

As earlier mentioned, various other legal measures and regulations have been enacted

¹ The District or Regional Associations, the Portuguese Professional Football League, the organizations representing sports agents and the entities recognized by the General Assembly of the FPF, Sports Clubs or Entities, players, coaches and referees enrolled in the FPF or their District or Regional Associations, are affiliated and are subject to the Portuguese Football Federation.

at national level to complement the Constitution and the regulations enacted by the FPF. These are:

a) *The Collective Bargaining Agreement*

The Collective Bargaining Agreement was entered into between the Liga and the Professional Football Players Union, and governs the specificities of Portuguese professional football. It also applies to sports employment relations between professional coaches and clubs, which are members of the Liga. It was signed on 15 July 1999 and was published in the 1st Series of the Work and Employment Bulletin, no. 33, on 8 Sep. 1999.

Among other things, paragraph (d) of Article 14 of the Collective Bargaining Agreement expressly prohibits clubs from altering players' working conditions in such a way as prevents the player from working as a member of the normal working group, other than in special circumstances, for medical or technical reasons. This does not, however, mean that the club is obliged to use players in all games of the competitions in which it competes. Clubs have the power to make the technical decision whether or not to use a certain player in competitions. This protection applies, above all, as a prohibition of exclusion from training, and of the isolation of players during non-training activities. It is common practice in Portugal to invoke technical reasons in order to justify the exclusion of players from the normal working group.

b) *The Law on Professional Sports Employment Contracts*

The Law on Professional Sports Employment Contracts establishes the legal framework governing the employment contracts of professional sportsmen as well as training contracts for the education and training of young sportsmen (amateurs and/or minors).

It also establishes the maximum and minimum terms of contracts, the rights and obligations of contracting parties, the acts and/or omissions, which warrant disciplinary measures, and makes provision regarding loans and transfers, termination of contracts and compensation criteria.

c) *The Law of Physical Activity and Sport*

Although not a law that governs employment relationships in Portuguese football *per se*, the Law of Physical Activity and Sport contains provisions regarding the resolution of strictly sporting matters² that are based on technical or disciplinary

² According to Article 18, no. 4 of the Law of Physical Activity and Sport, decisions and deliberations regarding violence-related offences and other matters related to sports ethics, such as violence, doping, corruption, racism and xenophobia are not strictly sports matters. For example, a referee's decision during a game to warn a player with regard to an assault on another player, or the referee,

rules of the game. For instance, the Law of Physical Activity and Sport prohibits any appeal against decisions and resolutions with regard to strictly sporting matters, to a body outside the sports dispute resolution systems. With the exception of disputes arising from the exercise of public powers, which can be commenced in an ordinary court, as permitted by the constitution, all other sporting disputes may only be resolved by recourse to the relevant decision making bodies federation level, to arbitration, or mediation, if there is a prior arbitration agreement in writing, or in accordance with the provisions of the bylaws or regulations of the relevant sports associations.

d) *The Basic Law of the Sports System*

As with the Law of Physical Activity and Sport, subsection 2 of Article 25 of the Basic Law of the Sports System, whose states that decisions and deliberations with regard to strictly sports matters cannot be challenged or appealed outside of the sports dispute resolution and disciplinary system.

In addition to this, the Basic Law of the Sports System also contains provisions regarding the training of coaches and players agents.

2.4 *Professionals and amateurs*

According to article 4.2 of the FPF Transfer Regulations, the status of a player, as either an amateur or a professional, is to be defined by the club at the time of registration.

In Portugal, it is generally accepted that the relationship between players and the club for which they work for a salary and bonuses, is an employment relationship.³ Indeed, on 9 October 1996, the Supreme Court held that a contract between a sports club and a volleyball player, in which the player was required to work on a continuous basis together with other players and subject to the orders and instructions of the club, is an employment contract.

According to Article 2 paragraph (b) of the Law on Professional Sports Employment Contracts, a professional sportsperson is a person, who plays a sport as an exclusively or primarily professional player, after the necessary technical and occupational training, pursuant to a sports employment contract and for which he or she is remunerated.

should not be deemed to be a strictly sports matter. Further reading, see José Manuel Meirim, *Lei de Bases da Actividade Física e do Desporto – Estudo, Notas e Comentários* (Coimbra: Coimbra Editora, 2007), 188.

³ Cf. Bernardo Xavier, *Curso de Direito do Trabalho*, 2nd ed. (Lisbon: Verbo, 1993), 15, Pedro Romano Martinez, *Direito do Trabalho*, 3rd ed. (Lisbon: Almedina, 2006), 40, João Leal Amado, *Rescisão do Contrato de Jogadores de Futebol, Questões Laborais*, no. 4 (Coimbra: Coimbra Editora, 1995), 50 et seq., André Dinis de Carvalho, *Da Liberdade de Circulação dos Desportistas na União Europeia* (Coimbra: Coimbra Editora, 2003), 60, Lúcio Correia, *Limitações à Liberdade Contratual do Praticante Desportivo* (Lisbon: Livraria Petrony Editores, 2008), 47.

Under Article 4.5 of the FPF Transfer Regulations, a professional can only be allowed to carry on his sporting activities pursuant to a written employment contract registered at the FPF.

Article 4.3 of the FPF Transfer Regulations considers an amateur to be a player, who plays sport just for fun, or as a hobby, without any material gain, and who has never received any remuneration other than payment for expenses actually incurred. An amateur footballer's license is only valid for one sporting season,⁴ whereas the licenses given to professionals and trainee players are valid for the duration of the corresponding training and/or employment contracts.⁵

Minors may sign professional contracts, but only with the express authorisation of their legal representatives.

2.5 *Semi-professionals*

In Portugal, a sportsperson, who has another occupation, may be considered to be a professional sportsman if the aspects of legal direction and control of the employee, and payment are present. The question as to whether or not a sportsperson's sports occupation is his or her principal or secondary occupation is a matter of secondary concern.

It is still debatable whether a sportsperson, who signs a sports employment contract with a club and then decides that this is not going to be his or her main activity, automatically loses his or her status as a professional merely because he or she has some other paid activity. The legislation makes no provision for this situation, but legal theory considers that there is no loss of professional status.

2.6 *Autonomous workers and/Voluntary work*

Given the rather specific nature of sport, and football in particular, the term "voluntary" work does not quite exist and/or fit with football. The closest comparisons to voluntary work can be seen in players, who attend trials at football clubs for a specific period of time and play some competitive games, but no official matches for the said clubs.

According to the Law on Professional Sports Employment Contracts, trials of footballers cannot exceed thirty days. Article 108 of the Law on Professional Sports Employment Contracts provides for a 30-day trial period for contracts with a duration of six months, or more, and a 15-day trial period in (i) contracts for a

⁴ Article 10.1 of the FPF Transfer Regulations: "*An amateur player's license is valid for one sporting season.*"

⁵ Article 10.2 of the FPF Transfer Regulations: "*The licenses of trainee players and professional footballers are valid for the number of seasons corresponding to the duration of their training and/or employment contracts (...).*"

⁶ "*No one shall be privileged, favoured, prejudiced, deprived of any right or exempted from any duty on the basis of ancestry, sex, race, language, place of origin, religion, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation.*"

fixed term of less than six months and ii) contracts for an indefinite term, the term of which is not expected to exceed six months.

2.7 *Discrimination law and equal treatment*

Portuguese football is subject to the principles of equality and non-discrimination. As Portugal is a member of the EU, Portuguese football is premised on the provisions of Article 45 of the EU Treaty, which precludes the application of rules laid down by sporting associations under which football clubs may field only a limited number of professional players, who are nationals of other Member States. Furthermore, article 26 of the Constitution provides legal protection against any form of discrimination, which is corroborated by article 13.2 of the Constitution,⁶ which provides guarantees in relation to equality.

3. *Individual employment relations in professional football*

3.1 *Essential elements and legal qualification*

3.1.1 *The employment contract*

According to Article 5.2 of the Law on Professional Sports Employment Contract, an employment contract must be in writing and signed by both parties, failing which the contract is null and void.

Article 5.2 (b) requires the following matters, to be included in an employment contract:

- a) Name and identity of the contracting parties, including the player's nationality and date of birth;
- b) The sporting services to be practiced and/or rendered by the player in question;
- c) Salary;
- d) The date when the contact commences;
- e) Duration of the contract; and
- f) Date of signing.

According to Article 4.1 of the Law on Professional Sports Employment Contracts "*Sports employment contracts can only be entered into with minors aged 16 and over, and provided that these minors meet the requirements of the general employment laws.*"

Contracts signed with minors must be authorised by their legal representatives.⁷ Contracts, which contravene these provisions, are voidable.

It is worth noting that in accordance with Article 15.2 of the FPF Transfer Regulations, minors cannot sign contracts for periods exceeding three sporting seasons, whilst training contracts must be in written form (article 15.3 of the FPF

⁷ Article 4.1 of the Law on Professional Sports Employment Contracts "*A sports employment contract signed by a minor should be co-signed by his legal representative.*"

Transfer Regulations).

According to article 9.1 of the FPF Transfer Regulations, the contract must also be registered at the FPF, failing which the player in question would be ineligible to take part in any official matches.

Article 18.2 of the FIFA Regulations on the Status and Transfer of Players fixes the minimum duration of an employment contract as being from its effective date until the end of the season, and establishes 5 years as the maximum permitted term.

However, given article 18.2⁸ of the FIFA Regulations on the Status and Transfer of Players, professional football contracts in Portugal have a maximum 8-year term, as per Article 8.2 of the Law on Professional Sports Employment Contracts, which provides that “*the duration of an employment contract shall not be less than one sporting season and shall not exceed 8 years.*”

As an exception to the rule that contracts cannot be for a period less than one sporting season, Article 8.2 (a) of the Law on Professional Sports Employment Contracts permits the following short term contracts:

- a) Contracts signed after the start of the sporting season and which will terminate at the end of the said season; and
- b) Contracts pursuant to which a player is employed to play in a particular competition or in a determined number of activities, which constitute an identifiable unit within the ambit of the corresponding sport.

3.2.2 *Players’ rights and obligations*

a) *Duty to train, to keep fit and to observe professional ethics and codes of conduct*

Article 13 of the Law on Professional Sports Employment Contracts requires players to:

- Provide their sporting services for the purposes for which they were contracted, to attend training sessions and other sessions intended to prepare them for competition;
- Players are also required to maintain their physical and technical condition in accordance with the normal sporting rules and norms and the instructions issued by the club, in order to be fit and ready to compete as contractually provided;
- Players must submit to the medical examinations and the necessary treatment required for them to be able to play; and
- The RJTCPD also requires players to comply with disciplinary regulations and professional sporting ethics.

b) *Right to use and exploit his own image*

According to the Collective Bargaining Agreement, the right to use and

⁸ Contracts of any other length shall only be permitted if consistent with national laws.

take commercial advantage of a player's image belongs to the player on a purely individual level. The player can transfer the right to his employer club, even if the club or sports company reserves the right to use the collective image of all of the players in a team.

Article 10 of the Law on Professional Sports Employment Contracts also provides that professional sportspersons are entitled to use their public image linked to sports activity and to take steps to prevent third parties from using their public image unlawfully, whether or not the said use is for economic gain.

A player is entitled also to transfer his right to his sports public image to the club for which he plays. This entitlement is provided for in the Collective Bargaining Agreement.

It should be noted that the taking and publishing the images of a sportsperson does not require that person's consent, provided they are taken of him in the exercise of his profession, or are in some way linked thereto, or as a public figure, provided that this does not interfere with his right to privacy.

c) Right to form and/or join Trade Unions

Players also have the right to form and join unions. This is a right enshrined in article 146 of the Constitution. It is pursuant to this right that the Professional Football Players Union was formed.

d) Right to strike

The right to strike is also an individual constitutional right granted to players. The exercise of this right can never amount to breach of contract. Despite the fact that it is an individual right, it is normally exercised collectively. The Law does, in exceptional circumstances, also admit the possibility of a one person strike. In Portugal, sport strikes are a recent and rare phenomenon, although it is a matter of public knowledge that the Professional Football Players Union has achieved many victories and agreements between parties by merely threatening strike action, without ever having actually led a players' strike.

e) Duty to play for the national team

Article 13 of the Law on Professional Sports Employment Contracts requires players to take part in the training and matches of the Portuguese national team.

3.2.3 Duties of clubs

According to Article 12 of the Law on Professional Sports Employment Contracts, clubs are obliged to provide players with the conditions necessary for participation in sport, and actual participation in training and other activities, which are preparatory or linked to sports competition.

One of the obligations arising from the specificities of the Law on Professional Sports Employment Contracts is that clubs are required by the FPF regulations to permit their players to play for, and represent the Portuguese National Teams, which is a matter of public interest.

It is the club's duty to ensure that the contract is registered at the FPF. Players prejudiced may seek a finding of liability against their employers on the basis of this provision.

Furthermore, article 12 of the Collective Bargaining Agreement establishes the following duties owed by clubs to players:

- a) To treat and respect the player like an employee;
- b) To pay the player timeously and as agreed;
- c) Ensure good working conditions;
- d) Allow him to exercise his trade union rights;
- e) Compensate him for any injuries sustained at work and/or professional illness in accordance with the laws in force; and
- f) Fulfil all its contractual obligations as well as the disciplinary and sports ethics regulations.

3.2.4 Remuneration

The main provisions governing the remuneration of players are Article 14 of the Law on Professional Sports Employment Contracts.

According to paragraph 1 of Article 14 of the Law on Professional Sports Employment Contracts, all benefits, which form part of the employment contract and are payable to the player with regard to the performance of his professional activities, are part and parcel of the salary.

Subsection 2 provides that clauses, which permit the reduction, or increase, of a player's salary, in the event of the relegation or promotion of the club, are valid.

As a general rule, and unless otherwise stated, salaries and/or bonuses are payable in the month following the month during which the acts and/or services remunerated by the said salaries and/or bonuses were performed.

Article 32 of the Collective Bargaining Agreement sets out the following minimum salaries for professional players, depending on the league in which their employer club plays:

- a) First Division: three times the national minimum salary.
- b) Second Division: two times the national minimum salary.
- c) Second Division B league: two times the national minimum salary.
- d) Third Division: one and a half times the national minimum salary.
- e) Players aged 18-23 and whose clubs have "B" teams are entitled to a salary equal to twice the national minimum salary.
- f) Players aged less than 18 years are entitled to a minimum basic salary equal to the national minimum salary.

Article 28.2 of the Collective Bargaining Agreement entitles a club to fine a player, who fails to report for work for no justifiable reason. The fine corresponds to the number of working days missed and is deducted from the player's salary.

3.2.5 Option Clauses

Option clauses were commonly accepted as valid, provided that they are agreed by the parties, given the specificity of sports employment contracts. However, such clauses were held to be unconstitutional by an award of the Paritary Arbitration Commission (the "Commission"), which is a decision making body that was established by the Liga as a result of the Collective Bargaining Agreement. Normally, options are granted to clubs, but there have been cases in which options have been granted to players. This was the case of a professional football player, who was under contract to a Liga club in the 2004/ 2005 season. His contract contained a clause stating that the contract would also be valid for the 2004/2005 season, if the player considered himself to be in possession of all his abilities and if he so wished. On 26 August 2005, the Coimbra Labour Court found the clause to be valid and ordered the club to compensate the player. The court held that the player's notice to the club informing the latter of his wish to extend the contract was sufficient and the renewal of the contract took place merely by virtue of that expression of intent and that the fact that the club was not interested in the continuation of the employment of the player was of no avail.

3.2.6 Working hours

According to Article 15 of the Law on Professional Sports Employment Contracts, players' working hours are deemed to include times:

- a) When the player is under the orders of and is dependent on the club with a view to having him take part in matches;
- b) Spent at technical, tactical and physical training sessions and other training sessions, and at medical examinations and treatment with a view to preparation and recovery for sports events; and
- c) Time spent at training camps and time spent travelling to and from matches.

Article 16 of the Law on Professional Sports Employment Contract also makes provisions for rest days and holidays.

According to paragraph 1 thereof, players are entitled to 1 day's rest per week in addition to the normal holidays provided by law, without prejudice to other rest days and time off work provided in the Collective Bargaining Agreement.

Where a player is unable to enjoy his weekly rest day because the club had to take part in an official or unofficial match, the rest day is taken on a date agreed between the parties, or in the absence of agreement, on the first available date.

Professional players' working hours are supplemented by the Collective

Bargaining Agreement, pursuant to which players are entitled to 22 days holiday per season, as from the month following the end of the season in question.⁹

According to article 24 of the Collective Bargaining Agreement, players are also entitled to a minimum of one and a half rest days per week. They are also entitled to the public holidays on 1 January, Easter, and on the 24-25th December.

3.2.7 *Termination of the employment relationship*

Like most employment contracts, professional football contracts can be terminated in any of the following six ways as stipulated by article 26 of the Law on Professional Sports Employment Contracts:

- a) Effluxion of time;
- b) By mutual consent;
- c) Revocation;
- d) Dismissal with just cause;
- e) Rescission with just cause;
- f) Abandonment of employment.

Whatever the way in which a sports employment contract is terminated, the termination is only effective once notice thereof has been given to the entities responsible for the obligatory registration of the contract, i.e. the federation of the sport in question.

3.2.8 *Termination for just cause*

According to article 43 of the Collective Bargaining Agreement, a player has just cause to terminate his contract when:

- a) The club fails to pay him on time, or delays payment for more than 30 days;
- b) The club breaches any provisions of article 12 of the Collective Bargaining Agreement;
- c) The club imposes abusive sanctions;
- d) The club offends the player's physical integrity, honour or dignity; and
- e) The club engages in acts intentionally aimed at forcing the player to terminate the contract.

When just cause is invoked by a player as the grounds for the termination of the contract, the player is not required to pay the sums normally due to the employer pursuant to valorisation clauses and vice versa.

Article 42 of the Collective Bargaining Agreement provides that clubs have just cause to terminate a player's contract when the player:

- a) disobeys lawful orders of the club, or its representatives;
- b) repeatedly fails to comply with the rules of conduct and the required work discipline;
- c) repeatedly provokes conflicts with his team mates, superiors or club officials;

⁹ Article 25 of the Collective Bargaining Agreement.

- d) knowingly commits an act/or omission, which has serious negative financial consequences for the club;
- e) is violent, injures others or commits other offences contrary to the honour and dignity of the club, its officials, his teammates or others connected with his work;
- f) repeatedly disobeys the disciplinary rules and sporting ethics, contrary to the club's interests;
- g) is unreasonably or unjustifiably absent and thereby directly prejudices the club, and independently of such prejudice, when the number of unjustified absences in each season amounts to 5 consecutive absences or 10 intercalated absences;
- h) repeatedly shows lack of interest in fulfilling his obligations or in performing the work inherent in the sport; and
- i) makes false declarations to justify his absences.

3.2.9 Termination without just cause

According to article 27 of the Law on Professional Sports Employment Contracts, termination without just cause has the consequence that the injured party is entitled to compensation equal to the amount due pursuant to the contract until its expected expiry date. In the case of players, any salaries they earn from new employers could be deducted from the compensation otherwise due.

3.2.10 Disciplinary rules and sanctions

Pursuant to article 3.1 of the FPF Disciplinary Rules, the jurisdiction to deal with all disciplinary matters is vested in the FPF Disciplinary Committee and in FPF's Council of Justice, without prejudice to any disciplinary jurisdiction of the Liga.

Sanctions such as verbal warnings, written warnings, fines and suspension¹⁰ can be imposed on players.

Verbal warnings are usually given for minor offences. Fines must be paid within 20 days of notification of the fine to the player.

The many offences, which are punishable under the FPF Disciplinary Rules include:

- a) Registering and/or entering into employment contracts with two or more clubs in the same season. According to Article 104 of the FPF Rules, any professional player who commits such an offence is liable to a fine ranging between Euro 1.500 and Euro 2.500 and a suspension of between 30 and 90 days. Amateur players could be suspended for 30 to 120 days.
- b) Making fraudulent and/or false declarations. According to Articles 92 and 105 of the FPF Disciplinary Rules combined, any player, who makes false declarations during disciplinary proceedings or uses a forged document with a

¹⁰ Article 15 of the FPF Disciplinary Rules.

- view to ensuring his registration as a player or the making, amendment or termination of a contract, is liable to a suspension of between 1 and 2 years and a fine of Euro 1,500 to Euro 2,500.
- c) Aiding and abetting non-appearance at a match. Article 106 of the FPF Disciplinary Rules punishes any player who aids or abets the failure of his club, or any other club, to appear at a match organized by the FPF, by suspending the player for a period of 1 to 3 years and also fining him an amount of Euro 1,500 to Euro 2,500.
 - d) Bribery and match fixing. Players, who directly or indirectly bribe referees, can be suspended for 2 to 8 years and fined between Euro 1,500 and Euro 15,000.¹¹ Similarly, players, who approach other clubs or agents with a view to fixing the outcome of a match, can be suspended for 4 to 18 months.
 - e) Assault: professional players, who physically assault any officials or agents acting in the course of their official duties may be suspended for 1 to 4 years and be fined between Euro 1,500 and Euro 3,000.
 - f) Abandonment and/or failure to comply with selection for the Portuguese national team: according to article 113 of the FPF Disciplinary Rules, a player, who is properly selected for the Portuguese national team and who abandons and/or unreasonably fails to attend a training session, match or any activity related to the Portuguese national team can be suspended for 1 to 3 months. The duty to honour a club commitment is not good reason for abandoning and/or failing to comply with the player's national team obligations.

4. *Medical and doping issues*

According to article 18.4 of the Collective Bargaining Agreement, "*the formation of a contract is subject to a medical examination conducted at the instance of the club, which confirms the player's physical and psychological fitness to perform his professional activities.*" Article 18.5 states that the failure to conduct the said examination renders the contract null and void.

As earlier stated, clubs are required to compensate players for any illnesses sustained in the course of the performance of their work.

As a general rule, and according to article 6 of Law no. 27/2009 of 19 June, which deals with anti-doping, players are responsible for any banned substances found in their bodies. The contracts of players found guilty of doping may also be terminated with just cause, presumably on grounds of bringing the club into disrepute, engaging in unethical conduct and/or being unable to perform their contractual obligations for reasons entirely attributable to them.

5. *Transfer of players*

As a general rule, and according to Article 11.1 of the FPF Transfer Regulations,

¹¹ Article 107 of the FPF Disciplinary Rules.

players may only be registered during one of the two annual Registration Periods fixed by the relevant Association. Article 11.2 of the FPF Transfer Regulations however provides an exception to this rule, by allowing a professional, whose contract has expired prior to the end of a Registration Period, to be registered outside of that Registration Period, provided due consideration is given to the sporting integrity of the relevant competition.

Clubs and players involved in the national transfer of players must abide by the FPF Transfer Regulations, which mirror the FIFA Regulations on the Status and Transfer of Players. One of the unique features of national transfers is that there is no need for the transferee club to procure an International Transfer Certificate.

Moreover, players intending to sign for a new club in the context of national transfers must comply with Article 9.4 of the FPF Transfer Regulations, according to which players can only be registered with a maximum of three clubs in one season, during which period the player in question is only eligible to play official matches for two clubs.

The FPF Transfer Regulations provide, among other things, for the need for transferee club, or clubs, to pay training compensation¹ to all clubs engaged in the training and education of players from their 12th to 23rd birthdays, when the said player signs his first professional contract

Likewise, article 21 of the FPF Transfer Regulations, provides that when a player transfers during the course of a contract, 5% of any compensation is deducted from the total amount of compensation and paid by the new club as a solidarity contribution to the club(s) involved in the training and education of the player from his 12th to 23rd birthdays.

There are however certain provisions of the FPF Transfer Regulations, which are specific to national transfers of amateur players. Article 17.2 of the FPF Transfer Regulations provides that amateur players, who have not signed any training contract, may transfer to another club, if:

- a) The minor players' parents or guardians change their residence to a place, which is more than 20 km away from their previous residence, provided that the new residence is further away from the club's headquarters;
- b) The player has been released by his current club, expressly and in writing, either unilaterally or pursuant to a mutual agreement, in a document written on the club's letter headed paper, which is signed by the player's representatives in the presence of a person with notarial powers and legalised by that person;
- c) The player's current club does not compete in the age-group in which the player is registered to play; and
- d) If, the club fails, after the first four official matches have been played, to give the player an opportunity to either play in the official matches or take part in any training sessions, for reasons which cannot be attributed to the player.

Given that international transfers are governed by the FIFA Regulations

¹² Article 20 of the FPF Transfer Regulations.

on the Status and Transfer of Players, it is the duty of the new club that wishes to sign a foreign player, to ensure that the player receives a work permit before signing an employment contract. This is because according to article 18.4 of the FIFA regulations on the Status and Transfer of Players, the validity of a contract may not be made subject to the grant of a work permit. Furthermore, the new club must first inform the player's current club in writing of its interest in the player before concluding an employment contract.

If an agent is involved in the transfer, his name must appear in the contract.

There are various laws which also govern players' agents in the performance of their activities.

Paragraph 1 of Article 37 of the Basic Law of Sports System describes players' agents as duly licensed natural or juristic persons, who are in the occasional or permanent business of representation, or intermediation, in connection with the making of sports training contracts, sports employment contracts, or contracts with regard to image rights.

According to the Basic Law of Sports System, the work of a players' agent is multidisciplinary and is associated with a vast range of specific acts, i.e.: (i) prospecting and negotiation of contracts (employment, transfer, sponsorship and other contracts) for a sportsperson, club or federation; (ii) registration of players, a club or federation in official/friendly or commercial events; (iii) elaboration and management of career plans for sportspersons; (iv) providing sportspersons with technical advice (training/coaching); (v) development of marketing strategies for sportspersons; (vi) organization/preparation of sportspersons' travel arrangements; (vii) management of the daily problems of sportspersons such as housing, and diet, inter alia; (viii) advising sportspersons on matters of tax, Law, social security, insurance and other matters; (ix) monitoring of the school education of sportspersons; (x) financial planning for sportspersons, etc. In any event, the fundamental role of a player's agent is to know how to assist the player in the making of sports contracts.

Following FIFA's recent enactment of the new FIFA Regulations on working with intermediaries, it is expected that the FPF will also adopt and implement the said rules.

6. *Social security principles (unemployment and pensions)*

According to the 2014 edition of the Portuguese Social Security Legislation, every professional athlete, whose occupational activity is exclusively sporting, is entitled to the benefits of the general social security scheme for employees. Professional sportspersons are therefore entitled to unemployment, professional injury, death, parenting, permanent disability and old age benefits.

So far as the contribution rates applicable to professional athletes are concerned, they are obliged to pay social security contributions equal to 11% of their net income, while the employer, i.e. the club, is required to pay a further 21.5%.

In order to have access to unemployment benefits, a person must meet the following requirements: be a resident in Portugal; be unemployed for reasons beyond his control; he must not be working when he applies for the benefits; he has to be registered in the employment centre of his residence area; have filed a request for the “unemployment benefit” within 90 days, of the date on which he became unemployed, although this period may be extended in some situations; and have worked as an employee and have deducted social security contribution during the period prescribed by law.

a) *Clubs' insolvency and players' protection*

Clubs are subject to the Portuguese law on Insolvency and Administration and Employment laws in matters related to insolvency and its consequences.

So far as the Insolvency of clubs is concerned, it should be noted that the insolvency decree does not terminate employment contracts automatically. An insolvency decree does not mean that the player ceases being the club's employee. The player continues to be an employee until the situation is resolved. If the administrator decides to maintain the employment contracts, the player's salaries rank as priority debts. When a player has to leave the Club because it is insolvent, or in difficult financial circumstances, the player, like a normal employee, can apply for unemployment benefits, as well to the career fund.

b) *Career Funds*

The purpose of career funds is to ensure the payment of credits resulting from breach or termination of the player's contract, when clubs do not have means to pay because of insolvency, or difficult financial circumstances.

Applications to the career fund are subject to certain requirements, such as having an employment contract or employment relationship, and unpaid salaries, bonuses and compensation for breach of contract.

7. *Labour Dispute Settlement*

The most common means of dispute settlement in Portuguese football is via the dispute resolution arbitration bodies established by the FPF and the Liga. Mediation is rarely used. The same is true of recourse to the ordinary courts, given the desire of FPF members (clubs and players) to respect the FPF bylaws, which generally discourage recourse to ordinary courts – although there is no express provision preventing the parties from litigating employment matters in the ordinary courts.

Article 30 of the Law on Professional Sports Employment Contracts permits the resolution of employment disputes by arbitration and appeals against decisions made by an organ of a federation, association or any sports entity, which has been granted disciplinary powers by Law.

Dispute resolution of employment matters via arbitration within the FPF and the Liga's dispute resolution bodies is mainly done by the Commission.

The Commission's jurisdiction is however limited to disputes arising from and related to employment contracts, and does not include matters related to inalienable rights, i.e. unlawful dismissal. The Commission can only exercise its

jurisdiction pursuant to an arbitration clause, or subsequent arbitration agreement, agreed by the parties.

According to Article 55 of the Collective Bargaining Agreement, the Commission may, *inter alia*:

- a) decide employment disputes between football players and clubs, or Public Limited Sports Companies;
- b) interpret the application of the Collective Bargaining Agreement between the players and the league;
- c) supervise compliance with the matters regulated by the Collective Bargaining Agreement;
- d) study the evolution of relations between the parties; and
- e) decide other matters with a view to the improvement of the practical efficacy of the Collective Bargaining Agreement or other matters allocated to it by the Collective Bargaining Agreement.

The Commission's decisions are taken by a majority and the chairman has a casting vote. Article 10 of annexe 2 of the Collective Bargaining Agreement, provides that the Commission's decisions are final and binding in the following terms "*by subjecting themselves to the Paritary Arbitration Commission, the parties renounce their right to appeal against the Commission's decisions.*"

The Commission has six members, three appointed by the Liga, and another three appointed by the player's union. The Chairman changes every two months.

8. *The Portuguese Court of Arbitration for Sport*

In July 2012, the Portuguese Parliament, in decree no 84/XII, proposed the establishment of the Portuguese Court of Arbitration for Sport (Tribunal Arbitral do Desporto, hereinafter "TAD"), and a commission was established the Court's structure and foundations.

Subsequently, in 2013, the TAD was established by decree no 128/XII as a jurisdictional body intended to act independently of (public law) administrative bodies and private sports bodies.¹³ It has jurisdiction to decide sports-related litigation in Portugal, namely disputes arising out of the sport legal system and disputes related to the practice of sport. Moreover, arbitration in the TAD may be either compulsory or voluntary depending on the nature of the dispute. This means that the TAD hears matters subject to compulsory arbitration as well as those freely submitted to it by the parties to the dispute.

The TAD exercises its compulsory arbitration jurisdiction when deciding disputes arising from the acts or omissions of federations, professional leagues and

¹³ As to the sought after independence of the TAD, it should be noted that the TAD has its seat on the premises of the Portuguese Olympic Committee (COP), which is also in charge of the setting-up and operations of the TAD. However, the COP is precisely made up of the entities against which proceedings may be brought before the TAD.

other sports bodies in their exercise of any administration and/or disciplinary matters, and also when hearing appeals against doping decisions of the Portuguese Anti-doping Authority.

The TAD can exercise voluntary jurisdiction pursuant to an arbitration agreement or a clause in employment contracts between clubs and players, or via the rules and regulations governing Portuguese football. When this happens, the TAD will essentially be assuming the role of, and consequently dispensing with the Commission, as a court of first instance, whose decision is nevertheless final and binding.

However, since its inception, the TAD for Sport has yet to decide any dispute and as things stand, it can neither operate nor function as a decision making body following a decision of the Portuguese Constitutional Court in November 2013 which declared that the TAD is incompatible with the Constitution because:

- a) appeals to the ordinary courts against decisions of the TAD are prohibited, thereby violating the right of access to the ordinary courts; and
- b) Its procedural rules compromise the independence and impartiality required in judicial proceedings by (i) providing for a closed list of arbitrators prepared by third parties foreign to the dispute, thereby preventing the actual parties from choosing their own arbitrators and (ii) by vesting the president of the TAD with powers to appoint the arbitrators, where the parties fail to reach an agreement, rather than vesting such powers in the ordinary court.

The issues raised by the Constitutional court regarding the TAD's compatibility with the Constitution are still under consideration, and it is hoped that a legal solution will soon be reached in the interests of Portuguese football dispute resolution.

9. *Conclusion*

Professional Portuguese Football is governed by various items of legislation, including the ordinary national laws. The government has however recognized the specific nature of sport and has therefore enacted other laws, which exclusively regulate the activities of professional footballers, in addition to the existing FPF regulations. These laws for instance provide for special working hours, rights, duties and obligations, disciplinary rules and sanctions. Employment disputes are normally decided and resolve outside of the ordinary courts, and the decisions in such disputes tend to be in line with those rendered internationally, e.g. by FIFA and CAS.

Perhaps more needs to be done in order to harmonize the work of dispute resolution bodies. There is no doubt that Portuguese football is willing to embrace the TAD, which is expected to be a positive step in dispute resolution by providing more rapid dispute resolution by a body of experts specialized in sports matters.

EMPLOYMENT RELATIONSHIPS AT NATIONAL LEVEL: ROMANIA

by *Geanina Tatu**

SUMMARY: Introduction – 1. Employment regulation and football structures – 2. Individual employment relations in professional football – 3. Medical and doping issues – 4. Transfer of players – 5. Social security principles (unemployment benefits and pensions) – 6. Labour dispute settlement – Conclusion

Introduction

Juridical regulation of social relationships evolving and developing in the field of sports has a bivalent character; in the sense that, depending on the specific aspects of sports activities, the juridical regulatory documents meant to define certain institutions are either in common or private law. From this point of view, we could say that, legally speaking, sport is an area of coexistence between common and private law regulatory documents. This chapter's aim is to analyze the complex professional footballer's employment relationship under labour law and the regulations of the Romanian Football Federation.

1. Employment relationships and football structures

1.1 Law sources and approaches (common law, private law, labour law...)

Within the Romanian law system, the private law sources were specifically enumerated by the New Civil Code, which came into force on the 1st of October 2011.¹ Thus art. 1, paragraph 1 of the mentioned regulatory document stipulates that “*The law, general law practices and principles are sources of civil law*”.

Law no 69/2000 on physical training and sports brings for the first time the recognition and support of the commercial aspect of the sports activities present

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¹ Law no 287 of July 17th 2009 then republished with amendments on July 15th 2011 in the Official Gazette of Romania Part I no 505-2011. The New Civil Code came into force by adopting the Implementation Law no 71/2011.

in professional sports. Consequently, the main regulation of the sports field in Romania encompasses common law regulatory documents (justified by the qualification of the sports activity as a state supported national activity) as well as the private law regulatory documents (which regulate the juridical relations built up in the professional sports field).

An important secondary source of law in sports is represented by sports regulatory documents (adopted by the national federations, instituted by sports branches or by the professional leagues) as an expression of the regulatory autonomy of the sports bodies, granted according to the law. Internal regulations are subordinated to and replenished with the regulations adopted by the specialized international federations. This is considered to be a consequence of international affiliation, an obligation which is still imposed by means of the national legislation.

1.2 *Specific laws on sport and football (sports and athletes specialized laws, ... collective negotiation)*

As has been pointed out in the previous paragraph, the main legal regulatory document in sports is represented by Law no 69/2000 on physical training and sports regulating the organization and functioning of the national system of physical training and sports in Romania.

The activity, on which from its regulatory point of view, the present case study is focused, is performance, a branch also encompassing professional sports. The inefficiency of the regulations in force is obvious from the analysis regulating the performance sports activity. First of all, sports law does not institute regulatory derogatory documents which highlight the individualistic status of the athlete, neither from the point of view of their labour relationship, nor from the point of view of their social protection. The only reference made by the law in order to regulate the professional athlete's labour relationships is that contained in art. 14 paragraph 2) letter b) "*The professional athlete is the person who, in order to practice the respective sport, meets the following conditions: b) concludes an individual labour contract or a civil convention, in written form, under the conditions of the law, with a sports structure.*"

Consequently, the law offers the contracting parties the possibility to choose between concluding an individual labour contract, governed by the provisions of Law no 53/2003² or a service civil contract according to the provisions of the Civil Code. Any potential sports specific provisions are left to be regulated by national sports federations.³

² Law 53/2003 – Labour Code was published in the Official Gazette of Romania, Part I, no 72 of February 5th 2003, republished and renumbered in the Official Gazette of Romania no 345 of May 18th 2011, according to art. V of Law 40/2011, to modify and amend Law no 53/2003.

³ Art. 14 paragraph 7 of Law no 69/2000 on physical training and sports: "The rights and obligations of the professional athlete are those stipulated in the national sports federations' statutes and regulations, as well as in the conventions or contracts, as case may be, concluded between the parties."

Such regulations represent the following inconveniences:

- there's an essential difference between the juridical nature of the individual labour contract and that of the civil convention, in the sense that the former type of contract provides a higher degree of protection to the employee, including also the employer's obligation of paying their contributions to social insurance; whereas in the case of a civil convention, the athlete may opt to make the payment of their contributions on their own behalf;⁴
- the sports regulations and statutes are inferior to the law, from the juridical force point of view. In this respect, should there be attempts to claim some specific regulation pertaining to certain sports relationships, these may not derogate from the imperative juridical regulatory documents instituted by the law, as a document emanating from the Parliament. In other words, national federations may regulate certain specific situations only within the pre-existing legal framework, a framework which does not encompass specific regulatory documents, adjusted to the dynamics of sports relationships.

So, the only rules providing minimum rights for professional footballers result from the contracts concluded by the parties, and from the Statutes and Regulations of the RFF.

1.3 *Football structures (associations, leagues, etc)*

The sports structures in Romania are enumerated by Law no 69/2000 on physical training and sports, sports associations or clubs.

In football, the responsibility for the national organization of the sports branch belongs to the Romanian Football Federation to which only sports structures with legal entity, legally constituted and officially recognized may affiliate.

At the level of the Premier League of the National Championship, the Professional Football League (PFL) is organized. The Professional Football League is a sports structure constituted by the association of all professional football sport clubs, regardless of their form of organization, which take part in the Premier League of the National Championship. The PFL is a legal entity in private law, autonomous, non-governmental, and apolitical and without any profit-making designation.

Any club affiliated to the Romanian Football Federation, which has obtained the professional licence and takes part in the Premiere League of the National Championship may hold membership of this organisation. A club becomes a member of the PFL based on their results within the Premiere League competition.

Any club which, according to the competition system, advances within the Premiere League national championship, becomes a member of the PFL; and

⁴ art. 14 paragraph 3 of Law no 69/2000 on physical training and sports: "The professional athlete, who has concluded a civil convention with a sports structure, is ensured, upon request, of their participation in payment of a contribution to a public and/or private pension system, under the conditions of the law."

any club which drops out, loses its membership. Membership may also be lost either by retirement from the competition or exclusion.

1.4 *Professional players, amateur players*

A general definition of professional sports is given by Law no 69/2000 on physical education and sports. According to its meaning, the professional athlete is the person who, in order to practice the respective sport, meets the following conditions:

- a) Possesses a licence as a professional athlete;
- b) Concludes an individual labour contract or a civil convention, in written form, under the conditions of the law, with a sports structure.

The Regulations on the Football Players' Status and Transfer, adopted by the Romanian Football Federation, offer their own definition of the professional football player:

"A player is deemed as professional if he has concluded a written contract with a club and is paid with an amount higher than his total expenses generated by his actual activity. All other players are deemed as amateurs." (art. 1 RSTJF).

Consequently, combining the conditions imposed by the law and sports regulations, a football player is deemed as a professional if:

- a) possesses a licence as a professional athlete;
- b) concludes an individual labour contract or a civil convention, in written form, under the conditions of the law, with a sports structure;
- c) is paid with an amount higher than his total expenses generated by his actual activity.

By an *a contrario* interpretation of the regulatory documents, it follows that the players who do not meet the above mentioned conditions are deemed as amateurs.

The rights and obligations of the amateur and professional football players are regulated by regulatory documents. Thus, the Regulations on Football Players' Status and Transfer stipulate as follows: as can be easily noticed, the main supplementary rights that professional players enjoy derive from their conclusion of a civil convention or individual labour contract: payment of due salary or fee and contractual stability.

1.5 *Football players performing independent activities. Self-employed workers*

In football, the player's status is influenced by the type of contract concluded with the club for which he plays. If the athlete concludes an individual labour contract, then his position is that of an employee, benefitting from the protection ensured by the labour law specific regulatory documents, together with variations derived from sports regulatory documents. Should the football player conclude a civil contract with the sports entity, then his position is that of a service provider who acts relatively independently; all diligences concerning payment of social or private insurances being for his account.

Yet, in all cases, all football activities derived from taking part in official competitions may be performed only by a football player identified with a football club.

In order to participate in the games organized by the different football leagues in Romania, a football player must cumulatively meet some conditions leading to the granting of the right to play. These conditions are enumerated in art. 7 of the RSTJF: “*Amateur or professional players have the right to participate in official or friendly matches within the team of a sports club or association if they cumulatively meet the following conditions: according to the regulations, be registered with or transferred to the respective club; by registration, it is understood that they have an annual visa stamped on their registration card and personal chart, issued by RFF/PFL/CFA, have medical approval issued by the relevant sports-medicine unit, have a contract concluded with the club where they are registered, all within their due validity term (applicable only to professional players)*”.

Registration is limited – in the span of one year, a player may register or transfer to a maximum of three clubs. Throughout this time, the player has the right to play in official matches for only two clubs.

1.6 *Voluntary work*

Although sports law makes no direct reference to volunteer activities, Romania is one of the few states to have created a legal framework by specifically regulating the volunteer contract. Yet, there are very few cases of volunteer activities in sport at the national level, with Romania occupying a low rank in this regard amongst European Union member states according to a report released in 2011.

1.7 *Discrimination law and equal treatment*

As a principle, non-discrimination is mentioned in Law no 69/2000 on physical training and sports. To this end, art. (5) of the above mentioned regulation stipulates that “*Practicing physical training and sports is a personal right granted by the state...*”. As a consequence of international affiliation, the Romanian Football Federation has foreseen and developed this principle within its statutes: “*Discrimination of any kind against a country, against a natural person based on ethnicity, sex, language, religion, political orientation or any other reason is strictly forbidden*”.

To ensure the observance of this principle, the Disciplinary Regulations of the RFF incriminates the acts of discrimination under the marginal notion of „Racism”. Thus, „*Any person, who publicly discriminates or denigrates any other person, in an offensive manner on grounds of race, colour, language, religion, sex, ethnical origin or who commits any disrespectful act of such character, shall be suspended for 6 matches at all levels, for players and coaches, and for 4 months for official representatives. In addition, the club to which the guilty player*

belongs shall be penalised with matches scheduled without an audience from 2 to 4 stages of the competition and a penalty of between 45,000 and 60,000 RON. If the guilty party is an official representative of the club, the penalty shall be from 65,000 to 80,000 RON. The same fine shall be also applied in the case of displaying xenophobic, offensive or harassing behaviour, all based on the same grounds”.

When it comes to the labour or contractual relationships of professional footballers, their protection is ensured by the provisions encompassed in the Labour Code: *“Within labour relationships, the principle of equality in treatment for all employees and employers is applied. Any direct or indirect discrimination against an employee, based on criteria such as gender, sexual orientation, genetic characteristics, age, national belonging, race, colour, ethnicity, political orientation, social background, handicap, family condition or responsibility, non belonging or activity is forbidden”.*

The prohibition of discrimination is aimed not only at the measures taken by the public authorities, but also by the sports associations’ regulations which establish the conditions under which professional athletes may engage in activities bearing a remunerative character.

2. *Individual employment relations in professional football*

2.1 *Essential elements and legal qualification*

Starting from the definition given to the professional athlete in article 14 paragraph 2 of the law, the contract categories which regulate their relationships with a sports structure are either the individual labour contract or the civil contract/convention.

Though at first sight the choice could seem purely formal, under the applicable legal conditions, the option of concluding a certain type of contract determines differences in the execution of contractual relationships between the professional athlete and the sports structure. Concerning social insurance and protection of the professional athletes: *“the professional athlete who has concluded a civil convention with a sports structure is ensured, upon request, of their participation in, and payment of contributions to, a public and/or private pensions system, under the conditions of the law”* art 14 paragraph 3 Law no 124/2006.

Major differences can also be noticed at the level of the theoretical interpretation of the respective contracts. Thus, if the provisions of the Civil Code, and especially the regulations specific to that sports branch within which the parties perform, are applied in the case of a civil convention; the individual labour contract is subject to the regulations corresponding to the Labour Code, Collective Labour Contract concluded at national level, collective labour contracts at sports branch level or unit (depending on the case), and special regulations issued by the national federations and professional leagues within the respective sports branch. What’s more, even the relationships between the contracting parties present significant differences.

Thus, in the event of concluding such a civil convention, the parties are contractually equal; the athlete having the status of a free professional with all the fiscal consequences deriving from that as well as the demands of contractual performance. Yet, the subordination specific to certain labour relations is ensured by sports regulations, keeping in mind the nature and finality of the activity he or she performs.

Should there be any labour relations conducted through the concluding of an individual labour contract, the subordination of the employee (the athlete) to his employer (the sports entity) has as its foremost ground the contract itself, and then the sports regulations. In this case, the contractual relations are much more rigorously regulated, and the provisions of the sports regulations in connection with the concluding, performing, modifying and cessation of the contract are reinforced by the provisions of the labour law; these having implications at fiscal as well as at social insurance level.

The organization of football as a nationally acknowledged sports branch is firstly done within the general framework instituted by Law no 69/2000, and then through the specific regulations adopted by the relevant football authorities. In this respect, we look at the statutes and regulations adopted by the Romanian Football Federation (RFF) as the only football authority acknowledged by the international organizations and Professional Football League, instituted according to Law no 69/2000, and given the competence for organizing and running the national football championship by the Football Premiere League.

Provisions concerning individual labour contracts or civil conventions concluded between football clubs and professional footballers are to be found in the Regulations on the Status and Transfer of Footballers (RSTJF) adopted by the Executive Committee of the RFF.

Assuming the general regulation of Law no 69/2000, RSTJF foresees the possibility for the parties to opt either for the conclusion of an individual labour contract or for the conclusion of a civil convention. Thus, when it comes to defining the terms within which the regulations work, at point 18, it is stipulated that the term “contract” stands for either the individual labour contract or for the civil convention. Yet, taking into consideration the specificity of each contract, their regulation is performed individually – art.11 refers to the individual labour contract, and art.12 refers to the civil convention. Should the regulation not specify the type of contract, the respective provision shall apply to both.

The RSTJF’s provisions concerning the individual labour contract are reinforced by the labour legislation in force, and the rights of the employee (professional football player) stipulated by it may not be inferior to those stipulated in the collective labour contract concluded at national level.

2.2 The individual labour contract

The individual labour contract benefits from regulations highlighted in art.11 of the RSTJF: “The individual labour contract is the contract upon whose basis the player

engages to participate in the training process and official matches within a sports structure for which he is granted financial and material rights. The Club engages to ensure all the necessary conditions for the player to perform his activities; to pay his salary and other financial rights in proportion to the quality and results of his performance, according to the contractual clauses; and to pay all other contributions, according to the law”.

It can be easily noticed that this definition is theoretically questionable on two grounds. On the one hand, it is too wide when it refers to “financial rights” (which, besides the salary include the match bonuses, and different target or performance based payments), when under the conditions of an individual labour contract, it is only the payment of a salary which is essential; and on the other hand, it refers to the possibility of granting certain “material rights”, a statement which contradicts the doctrine of a salary being expressed solely in monetary terms.

The specificity of sports law, as well as the constant practice of remuneration of professional players (regardless of the chosen contractual formula), has made it necessary to enlarge the classical definition of the individual labour contract in football and of adjusting it to specific conditions.

2.3 *The player's rights and obligations*

In the event of concluding an individual labour contract, the football player's (employee's) rights and obligations stipulated by the labour legislation are supplemented by those specific to the sports field. Thus, the Labour Code grants the following rights to the employee: the right to remuneration for the labour performed, to daily and weekly rest, to annual holiday, to equality in chances and treatment; the right to dignity in labour, to health and safety, to protection in case of dismissal; the right to take up or adhere to a union; and other rights stipulated by the law or applicable collective labour contracts.

Besides these rights, the RSTJF stipulates some specific duties of the professional football player, which in reality are nothing more than a reconfirmation of the „pacta sunt servanda” principle and, implicitly, of the incumbency of the contractual clauses. These are the duty to: observe the training schedule agreed by the club management; to participate at official and friendly matches of the team with which they are identified; to observe the stipulations of the RFF, PFL, CFA statutes and the statutes of the club; and to observe the provisions of the regulations adopted by FIFA/UEFA and the RFF.

The football clubs specific obligations, derived from individual labour relations, are also stipulated by sports regulations and they are as follows: to ensure the provision for the players of all material, technical, organizational, medical assistance, proper recovery and rehabilitation conditions necessary for training and matches; to ensure contractual stability for professional players, etc.

Besides these, in the case of concluding an individual labour contract, the minimum obligations stipulated by labour legislation are as follows: to inform the

employees of their labour conditions and elements concerning the execution of their labour relations; to grant their employees all the rights deriving from the law, applicable collective labour contract and individual labour contracts; to pay all contributions and taxes due from them, as well as to retain and pay all contributions and taxes due by their employees under the conditions of the law; to issue, upon request, all documents certifying their employee's quality, etc.

2.4 Remuneration. labour time

One of the essential obligations of the employer-club is that of paying the remuneration due to the professional footballer. In all sports regulations, the salary is expressed by "financial rights" which also include target and match bonuses, different benefits, gratuities or allowances. To this purpose we have the corresponding regulatory document which rules that "the salary encompasses the basic salary, emoluments, bonuses as well as other additions".

Regarding the allotted labour time, the sports legislation does not have derogatory provisions from the common law. Thus, the allotted labour time represents any period in which the employee works, finds himself at the disposal of the employer and fulfils his tasks and attributions according to the provisions of the individual labour contract, the applicable collective labour contract and/or of the legislation in force.

In Romania, for the employees hired full time, the normal labour duration is of 8 hours per day and 40 hours per week. The repartition of the labour allotted time throughout the week is normally even, with 8 hours per day for 5 days per week, having two days to rest. Depending on the specific sports activity, the Labour Code also allows for an uneven repartition of the allotted labour time, whilst still observing the normal duration of 40 hours per week. The maximum legal duration of the allotted labour time may not exceed 48 hours per week, including overtime.

Exceptionally, the duration of the allotted labour time, including overtime may be extended over 48 hours per week, on the condition that the average duration of the allotted labour hours, calculated over a reference period of 4 calendar months, should not exceed 48 hours per week. For certain activities or professions established by the applicable collective labour contract, reference periods longer than 4 months may have been negotiated in the respective collective labour contract, but they may not exceed 6 months.

2.5 The end of the individual labour contract

The individual labour contract terminates either upon expiry of the term for which it has been concluded, by mutual consent of the parties, on the club's initiative, on the player's initiative, or on other grounds stipulated by the law.

At the same time, the termination of the contract may occur due to "sports just cause" or without just cause.

2.6 *Disciplinary rules and sanctions*

The Regulations concerning the Status and Transfer of football players represent the main applicable regulatory document in the field of sports labour relations. Taking this aspect into consideration, it also encompasses the acts which represent offences breaking the contractual conditions, as well as their associated sanctions. Thus, serving as an example, we could outline the following offences from the provisions of the Regulations:

- “a) knowingly making modifications, corrections, additions, and erasures on the requests and registration cards, transfer agreements, labour contracts, civil conventions, or their associated labour addenda, as well as other official documents; encouraging a player to terminate his contract concluded with the club or aiming to facilitate the registration of the player with another club;
- b) the player’s signing of two or more registration requests;
- c) conclusion of contracts or conventions with two or more clubs for the same time interval;
- d) beginning negotiations with a player under contract with another club, without informing the respective club in writing; or conclusion of a contract with a suspended junior player, for the time that he/she remains under suspension;
- e) transfer of a player by the cessionary club, to which the player has been temporarily transferred, to another club, without the consent of the releaser club, etc.”

The sanctions for all these offences differ depending on whether the offender is the football player or the employer club.

With respect to the sanctions applicable to football players, these can differ depending on the entity applying them:

- a) sanctions for breaching the RSTJF, applicable by the jurisdictional committees of the Romanian Football Federation: the sports penalty, suspension of the right to play, the penalty calculated on the due amount, forbidding of the right to play until complete payment of the obligations to the clubs.
- b) sanctions applicable straight away by the clubs, under the conditions stipulated by the Disciplinary Regulatory Document of the RFF, the Internal Regulations of the clubs and contracts concluded between the parties: written warning, penalties (reduction of financial rights), suspension of the right to participate at official matches for a period of 1-3 months.

In the case of the sanctions applicable to the clubs, we encounter the sports penalty, which withholds from a club the right to transfer/register players as a cessionary club and/or the deduction of points gained during the competition.

3. *Medical and doping issues*

Concerning the issue of doping, in Romania, there is a general regulatory document

with regard to preventing and fighting doping in sport.⁵ The general legal framework is also delimited by the Convention against doping, adopted within the European Council at Strasbourg on the 16th of November 1989, and ratified in Romania by Law no 171/1998; and the Anti-Doping Word Code, developed by the Anti-Doping World Agency.

In football, doping offences are governed by the Disciplinary Regulatory Document adopted by the Romanian Football Federation. This assigns a whole section to the respective issue, under the marginal name of “Doping”. Defining doping and doping actions is done by reference to the definitions of the FIFA Regulations regarding doping within and outside competitions.

Essentially, depending on the seriousness of the action and the relapse, the sanctions may consist of suspension for a limited period of time or suspension for life. The Regulations also refer to the understanding of the perpetrator’s guilt, as well as the possible incidence of a medically justified case. At the same time, the sanctioning of footballers on grounds of doping may also imply the sanctioning of the club for which he plays by applying sports penalty, deducting points or excluding the club from the competition.

Concerning the sanctioning treatment, the disciplinary Regulations stipulate that “Even though the state bodies apply sanctions for some doping offences, FIFA/RFF/PFL/CFA may still examine the case and rule whether, according to this Regulations, it is necessary to apply a sanction.

At national level, the task of fighting doping in sport is entrusted to the National Anti-Doping Agency, a public institution having legal entity, subordinated to the Government, coordinated by the Prime-Minister through the Prime-Minister’s Chancellery, as a specific body having ruling authority in anti-doping.

The legal general regulatory document also refers to doping concerning relevant medical assistance of athletes. Thus, all doctors who have sports medicine as their speciality and nurses in the support staff of athletes must pay special attention to their athletes’ medical treatment and observe the following rules:

- a) to not recommend, not prescribe and not administer medicines which contain forbidden substances, when they can be replaced with others which do not contain such substances;
- b) to not recommend, not prescribe and not collaborate in using forbidden methods which are included on the forbidden list;
- c) to prevent athletes from using forbidden substances and/or methods;
- d) to inform the athletes and relevant sports national federations about the administered medication, its composition and effects on the body;
- e) to inform the relevant national sports federation, as well as the Agency should there be an athlete suspected of using forbidden substances and/or methods, so that the athlete could be subject to target-testing.

⁵ Law no 227/2006 on prevention and fighting of doping in sport, *published in the Official Gazette of Romania, Part I no 518 of 15/06/2006.*

4. *Transfer of players*

4.1 *Transfer rules*

As sports law specific institution, having applicability in the studied subject, the institution of transfer is covered in the RSTJF.

The transfer of football players consists of their moving from the club where they are registered to another club, with their own and the two clubs' consent. The transfer of players may be temporary or permanent.

Temporary transfer is that in which the moving of a player from one club to another (from the releaser to the cessionary club) is done for a limited period of time, upon end of which the player returns to the releaser club. The return is conditioned by the existence of a valid contract between the releaser club and the respective player.

Permanent transfer is that in which the moving of the player from one club to another is done irrevocably.

In the sense of the maximum allowed number per competition year, the following situations are not deemed as player transfers to or registration for another club:

- a) the return of a player to the releaser club as a consequence of a temporary transfer which ceased before the end of the transfer period;
- b) the performing of a permanent transfer to the same club, this being able to take effect only during transfer periods;
- c) the registration of an amateur player with another club as a consequence of having signed of his first professional contract.

The registration of players who find themselves in the situations stipulated in subs a) and c) may be done throughout the year, except for during the last 6 rounds of the championship.

4.2 *Specific problems of labour relations*

In order to be able to participate in the matches organized by different football leagues in Romania, a football player must cumulatively meet some conditions leading to the granting of the right to play. These conditions are enumerated in art.7 of the RSTJF: "*Amateur or professional players have the right to participate in official matches within the team of a sports club or association if they, cumulatively, meet the following conditions: be duly registered or transferred to the respective club; possess their annual endorsement and medical approval; have a contract concluded with the club with which they are registered; be available for selection (only professional players); and, only for junior professional players, show an identity card or passport, in original, to the referee together with the registration card.*"

Non-fulfilment of any of these cumulative conditions implies the non-

granting of the right to play to the respective player, rendering him unable to participate in friendly or official matches organized within the national competitions.

Concerning the registration of a football player in order to be able to play for a club, as a professional or an amateur; the procedure is regulated by art. 4 of the RSTJF. Registration of a player may be done by observing the following principles:

- Registration represents an essential condition concerning the granting of the right to play to the respective player;
- Participation in an official match of an unregistered player represents disciplinary deviation, sanctioned according to the Disciplinary Regulatory Document;
- Registration is unique – a player may be registered with one single club at any one period of time;
- Registration is limited – in one competition year, a player may be registered or transferred to a maximum of three clubs. During this period of time, the player has the right to play in official matches for only two of the clubs;

To register or transfer foreign, non-EU players, the clubs must present the following documents to the relevant authority – RFF/PFL/CFA: *the international transfer certificate, the contract concluded by the club with the respective player, the work permit or prove of having submitting the documents in order to obtain the work permit from the Ministry of Administration and Home Affairs – The Romanian Office for Immigration.*

4.3 *Compensations for training, promotion and solidarity*

The compensations are amounts of money due by the present club to the former club in view of partly recovering the expenses incurred by a player. These could be:

- a) Compensation for training – a contractual amount to compensate the expenses of the former club on the selection and training of an amateur player in view of practicing football;
- b) Compensation for promotion (upgrading, advancement) – an amount to compensate the expenses of the former club on the development of training and raising the value of a professional player;
- c) Contribution for solidarity – the amount representing 5% of the transfer fee paid for the transfer of a professional player, distributed among the clubs involved in his training during the time when the player was 12 - 23 years old.

5. *Social security principles (unemployment benefits and pensions)*

5.1 *Injuries, illness and disability*

Athletes benefit from social security rights, social assistance, and healthcare, as well as from all the rights to which they are duly entitled from private pension funds, under the conditions of the law.

According to labour law, the employer must *insure all employees against the risk of professional accidents and illness, under the conditions of the law*. These regulatory documents are also superseded by the provisions of the RSTJF which institutes the incumbency of insurance against risk of accidents for the players whose services are requested for the actions of the national team: “*The clubs must make the list of selected players for the national representatives (teams), regardless of their age available to the RFF. The clubs whose players are called up to the national teams are responsible for insuring these players against the risk of death or accidents occurred throughout the entire period in which they are made available for the national team. The insurance must cover any accidents suffered by the player during the international matches for which he has been selected*”.

5.2 *Benefits of unemployment, pension funds, career funds*

Sport law stipulates special social protection measures for athletes. Thus, any athlete who has obtained a gold, silver or bronze medal for individual or team-based events within the Olympic games or a gold medal during a senior World or European Championships has the right to, upon request and by confirmation of the Ministry of Youth and Sport, annuity for life. The annuity for life represents the equivalent of 1.5 times the gross average national salary. When determining the annuity for life, the calculation is made based on the gross average national salary, communicated by the National Commission for Statistics, valid for the month previous to that of making the payment of rights.

For an athlete who cumulates the title of Olympic Champion and World or European Champion or the title of World and European Champion, the annuity for life granted for their best performance cumulates with that for the lower performance. The annuity for life is paid monthly in lei and it is not subject to taxes. At such a time as the athlete decides to return to their activity, payment of the annuity for life is suspended.

For the athletes who do not qualify to obtain this annuity for life, there are no derogatory provisions from common law. Thus, the unemployment benefits insurance system is guaranteed, under the conditions of this law, for natural persons, known as the insured party. Insured persons may be:

- a) Romanian citizens who work or obtain income in Romania, under the conditions of the law, except for those persons who are pensioners;
- b) Romanian citizens who work abroad, under the conditions of the law;
- c) foreign citizens or stateless persons who, during the time when they live or reside in Romania, work or obtain income, under the conditions of the law.

The ensured persons must pay their contributions to unemployment insurance and have the right to benefit from unemployment payments.

6. Labour dispute settlement

6.1 Mediation

Mediation is quite a new procedure in the Romanian legislation used, mainly in civil law and family law matters. Within football, mediation is not used for the moment.

6.2 Arbitration

With regard to national legislation, institutionalized arbitration receives a schematic regulation in the Civil Procedure Code, which will soon come into force. Thus, in Title VII of Book IV, its notion is defined as: “*arbitration is that form of arbitrary jurisdiction which is constituted and functions permanently in close relation to an internal or international institution or an independent public interest non-governmental organization, under the conditions of the law, based on their own applicable regulations in the case of litigations submitted to settle, according to an arbitrary convention. The activity of institutionalized arbitration has no economic character and does not aim at making a profit*”.

Keeping in mind these characteristics of institutionalized arbitration, we can notice that they are also found in the principles of functioning of the jurisdictional commissions within the RFF/PFL/CFA, which qualifies them as permanent arbitrary institutions, bearing all consequences deriving from that.

6.3 Sports jurisdictional bodies

Taking into consideration the necessity of conformity of the status of the national federation with that of the corresponding international federation (a *sine qua non* condition to meet the target imposed by the national legislation with regard to the representation of Romania in international competitions and bodies organizing these competitions), the Romanian Football Federation inserted into its statutes the provision limited by art. 56,⁶ which reproduces similar provisions to the FIFA statutes, encompassed in art. 64 paragraph 3 – “*each member association must introduce in its statutes or regulations a clause to stipulate that it is forbidden from submitting to common law courts the litigation within the association or the litigation involving the leagues, leagues’ members, clubs, clubs’ members, players and other associations’ official representatives.*”

⁶ *Litigation deriving from or in connection with football activity in Romania, in which affiliated clubs or their official representatives, RFF/PFL/CFA official representatives, players, players’ agents or match agents are involved, shall be exclusively resolved by the jurisdictional bodies of the RFF. The present provisions exclude, for all litigation deriving from sports activity, the competence of the courts of law, except for the litigation deriving from the interpretation and execution of civil or individual labour contracts concluded between players and clubs or between coaches and clubs.*

By means of symmetry, in art 15 of its Statutes, the RFF imposes on its members, as a mandatory condition, the following: *“adopt a statutory clause, according to which any national or international litigation in which they or their members are involved, and which refers to the Statutes, regulations, directives and decisions of FIFA, UEFA, the RFF or of the League(s) may be settled, as a last resort, only by the Sports Arbitrary Court (SAC), according to the provisions of FIFA Statutes, or respectively by an independent and impartial arbitrary court which shall irrevocably settle the litigation, without appealing to the courts of law, except for the case when the Romanian legislation specifically forbids it.*

According to these dispositions, permanent arbitrary institutions are institutionalized in the association of the Romanian Football Federation, to have national relevance exclusively in the settlement of sports litigations.

Thus, in article 25 of the RSTJF, it is stipulated that: *“The clubs and persons subject to RFF/PFL/CFA jurisdiction may proceed to negotiations, in case of misunderstandings, and should these be not amicably settled, they may go as far as to the RFF/PLF commissions having jurisdictional attributions, depending on the case.”*

In complete observance of FIFA Statutes, as well as the Regulations on the Status and Transfer of Players, national commissions which have jurisdictional attributions within the RFF/PFL/CFA have come into being. Thus, according to article 22 of the Regulations on the FIFA Status and Transfer of Players, there is a DRC (Dispute Resolution Chamber) – FIFA, an arbitrary institution to settle litigations at international level. What should also be mentioned is that DRC-FIFA has the competence to settle litigation only if, at national level, there is no independent arbitrary court, able to ensure an equitable procedure, constituted on the principles of equal representation of the clubs and players.

Starting from these regulatory premises, the sports arbitrary institutions are organized at national level. Thus, according to the provisions of the RFF Statutes, and of art 26.1 of the RSTJF (Regulations on the Status and Transfer of Players), depending on the subject, the competences concerning the resolution of litigation fall on the RFF/PFL/CFA commissions having jurisdictional attributions, as follows:

- a) in the first instance: the National Chamber for Litigation Settlement (CNSL/ NCLS) of the RFF/PFL or the Players Status Commission (CSJ/CSP) of the CFA, depending on the case;
- b) the decisions handed out in the first instance may be appealed at:
 - the Commission of Appeal of the CFA for appeals against the decisions handed out by CSP of the CFA;
 - the Commission of Appeal of the RFF for the appeals against the decisions handed out by NCLS of the RFF;
 - the Commission of Appeal of the PFL for appeals against the decisions handed out by the NCLS of the PLF;
- c) the decisions handed out by the Commission of Appeal of the RFF/PFL/CFA may be exclusively appealed at the Sports Arbitrary Court, under the conditions mentioned by the RFF Statutes.

Deriving from systematically interpreting the RFF and RSTJF Statutes, the sports arbitration general jurisdictional competence (in football) belongs to the Romanian Football Federation, which has the possibility to settle any litigation within the field limited by its statutes. By exception to this general rule, bearing in mind that at the level of the first football echelon of the country there is a professional football league,; by annual convention between the RFF and the PFL, in cases of sports litigation occurring between PLF members or in connection with acts associated with football activities at the level of the first echelon, arbitrary jurisdictional authority is delegated to the latter. This circumstance is regulated by art 57 point 6 of the status of the Romanian Football Federation, bearing the following terms: *“Exceptionally, by the annual convention concluded between RFF and the professional leagues, approved by the Executive Committee of the RFF, the professional leagues may have, for the competition level that they organize, their own jurisdictional bodies, as following:*

- a) *the Disciplinary Commission;*
- b) *the National Chamber for Litigation Settlement;*
- c) *the Commission of Appeal”.*

In this context, in article 26.8 of the RSTJF, it is stipulated that:

“The competence to settle the cases involving exclusively the clubs participating in the Premier League National Championship, their official representatives, players and coaches,; are to be exclusively settled by the PLF jurisdictional bodies according to the annual RFF – PFL convention, respectively the NCLS of the PLF and the Commission of Appeal of the PFL. The NCLS of the PLF and the Commission of Appeal of the PLF are made up of 5 members, among whom there is a president and a vice-president; their nominal composition and division by position being subject to approval of the Executive Commission of the PLF for a one-year mandate”.

As of right now, there have been no further conventions between the RFF and the PFL, so currently all sports litigations are resolved by the competent jurisdictional commissions within the RFF.

Another exception to the plenitude of arbitrary jurisdiction in sports is represented by the delegation of disciplinary jurisdictional competence by the County Football Associations (CFA) with concern to their members. Thus, in art. 24 of the Regulations of implementation of the RFF Statutes, it is stipulated that *“the County and Municipality of Bucharest Football Associations, as well as the professional football leagues constituted per competition level shall stipulate their own modalities of exerting disciplinary authority within their own statutes and regulations, in relation to the competences delegated by the RFF statutes and regulations and their jurisdiction”.*

All these jurisdictional bodies present organizational and functional similarities with those within the RFF, so they can be analyzed by common approach. Article 26.9 RSTJF: *“the Player’s Status Commission within the CFA settles the causes and litigations which have occurred within football activities in its territorial range, having similar competences to those of the NCLS”.*

The National Chamber of Litigation Resolution (NCLS – RFF/PFL/CFA) is competent to settle cases relating to, for example:

- a) the conclusion, interpretation and execution of contracts concluded between clubs and players, as well as maintaining contractual stability;
- b) the training, promotion and solidarity compensations, occurring between the affiliated clubs and the RFF;
- c) the amateur and professional status registration and transfer of football players;
- d) litigation amongst the clubs affiliated to the RFF/PFL/CFA with regard to concluding, interpreting and executing transfer agreements concerning the mutual rights and obligations of the clubs, as well as other contracts concluded between clubs affiliated to the RFF/PFL/CFA;
- e) the conclusion, interpretation and execution of other contracts concluded between the clubs affiliated to the RFF/PFL/CFA;
- f) the conclusion, interpretation and execution of contracts concluded among the clubs taking part in the competitions organized by the RFF, the PFL and their hired coaches;
- g) the conclusion, interpretation and execution of the clauses of the contracts concluded between the clubs affiliated to the RFF/PFL/CFA and the players' agents, as well as between the players and players' agents;
- h) other causes/litigation concerning football activities, upon request of the players, clubs, coaches and players' agents.

When it comes to fulfilling the above mentioned conditions which allow the admission of the respective commissions in the sphere of institutionalized arbitration, the analysis may be performed from a general perspective, the principles being common regardless of the nature of the resolved litigations. Thus:

- a) regarding the necessity of *being constituted and permanently functioning* in association with an internal or international organization or institution – the sports jurisdictional commissions are organized and function in association with the RFF – private law legal entity, of public utility, without seeking profit, independent, non-governmental and neutral from the political, religious and ethnical point of view;
- b) regarding the incumbency of having *their own regulations*, non-discriminatorily applicable – the jurisdictional commissions of the RFF/PFL/CFA function based on their own regulations adopted by the RFF;
- c) regarding the *jurisdictional independence of the commissions*, we should mention that they are organized as independent entities and when it comes to performing their activities they are subject only to the specific national and international laws and regulations;
- d) *the procedure rules* guiding the resolution of arbitrary litigation are encompassed, depending on the case, in the Regulations on the Status and Transfer of Football Players. Thus, as a general rule, the arbitrary procedure is done in written form in compliance with the provisions of art. 31 of the RSTJF. Yet, if the Commission is not clear, it may call a hearing of the parties or of other persons.

The evidence system is that of common law. The decisions are ruled by simple majority, and if the number of votes is equal, than the president has the decisive vote. The decisions handed out on the main issue may be appealed at the associated Commissions of Appeal – RFF – PFL – CFA, being definitive and executory at the date of being given. These, may be appealed at the Sports Arbitrary Court within 21 days from the communication of the decision.

Conclusion

Regarding employment relationships, we may not say that in Romania there is a particular regulation of labour relationships specific to professional athletes. Statistically speaking, the share of civil contracts is higher than that of individual labour contracts per sports branch. In football, there have been some attempts to implement these contracts, embodied by the institution of AFAN (Asociatia Fotbalistilor Amatori si Non-amatori – Amateur and Non-amateur Football Players Association), but these trends have come to a dead end due to lack of representativeness.

EMPLOYMENT RELATIONSHIPS AT NATIONAL LEVEL: RUSSIA

by *Olga Rymkevich**

SUMMARY: 1. Introduction – 2. Employment regulation and football structures – 3. Individual employment relations in professional football – 4. Medical issue and doping – 5. Transfer of players – 6. Social security principles (unemployment and pensions) – 7. Dispute resolution – 8. Conclusion

1. *Introduction*

The end of the communist regime and Russia's transition to the market economy were accompanied by far-reaching reforms in all spheres of everyday life, including sport. In the presence of new challenges arising from the opening up of borders and the need to comply with international competition rules, the legislative framework for sport demonstrated its inadequacy in relation to the new economic, social and political realities affecting all stakeholders. In analysing the current state of affairs in Russia, this paper will focus on employment relations in professional football, that is self-evidently a domain of economic and social importance.

2. *Employment regulation and football structures*

2.1 *Sources of law and approaches*

In the absence of a comprehensive legal framework regulating sport (*lex sportiva*) this domain is governed by interdisciplinary norms belonging to different branches of law (civil, criminal, tax, administrative and so on). There are many disputes among legal experts about the role of civil law and labour law in regulating sport. The supporters of civil law, inspired by the Anglo-Saxon system, consider that the specificity of sport cannot be fully accounted for by labour law norms, while other experts argue that it is inappropriate to exclude sportsmen and women from the protections provided by labour law. Following national legal traditions¹ in recent

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¹ Labour Code of 1971 (KZoT) considered sportsmen regular employees subject to standard labour law provisions.

legislative initiatives, the Russian legislator has given priority to labour law while leaving the option of concluding contracts under the civil law (mainly in the case of individual sports). The intention was to reduce possible conflicts between civil and labour law norms. Moreover, the need for a differentiated approach for this category of workers is recognized.

During the Soviet period, sport, especially at a high level, received considerable attention as it was an important means for representing the Soviet Union in the international political arena. Both mass and high level competitive sport were encouraged and supported by the State. After *perestroika* and the ensuing economic crisis, investment in sport, as in most other economic sectors, went into considerable decline. The negative consequences were felt immediately. The number of athletes practising sport fell, and many talented sportsmen and women emigrated in search of better training and employment opportunities. Moreover, the lack of specific sports legislation resulted in many clubs suffering economic losses due to the fact that sportsmen and women tended to leave their clubs at short notice or with none at all, with a liability to pay only minimal compensation. All these factors underlined the need for reform of the existing legal framework.

Considering that sport regulation in Russia is based on a mixed model with a significant role for the State, together with self-regulation by professional sports bodies (federations/associations),² the provisions regulating sport can be found in different legislative acts. Some of them are laid down in the Russian Constitution, federal laws, acts issued by federal bodies of the Russian Federation (RF),³ regulations adopted by sports federations and associations, and the terms and conditions of individual contracts. Aspects such as working hours, night work, holidays and salaries of sportsmen and women can be regulated by collective agreement and local normative measures. According to the general principles of law, lower level legislative acts may not contradict higher level ones. Moreover, Art. 15 (4) of the Russian Constitution establishes the priority of international legislative acts ratified by the RF over national law. The Russian Constitution refers to sport in relation to human rights, in connection with the promotion of a healthy lifestyle and special state-supported programmes in favour of those practising sport (Art. 41), and in relation to matters jointly regulated by the federation and federal government bodies (Art. 72).

2.2 *Specific laws on sport*

As for specific legislation, one of the main legislative sources in the field of sport is the Federal Law of the RF of 4 December 2007, 329-FS On Sport in the Russian Federation (hereinafter: the Law on Sport) repealing the Law of 29 April 1999, 80-FZ On Physical Culture and Sport in the Russian Federation. The Law on

² Art. 3 comma 3, Law 329-FZ of 4.12.2007 (Law on Sport).

³ At present there are 85 federal government bodies in the Russian Federation (Federal States). According to Art. 5 of the Russian Constitution they have equal rights in relations with the federal government.

Sport deals to a great extent with administrative matters such as the division of powers between the federal state and federal government bodies. It is not limited to the Olympics but also covers the Paralympics and Deaf Sports. It defines the conditions of functioning of sport federations and clubs and the obligations of sportsmen and women without making a clear distinction between professionals and amateurs. This Law highlights the business and entertainment aspects of sport, though it still leaves significant gaps in relation to many legal matters, including employment rights, that are regulated by other legislative acts, corporate norms, collective agreement and individual contracts. The lack of specific norms gives rise to significant practical problems for the courts that do not always have the powers to adopt proper decisions.

The legislator recognized that due to the specific nature of sport linked to the intense physical and psychological effort, short professional career, increased risk of injury, and finally the entertainment and commercial aspects of sport, players require special legislative regulation compared to other categories of workers. As a result the Federal Law 13-FZ on 28 February 2008 on the amendments to the Labour Code (hereinafter, LC RF (2001)) was adopted. It included an entire section 54.1 (Art. 348.1- 348.12) regulating the employment of professional sportsmen and women. Despite its role in improving the general legal framework regulating sport, it still leaves some gaps, especially with regard to such controversial issues as the transfer of sportsmen and women, and the termination of employment contracts which due to the substantial financial implications often leads to litigation at national and international level. Some of them are regulated by the norms of sports federations that are intended to comply with the norms of the international federations. Sports federations usually have their own regulations, and disputes relating to sport are often resolved within the federations through internal dispute resolution bodies.

Under this law, employers of professional sportsmen and women 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 women, 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 the opinion of the trade union. The All-Russia Sports Federations are state-accredited organizations whose aim is to promote one or more sports, the management of sporting events and the training of members of sports teams.

2.3 The Russian football system

The following stakeholders are involved in the Russia football system: the Russian Football Union (RFU), leagues, federations, football clubs participating in the competitions under the aegis of the RFU, sport academies participating in the competitions under the aegis of the RFU, football players and coaches, and football agents.

2.3.1 *The Russian Football Union (RFU)*

The Russian Football Union (RFU)⁴ is the main football organization in Russia. The RFU is the All–Russia Federation officially recognized by FIFA. The main aims of the RFU are the development and promotion of football in Russia, the management of football events, and the formation of national football teams. The RFU brings together territorial and regional federations, football clubs with the status of public bodies, and football academies. It also collaborates with local sports committees in the federal bodies of the RF. The management body of the RFU is a conference which elects the president and executive committee for a five-year term of office, and the executive committee runs the RFU between conferences. In order to solve problems more effectively, the RFU has a number of departments (sport, finance, international and so on). The governing bodies are as follows:

- Governing and Disciplinary Committee
- Ethics Committee
- Committee on the Status of Players
- Dispute Resolution Chamber
- Agents' Committee
- Appeals Committee.

The following bodies also play a significant role in Russia:

League – a non-commercial partnership,⁵ Russian Football Premier League,⁶ National Football League,⁷ Professional Football League,⁸ Association of Mini-Football in Russia⁹ or any other body organizing football competitions under the aegis of the RFU and obeying to its rules.

Federation – regional football federations and interregional unions of football federations.

Association – FIFA member governing football in a certain territory.

Professional football club – a football club founded as a legal person and member of the Russian Football Premier League, National Football League and Professional Football League, and recognized by the RFU as participating in professional football competitions.

Amateur football club – a club participating in amateur competitions organized by the RFU or the federations.

Sports academy – an autonomous legal body or branch of a football club that recognizes the norms of the RFU and whose aim is the training of young football players under the guidance of coaches including practical training and organization

⁴ www.rfs.ru/.

⁵ According to Art. 8 of the Federal law on non-commercial partnerships, of 12.01.1996 N. 7-FZ the non-commercial partnership is a non-commercial organization based on membership, established by natural or/and legal persons to help its members to achieve specific aims under the law (Art 2 (2)).

⁶ www.rfpl.org/.

⁷ <http://1fnl.ru/>.

⁸ www.pfl-russia.com/.

⁹ <http://amfr.ru/>.

of their participation in amateur competitions under the aegis of the RFU.¹⁰

The All-Russia Sports Federations are public state-accredited organizations whose aim is to promote one or more sports, the organization of sporting events and the training of members of sports teams.¹¹

2.4 Professional and amateur players

The Law 329-FZ 2007 and the Labour Code do not provide any definitions of professional and amateur players, but adopt the term “professional sport” which is defined as sporting activity aimed at organizing and carrying out sport competitions for which players are remunerated or receive a regular salary provided that this is their main activity. (Art. 2 (11), Law on Sport). Membership of the sports organization is defined on the basis of the existence of an employment contract concluded with this organization (Art. 27(3) Law on Sport). As a result all categories (professionals, amateurs, and elite sportsmen and women) are grouped together under the generic term “sportsmen” defined as physical persons practising a certain sport and taking part in sports events (Art. 2, Law on Sport). This means that the definition of professional sports activity can be inferred from factors such as a regular income from sport and an employment contract with a duly established sports body. Sports coaches are defined as physical (natural) persons with proper professional qualifications providing training for sportsmen and women, and guiding their competition-related activity to achieve certain results (Art. 348-1 LC).

Considering the vagueness of certain norms in the sports legislation, it is logical to expect more precise definitions in the regulations of various kinds of sport. With regard to football, the regulations governing the status and transfer of players contain definitions of professional and amateur players. According to Section 2, Art. 3 of the Regulations, football players taking part in competitions under the aegis of the RFU may have a professional or an amateur status. Professionals are players who have a written employment contract with a professional football club and who are remunerated for their activity. The amount of this remuneration should be greater than the expenses of the player relating to training and participation in football competitions. Football players who are not professionals are amateurs. Amateur players may receive expenses for food, travel, living subsistence, equipment and insurance relating to training for football competitions. Disputes arising from the definition of the status of players are resolved by the committee on the status of players. Art. 4 of the Regulations lays down the procedure for the reinstatement of amateur status.

¹⁰ The definitions are taken from the Regulations on the Status and Transfer of Players (2011), www.rfs.ru/rfs/documents/strategies/.

¹¹ Art 2(6) law 329-FZ of 4.12.2007.

2.5. *Autonomous/semi-professional/voluntary activities*

Sportsmen and women practising individual sports¹² can conclude contracts under the civil law. However, it is not permitted to conclude such contracts to circumvent employee-protection legislation. In the presence of factors that are typical of salaried employment, the courts can rule that it is indeed an employment relationship. There is no specific regulation of semi-professional or voluntary football players.

2.6. *Discrimination and international players in Russia*

Since discrimination is a wide-ranging and complex issue, in the present study we will consider it only with regard to international football players in Russia in the context of the norms regulating their work and residence permits, and their employment rights compared to national players.

Formally discrimination is prohibited in the Russian Federation by a number of legislative acts. At the international level Russia has ratified ILO core Convention N. 111 (1958)¹³ and is a party to international agreements with the European Union, Belorussia and Kazakhstan.

Art. 19 of the Constitution of the RF prohibits any limitation of the rights of the citizens:

1. All people shall be equal before the law and court.
2. The State shall guarantee the equality of rights and freedoms of men and citizens, regardless of sex, race, nationality, language, origin, property and official status, place of residence, religion, convictions, membership of public associations, and also of other circumstances. All forms of limitations of human rights on social, racial, national, linguistic or religious grounds shall be banned.
3. Men and women shall enjoy equal rights and freedoms and have equal possibilities to exercise them.

Art. 3 of the Labour Code upholds equal opportunities in labour rights for all individuals:

Everyone shall have equal opportunities to implement their labour rights. Nobody may be subject to restrictions in labour rights and liberties or gain any advantage regardless of sex, race, colour of skin, nationality, language, origin, property, family, social status and occupational position, age, place of residence, attitude to religion, political views, affiliation or failure to affiliate with public associations, as well as other circumstances not pertaining to the business properties of the employee.

Discrimination does not apply in the case of differences, exceptions, preferences, as well as restrictions of the rights of employees determined by

¹² The legislation does not explicitly prohibit this for collective sports, and it is a common practice for employment contracts to be concluded in these cases.

¹³ Discrimination (Employment and Occupation) Convention, 1958 (no. 111), ratified by Russian Federation on 04.05.1961.

specific requirements for the given type of work specified in federal law, or stipulated by the state with respect to persons in need of greater social and legal protection.

Persons who consider that they have been subject to discrimination in the labour sphere may apply to a court to restore the violated rights, reimburse material damage and compensate for the moral damage.

With regard to the controversial question of the participation of international players in official football matches, Art. 16 of the Law on Sport states that sports federations can adopt restrictions on participation in All-Russian sports competitions for players who do not have right to compete in the national teams of RF according to the norms of international sport organizations taking part in international competitions.

Russian football regulations lay down a limit on the employment of international players known as “legionnaires”. According to the regulation,¹⁴ the term “legionnaire” indicates an individual who does not have a Russian passport or citizenship of the RF but has a duly registered transfer certificate and employment contract with a club. Legionnaires do not have the right to play for the national teams. At present (the new rule is valid until 2017) it is possible for a club to have up to seven legionnaires on the field.¹⁵

However, the limit on the employment of legionnaires may be struck down by the courts as a discriminatory measure since according to Art. 3 LC RF only federal law can place limitations on the right to work.¹⁶ Moreover, Art. 348 (1) states that any reduction of the level of the rights and safeguards of professional sportsmen and coaches should be implemented by the LC.

The Government of the RF can also introduce limits by means of special annual quotas for foreign workers in certain economic sectors. Art 83 (12) of LC RF lays down as a justified reason for dismissal of immigrant workers a government order to bring the number of foreign workers into line with the established quotas. It seems that such provisions may be in conflict with the international agreements concluded by the RF which guarantee equal treatment for nationals of other countries in the RF with regard to their rights to work. As mentioned above, Art. 15 (4) of the Russian Constitution establishes the priority over national law of the norms of international agreements signed by the RF.

In this connection mention should be made of the Simutenkov case,¹⁷ sometimes compared to the Bosman case in terms of its scope, concerning the

¹⁴ Regulation SOGAZ of the Russian football championship among the premier league clubs for 2011/2012, S. V. Alexeev, *Sports Law of Russia*, 3d edition, Law and Legislation, Moscow, 2012, 318 (in Russian).

¹⁵ The first limit on legionnaires was introduced in November 2005, with seven international players plus four Russian nationals. In 2009 it was changed to six international players plus five Russian nationals. From 4 July 2012 the RFS returned to the previous scheme (seven plus four).

¹⁶ Alexeev, 316.

¹⁷ Case C-265/03 Igor Simutenkov v. Ministerio de Educacion y Cultura, Real Fedearcion Espagnola de Futbol [2005] ECR I-5961.

limits on international players. Simutenkov, employed in the time by the Spanish football club Deportivo Tenerife, contested the unlawful nature of the restrictions imposed on him as a citizen of a third country citing Art 23 of the EU-Russia Agreement prohibiting discrimination. In this case the European Court of Justice (as it then was) ruled that the EC-Russia partnership agreement precludes the application to professional sportsmen of Russian nationality, lawfully employed by a club established in an EU Member State, of a rule established by sport federations limiting the participation of players from countries that are not members of the EEA agreement. It is important to add here that this ruling concerns only workers already legally residing and employed in the Member State and not the entry permit and labour market access which remain the prerogative of the Member State.¹⁸

As a result the Simutenkov ruling may serve as a precedent for the Russian courts in cases in which the nationals of the states with which the RF has bilateral international agreements file a claim for discrimination.

2.7 *Work and residence permits*

In Russia it is possible to hire foreign workers only if they are in possession of a work permit. The laws on immigration and foreign workforce in Russia are as follows:

- Federal Law N. 115 –FZ of 25 July 2002 on the legal status of foreign citizens;
- the decree of the President of RF n. 2146 of 16 December 1993 on the attraction and employment of foreign workers;
- the regulation of the Russian government no. 941 of 30 November 2002 on the issuance of residence permits to foreign nationals.

According to Law N. 115 foreign nationals have the same rights and obligations as Russian citizens in the absence of provisions in federal laws. A foreign national has the right to work in the RF territory after obtaining a work permit.

The following categories of foreign workers are exempt from the requirement to obtain a work permit:

- those who have temporary residence permit of three to five years, employed within diplomatic or consular bodies or international organizations;
- foreign journalists;
- students (on work experience during vacations) and teachers (with the exception of those in religious education).

Another exemption is granted for high-level professionals. Employers may hire high-level professionals who benefit from a number of advantages such as longer work permits, longer residence permits for the purpose of searching for a new job in case of termination of employment and so on. They also fall outside the quota system. Two criteria must be met to qualify as a high-level professional. First, it is necessary to have experience and outstanding achievements or skills in

¹⁸ F. Hendrickx, *The Simutenkov Case: Russian players are equal to European Union players*, *The International Sports Law Journal*, 2005/3.

the sphere of activity, and second to receive an annual salary in Russia of not less than 2,000,000 roubles (approx. 40,000 euros).¹⁹ It should be noted in this regard that in Russia the right to hire high-level professionals is granted only to commercial, scientific research and certain other organizations. It is unclear whether non-commercial sports organizations can benefit from this rule.

In order to obtain a work permit the employer must pay one month's salary and present the following documents:

- an application;
- a statement from the authorities regarding the need to hire foreign workers;
- a draft employment contract or other document confirming a preliminary employment agreement with the foreign worker.

The documents must be filed with the territorial employment agency of the corresponding administrative district, the regional office of employment, and the immigration service of the Ministry of Internal Affairs.

A work permit is not required in the case of temporary transfers. To be considered a temporary transfer, the stay of the foreign national should not exceed one month, otherwise it will be deemed to be a standard employment contract. There are some exceptions (including some categories of sportsmen like instructors, senior coaches, and the senior coach of the national team) but the duration cannot exceed 40 calendar days over a two-month period, and the duration of the work activity cannot exceed 90 calendar days over a 12-month period. Some exceptions exist for high-level professionals but they do not apply to all categories of sportsmen. Generally speaking the system is still highly restrictive from the point of view of the free movement of workers.²⁰

The transfer system is also highly restrictive towards foreign workers as it limits their stay in regions other than the one for which the work permit was issued. Art. 13(4) of the law on the legal status of foreign citizens prohibits them from performing work outside the region for which their work permit was issued.

Foreign sportsmen and coaches have the same rights and duties as national workers and their employment contract is governed by the LC RF and other legislative acts. However, Art 5(5) of the federal law on the status of foreign citizens lays down that the duration of the stay in the RF of a foreign citizen with an employment contract or civil law contract can be extended for the duration of the employment contract but for no more than one year. As a result, the work and residence permit of foreign players may be limited by the duration of their visa and (with few exceptions) it cannot exceed one year. Foreign players are also covered by the general terms of termination of employment. There is, however, a special clause (Art. 83(12) LCRF) which lays down an obligation to terminate the employment contract following a decision by the Government of the RF to bring the quota of foreign workers into line with the limits laid down by the Government.

In spite of the laws prohibiting discrimination, in practice it is difficult for

¹⁹ Art 13(2) of the federal law on the legal status of foreign citizens.

²⁰ Alexeev, *op. cit.*, 334-335.

sportsmen (and individuals in general) to prove discrimination in court due to the absence of the necessary mechanisms and due to judicial practice and culture. The legislation regulating the hiring of foreign players is still burdensome and in general creates bureaucratic obstacles to block the hiring of foreign workers especially in the case of sportsmen other than those at the highest level. It is still difficult for players to exercise their right to freedom of movement within the territory of Russia. The limit on “legionnaires” may however be subject to appeal due to its discriminatory nature and due to the implications of the Simutenkov case.

3. *Individual employment relations in professional football*

3.1 *Essential elements and legal provisions*

Employers of professional sportsmen can be legal and physical persons registered as individual entrepreneurs. Physical persons not registered as individual entrepreneurs have no right to be employers.²¹ In some cases laid down by federal law, other bodies may also have the right to conclude employment contracts (Art. 20 LC RF).²² In particular Art. 348 LC RF establishes the normative measures regulating relations between coaches and sportsmen and specifies that these measures must be adopted by the employer in accordance with Art. 8 LC RF taking account of the norms laid down by the All-Russia Sports Federations and the views of the trade union. Art. 348 (1) states that any lowering of the level of the rights and guarantees of professional sportsmen and coaches as well as any increase in the level of disciplinary or material liability should be carried out only as part of the LC.

3.2 *Contractual terms of the parties according to the Labour Code*

As mentioned above, the Labour Code of the RF includes a section regulating the working conditions of sportsmen/women and coaches. Pursuant to Art. 348.2 LC RF, athletes and coaches can conclude either open-ended or fixed-term contracts for up to five years, in the same way as any other category of workers. Fixed-term contracts can be concluded without taking account of the nature of the work and its performance. If there is no specific agreement on a fixed term, the contracts will be deemed to be open-ended. There are no restrictions for professional sportsmen. As for coaches, fixed-term contracts may be concluded only in case of training and the management of competitions aimed at achieving certain results in professional sport or in the hiring of coaches for the national team.²³ There is no minimum term. In addition to Art. 57 LC RF on the general terms for the conclusion of

²¹ This restriction may be a severe limitation on coaches since in theory physical persons might wish to hire them as personal trainers.

²² Civil Code, Art. 55 – they can be branches or representative offices of the companies.

²³ Thus it might be difficult to conclude contracts with coaches in amateur sport.

employment contracts, Art. 348(2) lays down additional requisites to be included in employment contracts with professional sportsmen and women. In particular, employers are required:

- to provide training for sportsmen and women and promote their participation in competitions under the guidance of coaches;
- to make sure that sportsmen and women comply with sports regimes and prepare for competitions;
- to ensure that sportsmen and women take part in competitions only at the employer's request;
- to ensure that sportsmen and women do not use doping or prohibited substances and that they undergo doping tests;
- to require employers to provide information about their location for doping testing;
- to take out life assurance and medical insurance for their players. They are also required to take out supplementary medical insurance providing sportsmen with medical cover that is additional to the cover provided by compulsory insurance schemes.

There is also an obligatory clause to include in contracts with professional coaches concerning the duty to take all the necessary measures to prevent players from violating anti-doping rules.

Additional provisions may be included concerning:

- the consent of the sportsmen or women and coaches for their personal data to be kept on file, and a copy of the employment contract to be sent to the All-Russia Sports Federation for the sport in question; in the case of sportsmen/coaches taking part in the national team of the RF, to transmit a copy of the contract to the federal executive body responsible for state policy in the field of sport;
- the requirement to wear outfits provided by the employer while taking part in training and sporting events;
- the requirement to comply with sports competition regulations in relation to employment;
- the requirement of sportsmen to give notice to the employer about the termination of the employment contract at their initiative subject to the terms laid down in Art. 348.12 LC
- the amount and nature of any indemnity to be paid to the employer by sportsmen or women in the 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 duration of the employment contract to inform the sportsmen and women about the norms adopted by the All-Russia Sports Federations, the regulations on sporting competitions, the contractual terms between the employer and sponsors, and the organization of sports meetings, to the extent that they concern the sportsmen and women in their employment. The regulations on the status and transfer of players

also govern employment matters concerning professional football players.

3.3 *Contractual terms of the parties according to the regulations on the status and transfer of players*

Obligations of clubs

Clubs are under an obligation:

- to pay monthly salaries in full and in a timely manner, and make other payments according to the employment contract and local normative acts regulating bonus payments;
- to provide players with appropriate working conditions according to the labour legislation of RF, collective agreements and individual employment contracts, and FIFA, UEFA and RFU regulations;
- to ensure players take part in training and competitions under the guidance of a coach;
- to provide the compulsory social insurance for players according to the labour legislation or other normative acts of the RF;
- to cover the cost of health and safety insurance as well as medical insurance in order to enable players to receive medical services in addition to those required by law and to specify their terms;
- to organize at their own expense obligatory preliminary and annual periodical medical check-ups for the player, extra medical check-ups at the request of players, and medical advice;
- to ensure training and the participation of players in competitions under the guidance of a coach;
- to provide players with the necessary sports gear and other technical equipment necessary for their activity and to carry out any necessary maintenance;
- to provide financial assistance in the case of a temporary inability to work due to sports-related injury under the employment contract, in order to bring the temporary disability benefit into line with the average monthly salary of players in cases in which this benefit is lower and no income support is provided by supplementary insurance schemes.

Obligations of players

Players are under an obligation:

- to comply with the sports programme defined by the club and take part in training for competitions;
- to take part in competitions only as indicated by the football clubs to which they belong;
- to take part in training or other events (including commercial events, meetings and press conferences);

- to travel with the team within the RF and abroad, following the itinerary and using the means of transport made available by the employer;
- to use the equipment made available by the employer for use during working hours;
- to comply with FIFA, UEFA and RFU regulations on working conditions;
- to comply with internal working rules or local regulations of the employer on working activity;
- to abstain from the use of doping, and to consent to doping tests;
- to abstain from any dangerous kind of sport or other activity without the written authorization of the employer;
- to uphold the reputation of the employer during public meetings and contact with the press;
- to behave in compliance with moral norms in their personal and public life;
- to maintain confidentiality with regard to confidential commercial or other information, including information relating to the terms of employment and transfer contracts, internal documents of the employer or sponsorship contracts;
- to abstain from gambling or any kind of match-fixing;
- to take part in medical check-ups and follow medical advice;
- to give their consent for the transmission of their personal data, including a copy of the employment contract, to the RF or other football league; in case of the appointment of the player to the national team of the RF, to transmit the employment contract to the federal body responsible for state policy in the field of sport.

3.4 *Remuneration, working time and other employment aspects*

Football players like other employees are subject to the norms of the LC RF as mentioned above, with some specific norms and exceptions. Sportsmen normally have unregulated working hours,²⁴ but they have a right to a total of 28 days' holiday. Moreover, they have the right to at least four additional calendar days in the case of sportsmen, women and coaches²⁵ and three calendar days for the unregulated working regime.²⁶ Longer holidays may be agreed on in collective agreements or individual employment contracts. With regard to pay, players receive a fixed monthly salary plus bonuses based on their sporting achievements, in addition to other incentives.

There are also additional provisions in relation to the labour code limitations. For example, they concern the practice of *sovместitелство*²⁷ or working for several employers. According to Art. 348.7 LC professional sportsmen or coaches

²⁴ Art. 101 of the Labour Code of the RF

²⁵ Art. 348.10 of the Labour Code of the RF

²⁶ Art. 119 of the Labour Code of the RF

²⁷ Art. 282 of the LC defines it as the performance by the worker of regular work (different from the main job) on the basis of the employment contract during the worker's free time.

need permission from the main employer for this. In case of a temporary transfer of the sportsman to another employer (Art. 348.4 LC), permission from all employers is required.²⁸ This limitation concerns only *sovmetitelstvo* on the part of sportsmen/coaches. In theory they may have another job for other activities not related to sport. Persons under 18 years of age are not permitted to work on the basis of such a contract.

3.5 *The termination of the employment relationship*

The termination of employment contracts is one of the most important and controversial matters in professional sport and it may entail serious financial losses for both parties. On the one hand, clubs usually spend a considerable amount on transfer fees to be paid to the player's previous club. On the other hand, players can face difficulties in finding a new club willing to pay substantial transfer fees to the old club. Until recently no special rules on the termination of employment contracts were laid down in the LC RF and federal laws, and as a result the general rules on the termination of employment contracts were applied (Art. 77- 83 LC RF). However, the 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 the employment contract two weeks before the expiry date if no other term is laid down by the LC RF or other federal law in the case of:

- impossibility to continue employment because of acceptance at an educational institution, or retirement
- violation by the employer of the labour law norms and other legal provisions containing labour law provisions, local normative measures and terms of the collective agreement or individual employment contract.

In the case of professional sportsmen one month's notice is required down rather than two weeks as in the case of other workers. In the case of contracts concluded for a period of less than four months, a general two-week period of notice is applicable (Art. 348.12 LC RF). However, the regulations of the sport federations may lay down shorter or longer periods of notice.

The employment contract between the player and the club can be terminated without penalty or indemnity after the natural termination of the employment contract. In the case of unilateral termination before the expiry of the contract, the party responsible for the breach is required to compensate the other party.

²⁸ In the case of other categories of workers, the general rules under Art. 282 LC do not require the permission of the employer and do not limit the number of potential employers.

Termination with just cause

The LC RF does not specify what a just cause is, and hence Art. 80 LC can be applied by analogy.

Considering the specific nature of sport, certain sport-related reasons can justify unilateral termination such as:²⁹

- failure to take regular part in competitions, meaning less than 10% of official matches in the season in the case of football;
- failure to include the player in the current season if not related to full or partial inability to play;
- 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 sporting events;
- reinstatement of the player's amateur status;
- termination of the player's career.

These matters were previously governed by the Russian Football Union regulations in accordance with the relevant FIFA regulations. Currently, Art. 12 of the Russian Football Union regulations make more specific provisions for the termination of employment contracts for sport-related reasons. Prior to the recent changes it was possible to terminate the contract of an established football player who played less than 10% of the matches in a given season. Now the contract can be terminated for sport-related reasons by a player who has reached the age of 21. Goalkeepers playing in the season are excluded. Sport-related reasons cannot be applied in cases in which the player played in fewer than 10% of the matches due to:

- temporary inability because of sports injury or health reasons in general;
- sports disqualification and a ban on playing football for a period of more 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 the season considering the number of minutes spent on the field, whereas the Russian Football Union calculates the number of matches.

The regulations also lay down justified reasons for the unilateral termination of the contract by a football player. Previously this was regulated by the Chamber of the Russian Football Union in specific cases. At present Art. 11 of the regulation reflects the case law of the Chamber with regard to justified reasons:

- violation by the club of laws and other normative acts, collective agreements, or the individual employment contract;

²⁹ 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 (In Russian).

- loss of professional status of the club;
- reinstatement of the player's amateur status pursuant to the Regulations;
- arrears in the payment of salary of a football player for more than two months from the date due for payment, or in the case of litigation, from the date of entry into force of the court ruling;
- failure to include a professional player who has turned 18 in the current season not linked to a temporary inability to work, disqualification, or temporary transfer to another club;
- violation of the rights of the player, such as discrimination in relation to other players on the team, including training without the ball or outside the team (not related to the status of the health of the player) and extended exclusion from training activities;
- other violations by the club recognized as violations by the Chamber.

The FIFA regulations do 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 that has been consolidated over time.³⁰

Termination without just cause

If a player 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 limit for the payment is not agreed on, it can be settled by the dispute resolution chamber which considers such criteria as (Art. 10 of the Regulations on the status and transfer of players):

- salary or other payments due to the player under the employment contract with the current and the new club;
- the remaining period of the contract with the current club;
- expenses of the current club relating to the player;
- whether the termination occurred during the protected period or not;
- other objective criteria.

In case of the termination of the employment contract during the protected period without just cause, sports sanctions may be applied.

A player intending to terminate the employment contract outside the protected period is required to inform the club 15 calendar days after the last official match of the seasons performed by his club (Art. 10(5) of the Regulations on the transfer of players). Failure to comply with this notice period results in the imposition of sports sanctions in proportion to the length of the period.

In case of unilateral termination without just cause by the club, the player has the right to compensation. If the amount has not been previously agreed by the parties, it is determined by the dispute resolution chamber after consideration of the applicable criteria (Art. 9 of the Regulations on the status and transfer of players):

³⁰ Prokopez, *Transfer revolution*, 2011, www.sports.ru/tribuna/blogs/lexsportiva/204563.html.

- salary or other payments due to the player under the employment contract with the current and future club;
- the remaining period of the contract with the current club;
- expenses of the players relating to the transfer to the new club;
- whether the termination occurred during the protected period or not;
- other objective criteria.

The compensation cannot be less than three months' salary unless the remaining period of the employment contract is less than three months (Art. 9 of the Regulations on the status and transfer of players). In case of the unilateral termination of the contract by the club without just cause during the protected period, sports sanctions are applied to the club.

The individual employment contract can include other clauses: Art. 348-12 LC RF establishes that the parties can stipulate in the contract an obligation on the part of a sportsman to compensate the employer in case the contract is terminated at the initiative of the player without justified reason, or at the initiative of the employer in the case of disciplinary sanctions, (Art. 192 (3) LC RF). In case of disciplinary sanctions the player is also required to compensate the employer.³¹ The employer can dismiss the player as a disciplinary sanction for the non-performance or inadequate performance of his contractual duties. Pursuant to Art. 348.12 the amount of this compensation can be determined as two months' salary 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,³² as in the cases of David Mujiti and Igor Strelkov. These cases demonstrate the power of clubs to dismiss players unilaterally without justified reason. As a result, stronger legal regulation of this matter appears to be needed.

3.6 *Disciplinary rules and sanctions*

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 players, known as sports reasons:

- disqualification of six months or more;
- use (even just a single instance) of doping ascertained in the course of doping tests according to the federal law.

These reasons for dismissal are classified as disciplinary sanctions and as a result a specific procedure pursuant to Art. 193 LC RF must be implemented.

³¹ Paragraphs 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 workplace in course of employment.

³² See the cases of: David Mujiri (Contractual dispute petition of D. Mujiri, 02/02/2010) and Igor Strelkov (Statement of professional player Igor Strelkov d/d 29.04.2011), O. Rymkevich and N. Grammatikov, The regulation of employment contracts for professional football players: the case of Russia, in *European Sports Law and Policy Bulletin*, I-2011.

Disqualification under the federal law on physical culture and sport of the RF³³ results in the exclusion of sportsmen from competitions by the All-Russia Sports Federation. This may occur 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 the case of a 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 impose a lifetime disqualification (for a second case of doping), in accordance with the International Anti-Doping Code (Copenhagen, 2003)³⁴ obligatory for sportsmen and women all over the world.

The following sanctions³⁵ are provided in section 3 of the Disciplinary Regulations of the Russian Football Union:

Natural and legal persons

- a. reprimand
- b. fine
- c. withdrawal of titles and awards

Natural persons

- d. reprimand
- e. expulsion from a competition
- f. disqualification
- g. prohibition of any football-related activity
- h. prohibition of access to the stadium

Legal persons

- i. obligation to play a match (or matches) behind closed doors
- j. obligation to play a match (or matches) in a neutral venue
- k. annulment of a match result
- l. assignment of a defeat
- m. deduction of points
- n. expulsion from competitions
- o. relegation to a lower division.

Annex 3 of the Regulation on the Status and Transfer of Players provides a list of offences and corresponding sanctions (our translation):

³³ 4 December 2007 329-FS.

³⁴ www.wada.ama.org, new reduction from 1 January 2009.

³⁵ The offences and sanctions are listed in appendix No. 3 to the Regulation on the Status and Transfer of Players.

№	Offences under the RFU Regulation on the Status and Transfer of Players	Sanction
1	Conclusion by the player of two or more professional employment contracts for the same period (excluding the “leasing” of players to another club)	Disqualification for four to six months
2	Conclusion by the player of an employment contract with the club to which they were transferred for any period exceeding the leasing contract	Ban on the registration of new players for the new football club for a maximum of two registration periods
3	Conclusion by the player and club to which they were transferred on the basis of a leasing contract of the actions aimed to transfer the player to a third club	Fine for the new club of up to 500,000 roubles
4	Termination of the employment contract before the established term at the players initiative during the protected period, or shortcomings on the part of the player during the protected period resulting in the termination of the contract by the club	
5	Failure of the player to comply with the term of notice of the club or contractual termination before the established term due to sport reasons or reinstatement of the player’s amateur status	Disqualification of the player for a period from one to three months
6	Failure on the part of the club to comply with the terms of the transfer contract or transfer leasing contract including transfer fees	Fine for the club of up to 250,000 roubles
7	Termination before the permitted term of the employment contract during the protected period and non-payment by the club of the salary or coach for a period exceeding two months	Ban on the registration of new players for a club for a maximum of two registration periods
8	Violation by the club of the terms of compensation fee payment or non-payment	Deduction of points from the club
9	Violation by the club of the terms of solidarity fee payment or non-payment	
10	Violation by the player of the terms of compensation fee for the termination of contract before the permitted term	Fine of up to 250,000 roubles
10 ¹	Failure of the club to comply with the terms of registration laid down in the employment contract with the player	Fine of up to 100,000 roubles
11	Failure to execute or failure to execute in a timely manner the decisions of the RFU Committee on the Status of Players or of the Dispute Resolution Chamber	Fine of up to 300,000 roubles Deduction of points Disqualification of the player for a period from four to six months
12	Failure to provide the player with a copy of the employment contract on the day of stipulation	Fine for the club up to 100,000 roubles
13	Failure to provide the player with a copy of the employment contract with all amendments or annexes	Fine for the club up to 100,000 roubles

№	Offences under the RFU Regulation on the Status and Transfer of Players	Sanction
14	Violation of the rules on the transfer of players (Art. 17 of the regulation)	Disqualification of the player for a period from four to six months
		Ban on the registration of new players with the new club for a maximum of two registration periods Fine for the new club of up to 500,000 roubles
15	Failure to comply with the rules on extrajudicial regulation of disputes relating to the regulations on the status and transfer of players	Ban on the registration of new players for a club for a maximum of two registration periods Disqualification of the player or coach for a period from three to six months
16	Failure on the part of the club to comply with the duty to send players to the national team of the RF	Fine for the club of up to 500,000 roubles Assignment of a defeat on the club for all the matches in which the player took part (annulment of all points gained in such matches or award of victory to the opposing club in case of cup games)
17	Violation by the player of the terms of temporary transfer from the football club to the national team	Fine for a player of up to 250,000 roubles
18	Failure to comply with the registration procedures by an official of the organization required to register players	Fine for such officials from 1,000 to 15,000 roubles

The application of the sanctions for disciplinary offences is carried out by the RFU Disciplinary Committee and the RFU Appeal Committee.³⁶ The Disciplinary Committee of the RFU acts as a court of first instance in the case of disciplinary offences and also deals with claims concerning decisions of the judicial bodies of the federations. The Appeals Committee deals with claims concerning the decisions of the Disciplinary Committee of the RFU. An appeal against decisions by the Disciplinary Committee can be made to the Appeals Committee except when they are deemed to be final under the regulations or other norms of the RFU. Decisions of these bodies can be contested at the Court of Arbitration for Sport in Lausanne, and the decisions of this court must be recognized by the parties involved. The Court of Arbitration for Sport or other arbitration courts whose competence is recognized by the RFU Executive Committee act as courts of last instance with regard to the decisions of the Appeals Committee of RFU, decisions of judicial bodies of the interregional confederations of regional football federations or the Disciplinary Committee.

The Court of Arbitration for Sport or other arbitration court recognized

³⁶ The judicial bodies in football (section III, chapter 6 of the disciplinary regulation of RFU).

by the Executive Committee cannot deal with the following matters:³⁷

- claims relating to the violation of the rules of the game;
- sanctions of less than five matches or three months;
- cases under consideration or already regulated by another court of arbitration in the RF.

4. *Medical issues and doping*

4.1 *Medical issues*

Art 348.3 LC RF regulates medical check-ups for sportsmen and women. Before the conclusion of the employment contract sportsmen are subject to an obligatory medical examination. During their employment relationship they are subject to periodical medical check-ups in order to ascertain and prevent occupational diseases.

Employers are under the obligation to organize at their own expense obligatory preliminary and annual periodical medical examinations of the player, extra medical check-ups at the request of players, and medical advice. Players continue to receive their salary during absences relating to medical check-ups. Sportsmen are obliged to attend these check-ups and follow medical advice. Analogous provisions are contained in the Regulations on the Status and Transfer of Players (Art. 7(12) for the players and Art. 7(14) for the clubs).

The refusal by sportsmen to undergo these check-ups is deemed to be a breach of discipline with corresponding sanctions, while repeated avoidance without justified reasons may result in legitimate dismissal. According to Art. 76 LC RF the employer is required to exempt from work an employee who has not passed an obligatory check-up. In cases in which failure to pass a medical check-up may be imputed to a fault on the part of the player, the player is not paid for the entire period up to the check-up. If players fail to pass a check-up for reasons not depending on their own actions, they are paid two-thirds of normal salary as in case of obligatory exemption from work.

4.2 *Doping*

Combating the use of doping is of a paramount importance for professional sport. The current legislation on doping in Russia is inspired by international standards in particular the World Anti-Doping Code.

The legal basis of anti-doping measures is to be found in the following normative acts:

- RF Constitution
- Federal Law 329-FZ of 4 December 2007 (Law on Sport)
- Federal Law of 27 December 2006 N. 240-FZ On Ratification of the International Convention against Doping in Sport 2005

³⁷ Art 40 (2) of the disciplinary regulation of RFU.

- Provision of the Ministry of Sport and Tourism of RF of 29 May 2008 N. 408 and other normative acts
- Provision of the state committee of sport on the organization of anti-doping measures in sport in RF, 10 October 2003, No. 837 and other normative acts.

Under the Law on Sport (Art. 26) doping is a violation of anti-doping rules including the use (or attempted use) of prohibited substances or methods according to the World Anti-Doping Agency (WADA) list that is periodically updated. It also specifies the measures in the fight against doping including test planning, sample taking and storage, transportation, laboratory analysis and after-test procedures as well as court hearings and appeals.

The obligation to make sure that sportsmen and women do not use prohibited substances, to ensure that they undergo doping tests and to require employers to provide information about their location for doping testing is laid down in the Labour Code (Art. 348(2)) as well as in the Regulations on the status and transfer of players. A number of stakeholders are involved in the fight against doping at the state level including the ministry of sport, sport federations, regional authorities.

Any player whose use of doping has been duly demonstrated, regardless of the reasons and circumstances, is subject to two years of disqualification and in the case of a second occurrence to a lifelong disqualification. Competition results may be annulled and the players may 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 set up an independent anti-doping agency and special inspection team at the Olympic Committee of Russia.

The All-Russia Anti-Doping Agency, RUSADA,³⁸ is a body meeting the WADA requirements. It is responsible for anti-doping testing, implementation of anti-doping rules, educational programmes, research into doping and the fight against it, investigation into the violation of anti-doping rules, the setting up of independent committees, and international cooperation.³⁹

5. *Transfer of players*

At present, certain controversial matters such as the transfer of players are not regulated by law.⁴⁰ Even the appropriate terms are absent from the legal provisions. No definition of the legal nature of the transfer contract is provided in the Law on Sport in the RF, nor in the special section of the Labour Code, and it remains doubtful whether it should be regulated by norms of commercial or labour law. In the Labour Code only temporary transfers to another employer are mentioned (Art. 348.4 LC RF).

³⁸ www.rusada.ru/en.

³⁹ Alexeev, *op. cit.*, 882-942.

⁴⁰ U. V. Zaitzev, *Legal Nature of the Transfer of Sportsmen: Economics, Law and Management*, 2009 (in Russian).

5.1 *Temporary transfer of players to another employer (Art. 348.4 LC RF)*

In cases where the employer cannot ensure the participation of players in competitions, it is possible to transfer them on a temporary basis to another employer for a period of no more than one year. During this period, the temporary employer concludes a fixed-term contract (pursuant to Art. 348.2 LC RF) with the player while the contract with the main employer is suspended and consequently all the rights and obligations ensuing from the employment contract and collective agreement are suspended, with the exception of the matters regulated by Art. 348.7⁴¹ of the LC RF. The terms of the original employment contract continue to apply. After the expiry of the temporary transfer, the original employment contract enters into force again, from the date immediately after the termination of the temporary transfer. In the course of the transfer, both the player and the employer are required to respect the rules laid down by labour law and other normative acts. The temporary employer cannot transfer the player to a third party. In the case of premature termination of the fixed-term contract, the original contract comes back into force the following day. If upon termination the player continues to work for the employer to whom he/she had been temporarily transferred and none of the parties asks to terminate the relationship, the original contract ceases and the temporary contract is prolonged for a period agreed by the parties. In the absence of an agreement on a fixed term, the temporary transfer contract is 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 players can defend their rights.

5.2 *Transfers of players according to the Regulations on the status and transfer of players (2011)*

In the absence of legislative regulation, the solutions to any problems regarding transfers are to be sought in the regulations of the sports federations containing specific norms regulating the working conditions of professional players that are lacking in federal laws. In particular, 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 Regulations of the Russian Football Union (Regulations on the Status and Transfer of Players, 2011)¹ include norms on the transfer of football players. They define transfers as relations regulated by FIFA and the Regulations on the status of transfer of player linked to the change by the player of the football club (or sports academy) the player is registered with. As a result transfers are regulated by sports regulations and relate to the registration of the

⁴¹ Art. 348.7 LC RF, Peculiarities of combining jobs with other employers of sportsmen and coaches (*sovmestitelstvo*). Sportsmen and coaches have a right to take up employment as sportsmen and coaches with other employers only with the permission of the main employer. During the temporary transfer, permission must be obtained both from the main employer and temporary one.

⁴² Available at: <http://sportslaw.ru/data/files/regstatus2011.pdf> (in Russian) (accessed 4 July 2014).

player with the club in order to take part in the competitions.

According to Art. 2, the Regulations cover the following matters:

- the status of football players registered with clubs (and sports academies) participating in competitions under the aegis of the RFU;
- the registration of football players for clubs (and sports academies) participating in competitions under the aegis of the RFU;
- the transfer of football players from clubs (and sports academies) taking part in competitions under the aegis of the RFU to other clubs (and sports academies) participating in competitions under the aegis of the RFU;
- reimbursement of the cost of training players to the clubs (and sports academies) participating in competitions under the aegis of the RFU;
- dispute resolution among football stakeholders including clubs and sports academies taking part in competitions under the aegis of the RFU; players registered with clubs taking part in competitions under the aegis of the RFU; coaches registered with clubs taking part in competitions under the aegis of the RFU; football agents licensed by the RFU.

The Russian Football Union Regulations of 2011 amended certain regulations 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 Regulations, 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 reasons not linked to the transfer of the player to another club (sports academy) 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 restriction as it violates constitutional rights for labour and it can easily be bypassed by clubs intending 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.

5.3 *Transfer fees*

The new regulation also increased the transfer fees to be paid to the football club on signing the first professional contract. Previously, pursuant to the Regulations of 2006 when players signed their first contract, the amateur football club or school was entitled to receive 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 transfer fee was 300,000 roubles. This amount was paid only to the last amateur club (sports academy) the player was registered with.

At present, pursuant to Art. 22 of the regulations, the basic transfer fee is calculated on the basis of the number of years the player was registered with the club (or sports academy) considering the age of the player as follows: age 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 their first contract (three for the premier league, two for the first division, one for the second division). Due to this amendment the final transfer fee to be paid to the football clubs that trained the player increased and all the clubs receive a transfer fee, not just the last club as was previously the case. These provisions are in accordance with FIFA requirements.

Also the calculation of the transfer fee for 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 expiry of his employment contract the club that the player was leaving had the right to a transfer fee calculated on the basis of the salary (including bonuses) 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 transfer fee has been abolished with one exception. Under Art.23 of the Regulations, this fee must be paid to the club the player is leaving 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 club that the player is leaving receives compensation for training, but the calculation rules have been changed. Now this transfer fee is calculated according to the player's salary, without considering 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 substantial transfer fees were required. No transfer fee is due if the club does not offer a new contract.

FIFA supports the abolition of transfer fees only in cases in which the club does not offer a new contract in the European Union. As for the calculation of the transfer fee, it is paid in the case of the transfer 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 a fixed sum (the hypothetical cost for the new club of training the player to the same level). The fixed amounts are: 60,000, 30,000 and 10,000 roubles annually.

5.4 Players' agents

The activity of players' agents is governed by the Regulations on agents' activity of the RFU. A new version was adopted on 18 December 2013. According to the Regulations the agent is the individual who has an RFU licence issued according to the Regulations and providing services to players and clubs according to the regulation. Art. 3 lays down the following requirements in relation to agent:

- he/she must be over 18 years;
- he/she must be an RF citizen or have been resident in the RF for at least two years prior to the application;
- he/she must have an impeccable reputation in sense that:
 - he/she has never engaged in agency activity without the license of the RFU or other recognized national association or FIFA member;
 - he/she does not have a criminal record;
 - he/she has never received treatment for drug addiction and does not have psycho-neurological problems;
 - at the time of the application he/she is not subject to disciplinary measures such as a ban on practising as an agent according to the decisions of FIFA, UEFA, RFU, or other national associations.
- He/she has a full secondary education or international equivalent.

If the candidate lacks even one of these requirements he/she cannot be admitted to the examination.

An important innovation in the Regulations is the obligation for successful candidates to take out an insurance policy for professional liability with an accredited insurance company. The aim is to obtain cover for any damage they might cause to the players or the RFU. The insurance must cover all standard risks (Art. 6(1) of the Regulation).

Moreover the Regulations govern in detail the activity of the agent, the examination procedure, the rights and obligations of players, clubs and agents towards each other and subsequent sanctions in the case of possible violations, contractual aspects of agents agreements, conflicts of interest, and dispute resolution. According to Art. 26 of the Regulations the control over agents is carried out by the commission of RFU whose activity is regulated in an annex regulation.

6. *Social security principles*

The level of social security protection for professional sportsmen and coaches is still modest. The Law on Sport does not contain any specific provisions in this regard so players like other categories of workers are covered by the general laws on unemployment benefits and pensions. Considering physical overload and the high injury rate resulting in partial or permanent invalidity and the loss of earning capacity, professional sport requires particular attention to be paid to insurance. The Labour Code contains some provisions in this regard: Art. 348(2) LC lays down an obligation to take out life assurance and medical insurance for players. Moreover, additional medical insurance cover is required.

In addition the Regulations on the status and transfer of players require clubs:

- to provide obligatory social insurance for players pursuant to the labour legislation or other normative acts of the RF;
- to cover the cost of health and safety insurance as well as medical insurance in order to enable players to receive medical services in addition to those required

- by law and to specify their terms;
- to organize at their own expense compulsory preliminary and annual periodical medical check-ups for the player, extra medical check-ups at the request of players, and medical advice;
 - to make available financial assistance in the case of a temporary inability to work due to sports-related injury under the employment contract, in order to bring the temporary disability benefit into line with the average monthly salary of players if such a benefit is lower and income support is not provided by supplementary insurance schemes.

Generally speaking there are two elements in the insurance system:

- compulsory insurance (common for all citizens regardless of occupation)
- voluntary insurance.

Compulsory insurance is governed by the Federal Law of 28 July 1998, N 125-FZ On the compulsory insurance against accidents at work and occupational diseases. However, in the case of professional players the cost of medical treatment may be too high to be covered by the compulsory insurance and supplementary (voluntary) insurance is needed.

As for additional safeguards for professional players the decree of the President introduced a special monthly allowance for certain categories of sportsmen such as members of national Olympic teams,⁴³ sportsmen and women taking part in the Paralympics and the Deaf Sports movements.⁴⁴ According to the Federal Law of 22 August 1996 N. 125-FZ On higher professional education, prize-winners and champions of the Olympics, Paralympics and Deaf Olympics can be admitted to the higher education institutions without an entrance examination to acquire sport-related qualifications.

The federal bodies of the Russian Federation can enact special legislation to ensure additional income support for outstanding sportsmen, and there are also special charity funds for champions. There are also some provisions concerning pensions. Under the Law of 12 February 1993 N. 4468-I, the champions of Olympics, Paralympics and Deaf Olympics have the right to a 50% allowance in relation to disability pensions, superannuation pensions, and survivors' pensions.

The system of social security for professional sportsmen and women has a number of drawbacks. There is no special legislation on the compulsory insurance of the members of national teams or on minimum standards and terms of insurance of sportsmen to be provided by employers. The above mentioned income support measures are fragmentary and cover only narrow categories of sportsmen such as high-level sportsmen and champions while leaving broader categories of sportsmen and coaches without adequate protection.⁴⁵

⁴³ The decree of the President of the RF of 6 July 2002 N. 692

⁴⁴ The decree of the President of the RF of 6 December 2003 N. 1423. See also the decree of the President of the RF of 31 March 2011 N. 368 regarding allowances for certain categories of sportsmen and women.

⁴⁵ Alexeev, *op. cit.*, 377-390.

7. *Dispute Resolution*

There is no single classification of sport-related disputes in the Russian legal literature.⁴⁶ This gives rise to significant practical problems concerning the definition of the proper jurisdiction of a particular dispute. In theoretical terms they may be subdivided into disputes concerning economic relations, employment relations, disciplinary sanctions (disputes between players and their organizations) and disputes between sports organizations.

Art. 45 (2) of the Russian Constitution grants all citizens the right to defend their personal rights and freedoms having recourse to all possible means not prohibited by law. Art. 46 (1) of the Constitution guarantees the right to judicial protection as an inalienable personal right, and this applies also to relations in sport. All those involved in sport or third parties have the right to apply to the bodies of general competence (regular courts) pursuant to the federal Constitutional Law of 31 December 1996 No. 1-FZ On the Judicial System of the Russian Federation, and to special courts (arbitration courts) or use alternative procedures (such as mediation). The Labour Code of the RF also grants all citizens the right to defend their employment rights and freedoms including the right to judicial protection (Art. 2 of the Labour Code).

7.1 *Arbitration*

The advantages of arbitration are widely recognized. The procedure is reasonably quick, which is important considering the relatively short careers of professional sportsmen and women. The parties can count on one or more arbitrators with specific competence in the field of sport (normally lacking in the ordinary courts) and they are free to choose them themselves. Arbitration decisions are considered to be final and not subject to appeal at a higher level. In addition the procedure is more economical than proceedings in the regular courts, and details of the cases are confidential.

The main principles of arbitration are as follows:

1. *independence and impartiality of the arbitrator*: arbitrators cannot represent the interests of one of the parties involved or be directly or indirectly interested in the decision on the case. They must inform the arbitration court immediately if they become aware of one of the above-mentioned problems;
2. *equality of the parties*: each party must have equal opportunities to present and defend their interests;
3. *competitiveness of the parties*: each party must demonstrate the consequences that it cites in order to justify its claims;
4. *promotion by the arbitration court of an amicable agreement* without violation of the rights and interests of the parties protected by law;

⁴⁶ Alexeev, op. cit, 971, V. Pogosyan, *Forms of Resolution of Sports Disputes*, Kluwer, 2011, 61-64.

5. *confidentiality of the arbitration procedure*: arbitrators and their staff cannot divulge the facts they become aware of during the arbitration without the prior agreement of the interested parties. The arbitrator cannot be interrogated about these facts.

The right to file a complaint with the court of arbitration for sport is granted to all persons, either legal or natural, engaged primarily in sport, with or without the status of an individual entrepreneur. Arbitrators are natural persons having the necessary skills in the world of sport. An arbitrator sitting alone is required to have a law degree. In the case of a joint panel, only the president is required to have a law degree. The arbitration panel consists of arbitrators appointed by the Chamber of Commerce of Russia as approved by the governing body for sports for a three-year period.

7.2 *Mediation*

Mediation is a relatively new procedure for dispute resolution in Russia. An increasing recognition of alternative forms of dispute resolution resulted in the adoption of a special Law of 27 July 2010 On Alternative Dispute Settlement Procedures with the Participation of Mediators. Pursuant to this legislation, mediation is a voluntary procedure, to which the parties have recourse with the aim of reaching an agreement. The mediator is required to be independent. The procedure can be concluded before a dispute arises or subsequently. It can be carried out on a professional or non-professional basis. Non-professional mediators are required to be at least 18 years old, to have legal capacity to act and not to have a criminal record. Professional mediators are required to be at least 25 years old, to have an advanced degree and to attend special professional courses in mediation. There is no impediment to mediation even when a case is under examination in a regular or arbitration court.

7.3 *Arbitration courts*

In line with international practice, Russia has set up arbitration courts. At present there are two specialized courts of arbitration for sport in the Russian Federation: the Court of Arbitration for Sport at the Russian Sports Chamber, and the Court of Arbitration for Sport at the Russian Chamber of Commerce, both located in Moscow.

The Court of Arbitration for Sport at the Russian Sports Chamber was set up as an autonomous non-commercial body on 10 June 2003 to deal with disputes about property rights including the status and transfer of players, disputes with agents, disputes regarding the decisions of sports organizations, and disputes relating to doping. Before applying to the arbitration court the claimant must exhaust all other means of defence provided by the federation or organization. An arbitration agreement must be concluded in order to refer the matter to the arbitration court. The court must hear the dispute within 60 days, or within 45 days in the case of appeals against the decisions of sport organizations.

The Court of Arbitration for Sport at the Russian Chamber of Commerce is an independent and permanent body regulated by Federal Law No. 102 of 24 July 2002, On Courts of Arbitration in the Russian Federation, and Federal Law No. 5338-1 of the Russian Federation of 7 July 1993, On International Commercial Arbitration. The activity and organization of the Court of Arbitration for Sport at the Russian Chamber of Commerce is regulated by the provisions on sports arbitration of 24 October 2003, Federal Law No. 114. The Russian Chamber of Commerce validates the list of arbitrators and arbitration fees. The main distinctive feature of the Court of Arbitration for Sport at the Russian Chamber of Commerce is that it has competence to deal with international disputes in the sphere of sport. According to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), decisions of arbitration courts must be recognized and enforced in the territory of foreign states.

The Court of Arbitration for Sport deals with disputes about property rights and the interests of stakeholders, including those deriving from the statutes, rules, regulations and other sources establishing rules for championships and other competitions on the territory of the Russian Federation, as well as disputes relating to the transfer of players and coaches, agents, sponsorships, and media rights. According to Art. 1 part 2 of the Law On Courts of Arbitration in the Russian Federation, only civil law cases can be heard in courts of arbitration. As a result, these courts cannot hear disputes about administrative or other relations unless specified by law. They also have no competence in employment-related disputes. Any provision for an arbitration agreement laid down in an employment contract with sportsmen or women is therefore invalid.

Disputes can be resolved at the arbitration court only with the consent of the parties in the form of an arbitration agreement in which the parties agree to refer the dispute to the court of arbitration for sport. Such an agreement may concern a certain dispute or category of disputes or all possible disputes in relation to a certain juridical situation.

According to international commercial arbitration law, sports arbitration deals with cases based on the law specified by the parties in the agreement and, in the absence of such a provision, on the basis of the law defined by sports arbitration according to the dispute rules considered appropriate. In all cases the court of arbitration for sport considers the terms of the agreement, and commercial practice is applied to the specific case.

In cases concerning the legitimacy of decisions of sport associations (doping, disqualification, violation of the rules of the game) the court of arbitration for sport is not a court of appeal but of first instance. In addition, the procedure is of a distinctive kind. Sportsmen and women can refer a dispute to the court if the regulation of the federation to which they belong provides such a possibility, if the parties have made provision for this option in the arbitration agreement, or if all other means of dispute resolution have been exhausted. Cases can be heard either by an arbitrator sitting alone or by a panel of arbitrators. This is a distinctive

feature of sports arbitration as the traditional arbitration procedure makes provision for a panel when the decisions of lower courts are concerned.

Disputes relating to administrative matters or labour relations come under the jurisdiction of the regular courts, while disputes relating to business relations in the sphere of sport subject to civil law may be dealt with by arbitration courts. The regular courts can overrule decisions of arbitration courts. Even if decisions of arbitration courts are deemed to be final and in principle cannot be contested, a limited number of factors may result in annulment.

Pursuant to Art. 421 of the Civil Code of Practice, arbitration courts rulings can be annulled in the following cases:

- the arbitration agreement was not valid according to federal laws;
- one of the parties was not duly notified about the nomination of the arbitrators or the arbitration hearing (the time and place of the hearing);
- the arbitration ruling was issued on a matter beyond the jurisdiction of the arbitration court or beyond its competence. Regular courts can partially annul an arbitration court ruling regarding questions beyond its competence;
- the composition of the arbitration panel or the procedures were contrary to the arbitration agreement or federal laws;
- the arbitration court ruling violated the basic principles of Russian legislation.

Depending on the nature and parties involved, the dispute may come under the jurisdiction of the regular court or arbitration court, pursuant to the Civil Code of Practice of the Russian Federation, and the execution of such decisions is mandatory. According to Art 24(1) of Law N. 102-FZ, On Courts of Arbitration in the RF, if a ruling of the arbitration court is not executed voluntarily and in a timely manner, it can be enforced by means of compulsory execution. In order to achieve this outcome, the party in whose favour the ruling has been handed down needs to appeal to the competent court within three years of the decision. The court must hear the application within one month. In the case of failure to comply with the three-year time limit, the appeal will be rejected by the Court.⁴⁷

There is an important difference between team and individual sports in Russia. Sportsmen and women practising individual sports normally have the status of individual entrepreneurs and are subject to civil law norms. As a result, disputes are referred to arbitration courts. In the case of team sports, an employment contract is generally concluded, labour law norms are applicable and disputes are referred to the regular courts.

7.4 *Judicial bodies in sport*

The international football federation (FIFA) and the Russian Football Union (RFU) promote extrajudicial dispute resolution in the RF through the following bodies:

- the dispute resolution chamber;

⁴⁷ Alexeev, op. cit, 966-1037.

- the committee on the status of players.

These two bodies are regulated by the Constitution of the RF, constitutional federal laws, federal laws, normative acts of the RF president and federal government, normative acts of the subjects of RF, international treaties, the RFU Statute and other norms, norms of FIFA, UEFA, customs and other norms in compliance with RF legislation. In cases in which relations are not directly governed by the RFU regulations, the FIFA statute and regulations are applied by analogy.

7.5 *Dispute resolution chamber*

The dispute resolution chamber is a judicial body of the RFU created pursuant to the Regulations on the status and transfer of players (Art. 42): it is responsible for pre-trial dispute resolution among football clubs, football players, coaches, agents and other parties. It applies disciplinary sanctions for the violation of the Regulation on the Status and Transfer of Players and other regulations as specified. Disputes may be referred to the Chamber by clubs, football players, coaches, agents or other parties in football according to the Regulation on the Status and Transfer of Players. The parties to a dispute are not entitled to refer the dispute to the Chamber if they have already referred it to a regular court, court of arbitration, dispute resolution chamber or committee on the status of players at FIFA or the Court of Arbitration for Sport in Lausanne.

The procedure is based on principles of legality, confidentiality, independence, impartiality, competitiveness and equality of the parties. The chamber consists of a president and vice-president, and five representatives of professional football players recommended by the players' trade union according to clause 8 of the Regulations on Dispute Resolution. The composition of the Chamber is approved by the Executive Committee of RFU for a period of four years. Members of the Chamber cannot at the same time be members of the Executive Committee, or the committee on the status of players, or directors of one of the leagues. The president is required to have a law degree.

With regard to the powers of the Chamber, it can deal with the following categories of disputes:

- violation of the terms of registration of players, unless referred to the committee on the status of players;
- violation of the norms governing employment contacts between clubs and players;
- violation of an employment contract during the temporary leasing of a player, or violation of supplementary contractual terms or terms on termination of employment contract or violation of collective agreements or other normative acts;
- violation of the terms of employment contract with coaches admitted to competitions;
- violation of training fees.

The official language of the proceedings is Russian. If one of the parties concerned is not proficient in Russian, an interpreter must be made available. The Chamber is required to keep all information confidential. Between April 2010 and March 2011 the Chamber dealt with 223 disputes referred by football players, clubs and agents, including 179 referred by players and coaches, 38 by clubs, and six by agents. It is evident that the majority of disputes are referred to the Chamber by players. The Committee on the Status of Players overruled only five decisions, whereas two decisions were turned into compensation.⁴⁸ The main aim of the Chamber is to reconcile the parties and resolve disputes in the pre-trial phase while seeking a mutually acceptable settlement. The percentage of appeals to other courts against the rulings of the Chamber is fairly low.⁴⁹

7.5.1 Committee on the Status of Players

This committee consists of a president, vice president and ordinary members. The total number of members cannot be more than nine. The composition is approved by the Executive Committee of the RFU, for a period of four years. The president is required to have a law degree. Members cannot at the same time be members of the Executive Committee, the Chamber, or directors of one of the leagues. The committee is a judicial body of second instance dealing with claims concerning the rulings of the Chamber on matters within its competence, such as matters concerning the definition of the transfer of player, or registration out of transfer windows, or the transfer of minor players.

8. Conclusion

Arguably Russian sports law is still at a formative stage. Some aspects such as the social security of professional sportsmen, the regulation of the employment of foreign players, and the dispute resolution system need more regulation than others that better correspond to the internationally established norms (doping, contractual rights and the obligations of clubs and players). Also the norms relating to the various branches of law and hierarchically different laws should be better aligned in order to avoid unnecessary conflicts, as well as to work towards improvements in the legal framework governing professional sport.

⁴⁸ CAS 2010/A/2204.

⁴⁹ Gusov, *Activity on the dispute resolution chamber of the Russian Football Union*, materials of the 5th international conference on Sports Law: Prospects for Development, Moscow, 2011 (in Russian).

**EMPLOYMENT RELATIONSHIPS AT NATIONAL LEVEL:
SLOVAK REPUBLIC**

by *Tomáš Gábriš**

SUMMARY: Introduction – 1. Employment regulation and football structures – 2. Individual employment relations in professional football – 3. Medical and doping issues – 4. Transfer of players – 5. Social security principles – 6. Labour Dispute settlement – Conclusion

Abstract:

The contribution explains the legal regulation of sports in Slovakia in general, and the position of football and status of football players in particular. It points to the fact that labour law is not applied with respect to football players, since they are considered self-employed in Slovakia. The paper explains and compares the potential labour law regulation and player's social security position side by side with the actual internal and contractual regulation of the rights and duties of players, transfer of players, as well as of the dispute resolution in sports. All the above mentioned areas are marked by the fact of players being self-employed which is caused by labour law being considered too rigid as to be applicable upon players. A solution can only be a new complex legal norm addressing the specificities of the status of sportspeople – this has however not been enacted so far.

Introduction

The contribution offers a general overview of the status of players in the Slovak Republic, mainly in the field of professional football. In contrast to many other EU Member States, Slovakia has not recognized the employment status of players so

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far. Even though there is a general rule in the Labour Code defining dependent work, as well as a rule stating that professional athletes' employment relations are governed by the Labour Code; in practice atypical contracts based on the Civil Code or Commercial Code are being used as players' contracts. This is due to the rigid nature of the Slovakian Labour Code and the failure of the Slovak Republic to enact specific law on the employment status of players, taking into account the specificities of the sports sector. Therefore, labour law does not play a role in regulating the rights and duties of players and, instead, internal rules of the sports organisations, general legal rules of civil or commercial code, and contractual practice influence the position and status of players.

1. *Employment regulation and football structures*

1.1 *Sources of law and approaches*

Sport in Slovakia is regulated by legal norms as well as by internal rules of sports organisations and contracts concluded within the sports sector. With regard to the specific issue of the employment status of sportspeople, the Slovak Labour Code has contained, since 2007, in its first paragraph an enumeration of features of dependent work. Dependent work can generally be carried out only within employment and only rarely in other legal relationships, governed by special legislation (e.g. civil service).¹ Still, in practice, athletes in Slovakia usually sign a player's contract under the Civil or Commercial Code, even if the work shows features of dependent work. This practice should be firmly rejected, also with reference to Sec. 3 (2) of the Labour Code: "*Labour relations of ... professional athletes are governed by this Act, unless stipulated otherwise*". (trans. T. G.) This provision explicitly stipulates that professional athletes should be governed by the Labour Code as long as the work meets the standards of dependent work and there is no special legislation which would state otherwise. The practice of circumventing the provisions of the Labour Code can only be explained by the rigid, predominantly mandatory nature of labour law in Slovakia. A simple application of the Labour Code is not possible because, for example, Slovak labour law does not accept fines, or arbitration in labour disputes, which would make application of labour law to professional sports especially difficult. As a result of this situation, there are hardly any collective bargaining agreements being concluded in the sector of sports. It is only within specific sports organisations directly under control of the Ministries of Interior and Defence that the practice of collective bargaining for sportspeople who are considered employees within the specialised organisations has been introduced.

¹ H. Barancová, *K vymedzeniu pojmu pracovného pomeru: Pracovný pomer alebo obchodnoprávny vzťah?*, *Právny obzor* 87, no. 1, 2004, 28–44.

1.2 Specific laws on sport and football

The basic legislation governing sporting activities in Slovakia consists mainly of the Acts of Parliament and of norms of lower legal force. Football is not mentioned explicitly in any of these norms. The basic sources are two general framework laws:

- 1) Act no.288/1997 Coll. on physical culture; and
- 2) Act no. 300/2008 Coll. on the organisation and promotion of sports.

The second category represents another two specialized laws:

- 3) Act no. 226/1994 Coll. on the use and protection of Olympic symbols and on the Slovak Olympic Committee; and
- 4) Act no. 1/2014 Coll. on the organisation of public sporting events.

Additionally, there are many other general legal norms in which the position of sports organisations and sports activity is an incidental matter. These are provisions from various branches of law e.g. the Labour Code, Act no.278/1993 Coll. on the administration of state property, the Act on municipal property no.138/1991 Coll.as amended, the Offences Act no.372/1990 Coll., Act no.543/2002 Coll. on nature and landscape protection, or the Small Trades Act no.455/1991 Coll.

Finally, the last and the most general category of legislation with relevance for sports are those generally binding legal regulations in which the concept of sport or physical education may not be mentioned at all but whose rules are binding on subjects of the sports movement due to the general applicability of these Acts. These are, e.g. the Constitution, Civil Code, Commercial Code or the Criminal Code, and others.

1.3 Football structures

The Republic only creates a legislative framework for sports and leaves a relatively large degree of autonomy to the sports movement under the heading of internal activities of mostly private associations or business companies (or other legal forms).

According to the Act no. 300/2008 Coll. on the organisation and promotion of sports, national sports associations (including the Slovak Football Association) can only have a legal form of private associations. The primary legal basis of private associations in Slovakia is the Act no. 83/1990 Coll. on association of citizens, as amended. It provides that citizens have the right to associate freely whereby the exercise of this right is not to be authorized by a state body. Therefore, the principle of registration applies rather than of authorization. The associations are registered with the Ministry of Interior.

Based on the Act on Sports, a national sports association is only such private association, which is:

- (a) accepted by the Slovak Olympic Committee as the national representative of the sport recognized by the International Olympic Committee;
- (b) recognised by the International School Sport Federation or the International University Sport Federation, or;

- (a) a member of an international sports federation in the sport, which is not recognized under subparagraphs a) or b), but which brings together at least ten national sports associations as its full members and the member simultaneously meets the following requirements:
 - a. contains at least ten active sports clubs and at least two hundred athletes with a certificate of athlete;
 - b. has regularly organized national athletic competition for at least three years;
 - c. ensures the selection and preparation of athletes for sports representation and care for sports talents, and
 - d. creates conditions for children to participate in sports outside of schools.

As an example, the Slovak Football Association (hereinafter referred to as 'SFA') is a member of the International Federation of Football Associations (FIFA) and Union of European Football Associations (UEFA). At the same time, it also meets all the remaining requirements to be recognised as a national sports association.

Concerning its inner structure, the SFA has regular members, associate members, individual members and honorary members. Regular members of the SFA are:

- (a) sports clubs in the form of private associations, business companies, or in the form of budgetary or contributory organisations;
- (b) Provincial Associations;
- (c) Regional Associations;
- (d) The Union of League Clubs;
- (e) Slovak Futsal;
- (f) associations and other organisations of players, referees, coaches;
- (g) associations and other legal entities representing Futsal, women's football and Beach Soccer.

The SFA sets up numerous bodies and organs in order to ensure the implementation of its objectives and tasks. The main representative body is the SFA Conference. Executive bodies are the SFA President and the Executive Committee. Control bodies are the SFA Audit Committee and the SFA Electoral Committee. Authorities administering justice are the Disciplinary Committee, the Appeals Committee, the SFA Dispute Resolution Chamber, and the SFA Licensing Bodies. Administrative authorities are the Secretary General, expert committees, *ad hoc* committees and working groups.

The football competitions are organised within leagues. However, these are not usually considered a separate legal entity with the exception of the Union of League Clubs which is (based on the Statutes of the SFA Art. 35) responsible for the administration of competitions in the First League ("Fortuna Liga") and in the Second League (called "DOXXbet Liga"). It takes the legal form of a private association of legal persons.

The second most common legal form of sports organisations is that of a

business company established on the basis of Commercial Code no. 513/1991 Coll. This is very often the form of football clubs.

1.3.1 Professionals

Under the SFA Registration Rules, individual footballers who wish to participate in sports competitions organized by the SFA, by the regional football associations or provincial football associations, have to be registered with the SFA. Registration of players is only possible in a particular club through which the player asks for registration. The player can be registered as a professional, non-amateur (receiving a partial compensation of costs) or amateur.

The issues of a contract between a player and a club and the resulting status of professional footballer are regulated by the SFA Directive for the registration of professional and non-amateur contracts. According to its Art. 1, persons may sign a professional contract only if they are at least sixteen years old. A professional contract is defined here as a written contract between a club and a player based on mutual cooperation in carrying out sporting activities with focus on football. According to the Directive (Article 1), a professional contract must be in writing. The minimum duration of the contract is the period between two transfer windows and the maximum duration is set at five years. This would, however, be in conflict with the provisions of the Labour Code which restricts (in accordance with the EU legislation on *fixed-term contracts*) the contracting period as well as the possibility of (re) contracting the relationship for a fixed term.

Under the Directive, the basic elements of the professional player's contracts are the following:

- (a) the basic monthly salary of a player shall not be less than 331.94 EUR (the amount is lower than the current minimum wage – in 2014, it was 352 EUR);
- (b) a player younger than eighteen years old cannot receive a monthly salary of less than the minimum wage if that is the only source of income for the player. If the player's agreed monthly salary is less than minimum wage, the club is obliged to prove another source of income of the player;
- (c) a professional contract must include the rights and obligations of each player and the club, the provisions on penalties for infringement or breach of agreed terms, the reasons for termination by the player and the club, and the conditions for terminating the contract;
- (d) a professional contract shall specify the date of its execution, the names, surnames, and functions and shall include hand-written signatures of two officials of the club, stamp of the club and the player's signature;
- (e) with minors, in addition to their signature, the signatures of parents or a guardian, are required;
- (f) if services of a player's agent were used in concluding the professional contract, the contract shall contain the name and signature of the players' agent (or authorized person). If the services of an agent (or other authorized person)

were not used, the contract shall contain a statement that services of an agent were not used.

This regulation only reflects to a minor degree the minimum requirements for players' contracts that have been drawn up at the European level of professional football.²

1.3.2 Amateurs

Those players who do not receive any compensation or remuneration for their sporting activities are considered amateurs. There are no specific requirements as to their contractual or membership relations with the clubs.

1.3.3 Semi-professionals

In addition to professional contracts, the SFA Directive for registration of professional and non-amateur contracts contains specific regulation of non-amateur contracts. According to Art. 9, non-amateur contract must be in writing, the minimum duration of the contract is one year, and the maximum period is set at three years. The minimum amount of compensation of the player's expenses is 33.19 EUR. Under Art. 26 of the SFA Transfer Rules for Professional Players (2012), such a contract must be archived with the club.

1.3.4 Self-employed

As already indicated, it is common practice in Slovakia to use the provisions of Sec. 51 of the Civil Code, or Sec. 269 (2) of the Commercial Code on atypical contracts,³ instead of subordinating the relationship between an athlete and a club under the Labour Code provisions. Employment is an exceptional situation in case of athletes of the National Sports Centre, and employees in service of the Military Sport Centre Dukla Banská Bystrica and the Centre of National Sports Representation of the Ministry of Interior. In the private sports sector, the use of civil and commercial contracts dominates absolutely. Therefore, at present, the practice prevails that players are mostly self-employed, and only exceptionally they are employees.

However, Small Trades Offices in Slovakia do not recognize sporting activity as a specific object of small trades licensing. Only performance of other activities than sporting may be considered as a small trades activity performed by an athlete, e.g. advertising and marketing.

² FIFA circular no. 1171, www.fifa.com/mm/document/affederation/administration/97/29/01/circularno.1171-professionalfootballplayercontractminimumrequirements.pdf, 16 January 2014.

³ L. Križan, *Mal by mať profesionálny futbalista na Slovensku postavenie zamestnanca?*, *Bulletin slovenskej advokácie* XV, no. 3, 2009, 28–34; M. Dolobáč, *Právne postavenie športovcov*, *Justičná revue*, no. 6-7, 2010, 796-801.

Additionally, regulations of social security law and tax law also consider players as self-employed persons. In particular, their income from sporting activities is characterized for tax purposes as an income from 'other self-employment', or 'other income' (Sec. 6 (2) b) and Sec. 8 (1) j) of the Act no. 595/2003 Coll. on income tax.

With respect to collective labour relations, it is then questionable whether the players can participate in collective bargaining and whether the athletes enjoy the right to strike. According to Art. 37 of the Constitution of Slovakia, the right of association belongs to 'everyone'. However, theory and practice assign the right to form trade unions only to employees. Similarly, the right to collective bargaining is limited only to trade unions. Finally, according to H. Barancová, the right to strike is a collective right of an employee, but the right to begin a strike is purely trade union's collective right. Similarly, the Supreme Court decision in R 1CO 10/98 states that the right to strike is a subjective right of trade unions.⁴ Moreover, Sec. 16 (2) of the Act no. 2/1991 Coll. on collective bargaining discerns only two types of strikes - a solidarity strike and a strike in a view of concluding a collective agreement - thus again, it is actually reserved for employees only.

There is an ongoing dispute as to whether there are acceptable forms of strike other than a strike with the view of concluding a collective agreement and a solidarity strike.⁵ Nevertheless, as long as the athletes in Slovakia are not considered employees, they have no right to form trade unions nor the right to collective bargaining nor the right to strike.

1.4 Voluntary work

Regulation of voluntary work in Slovakia is to be found in the Act no. 406/2011 Coll. on voluntary work. Based on its Sec. 2, 'a *volunteer is a natural person who, based on their free will and without an entitlement to remuneration, performs for another person with their approval or in public interest voluntary work based on the volunteer's abilities, skills or knowledge*', if, additionally: the work is performed outside working obligations, the work is not performed for the employer or an organisation of which the person is a member, and the work is performed outside the entrepreneurial activities of the volunteer. The activity should be performed on the basis of a specific volunteering contract.

In the sports sector, so far, voluntary work is not widely used in Slovakia in the formal sense of volunteering; maybe also due to the fact that volunteering may not be performed for organs or bodies of an organisation of which the volunteer is a member – and in case of football, all the natural persons involved in football in the broadest sense are usually considered members of the SFA. Still, they could be

⁴ H. Barancová – R. Schronk, *Pracovné právo*, Bratislava, Sprint, 2007, 787.

⁵ J. Drgonec, *Základné právo na štrajk: rozsah a podmienky jeho uplatnenia v právnom poriadku Slovenskej republiky*, *Justičná revue* 59, no. 6–7, 2007, 760; H. Barancová, *Štrajk len podľa zákona o kolektívnom vyjednávaní?*, *Právny obzor* 91, no. 2, 2008, 98–99.

considered volunteers with respect to performing voluntary work for local organisations and clubs, unless they are members of those organisations and unless they perform the activities for the organs and bodies of the organisations.

1.5 *Discrimination law and equal treatment*

Besides discrimination being prohibited in Art.6 of the SFA Statutes, and sanctioned under the SFA Disciplinary Code; under the influence of the European law, the Slovak Republic has introduced into its legal system a specific anti-discrimination legislation in the form of the Act no. 365/2004 Coll. on equal treatment in certain areas and protection against discrimination (Anti-Discrimination Act). This Act prohibits discrimination on grounds of: sex, religion or belief, race, nationality or ethnic origin, disability, age, sexual orientation, marital status, family status, colour, language, political or other opinion, national or social origin, property, birth or other status. Under Sec. 2, discrimination is categorized as: direct discrimination, indirect discrimination, harassment, sexual harassment and victimization. Discrimination is also an instruction to discriminate and incitement to discrimination. On the other hand, the Act restricts the prohibition of discrimination only to equal treatment in employment and *similar* legal relations, social security, health care, provision of goods and services and in education. It is therefore questionable whether the prohibition of discrimination expressed in this Act also applies to athletes who are not in an employment relationship, but instead in a civil or commercial relationship. One could argue the *similarity* of sporting relations to employment relationship and also with being discriminated in ‘provision of services’ – should the players be considered self-employed.

A particular issue in this context is discrimination based on nationality. A lot of explicitly discriminatory provisions on foreign participants in sports competitions can be identified, mostly in individual sports.⁶

The Act explicitly does not apply to unequal treatment relating to conditions of entry and residence of foreigners in the Slovak Republic, except for citizens of a European Union Member State, the European Economic Area Member State and Switzerland, and stateless persons and their families. The Slovak Anti-Discrimination Act does also not apply to different treatment on grounds of disability or age, resulting from special legislation (e.g. governing the civil service). According to the Act, there is also no discrimination on grounds of disability in case of an objectively justified differential treatment. Similarly, different treatment on grounds of age is not discrimination if it is objectively justified by a legitimate aim and is necessary and reasonable to achieve this aim. This would be particularly the case of age limits in sport.⁷

⁶ Cf. *Study on the equal treatment of non-nationals in individuals sports competitions*, 2010, 108, http://ec.europa.eu/sport/library/doc/f_studies/study_equal_treatment_non_nationals_final_rpt%20_dec_2010.pdf, 15 January 2014.

⁷ Cf. T. Gábriš, *Sports Law in Slovakia*, Alphen, Wolters Kluwer, 2012, 131-134.

The mechanism of protection in cases of discrimination involves a right to judicial protection whereby a reversed burden of proof is applied – the defendant is required to prove that they did not infringe the principle of equal treatment if the plaintiff notifies the court of facts from which it may be presumed that the principle of equal treatment was violated.

Under the Anti-Discrimination Act one has the possibility to request that the person violating the principle of equal treatment refrains from such conduct, and if possible provides remedy for the illegal situation or provides adequate satisfaction. Should the satisfaction not be adequate, especially if non-compliance with the principle of equal treatment has considerably impaired the dignity, social status or social interactions of the injured person, the victim may also seek pecuniary damages in money. The amount of damages in money is determined by the court with regard to the seriousness of damage and to all the circumstances of the case.

2. Individual employment relations in professional football

2.1 Essential elements and legal qualification

Since athletes in the Slovak Republic mostly do not have employee status, but instead have the status of self-employed, at this point only a basic outline of the nature and content of labour law in the Slovak Republic will be offered. Instead, internal rules of the SFA and the standard contractual practice will be paid attention to.

2.2 The employment contract

Under the Labour Code,⁸ the employment contract must be in writing and must contain the following essential elements:

- (a) type of work,
- (b) place of work,
- (c) day of starting work,
- (d) wage conditions,
- (e) working time,
- (f) length of holidays,
- (g) a probation period may be negotiated of no more than three months.

Employment may be contracted for an indefinite period or for a fixed term. Employment for a fixed term may only be concluded for no longer than two years, and its repetitive concluding is limited in Sec. 48 of the Labour Code. There would therefore immediately emerge a potential conflict with sports contracting practice, where fixed-term contracts may be awarded for up to five years, and even repeatedly.

⁸ H. Barancová, *Zákonník práce : Komentár*, Prague, C.H.Beck, 2010.

2.3 *Players' rights and obligations*

The rights and obligations of players are mostly enshrined in players' contracts based on Sec. 51 Civil Code or Sec. 269 (2) of the Commercial Code. As an example, in a contract pursuant to Sec. 51 of the Civil Code, the Club has the following obligations, representing at the same time the rights of the player:

- (a) to create for a player such conditions within the financial and material possibilities of the club in order to make it possible for him to work under the contract;
- (b) to ensure the player's training process, suitable training and playing areas and the material facilities, including sports equipment;
- (c) to fulfil an obligation to provide remuneration to the player;
- (d) to provide professional medical care. If a player is not capable or able to perform their contractual obligations, they are obliged to undergo a medical examination and treatment by a physician or hospital chosen by the club. Any disputes about the nature of injuries, fitness or ability of the player will be resolved by the club physicians and the player's physician. If these do not agree, the opinion of the club physician will be final;
- (e) to ensure conditions for regeneration and relaxation in periods set by the trainer or the club physician.

On the other hand, the player has the following obligations:

- (a) the player is obliged to contribute to the aims and objectives set by the club;
- (b) the player is obliged to behave on the field and in public so as not to cause injury to the interests of the association and the club;
- (c) on the basis of a decision of the coach, the player is required to fully attend the training process and team camps. In order to reach full sporting performance, the player is obliged to maintain and improve their sports performance and physical fitness by means of individual training; using all available forms of recovery, compliance with diet and rest periods as instructed. In case of any health problems that could affect their athletic performance, the player is obliged to inform the coach before training or before match;
- (d) the player is obliged to provide their services and to play in all preparatory friendly competition matches and possibly also international matches to the best of their abilities and in accordance with the provisions of this contract in favour of achieving the best performance of the player as well as of the entire team;
- (e) the player agrees that, during the term of the contract, the player will not perform any other sporting or other activities which by their nature endanger the health, physical and mental strength and readiness of the player;
- (f) the player is obliged to take care of the material entrusted to them and after completing the sporting activity they are required to return this material to the club;
- (g) where necessary, and upon summons, the player is required to attend the meetings of the club;

- (h) in the event that the player breaches the obligations specified in the contract, their remuneration may be reduced by up to 50% based on the decisions of the club. The player is obliged to respect penalties imposed by the coach and club under approved club rules for imposing fines by which their monthly remuneration will be reduced;
- (i) the player is obliged to pay the fines imposed on the team if caused by the player, as well as the penalties imposed on player for disciplinary offences; their monthly remuneration will be reduced by these fines;
- (j) the player is obliged to pay the damages caused by lack of care for entrusted materials lent to the player by the club (loss, damage, etc.); as well as intentionally caused damage to the property of the club, which will be paid by reducing the monthly remuneration of the player.

In respect of personality rights of players, the players usually agree that the club uses the rights of their personality, particularly to disseminate images of the player, to process their original signature as facsimile or printed for promotional purposes, whereby the revenues from ads and promotional activities belong to the club.⁹

2.4 Club's rights and obligations

Club commitments in contractual practice in Slovakia include, in particular, the following obligations:¹⁰

- (a) to provide remuneration;
- (b) to create conditions for training, daily regime, rehabilitation and recovery, to provide medical care;
- (c) to provide catering and accommodation during journeys and matches;
- (d) to lend sports equipment and maintain and replace it;
- (e) on the basis of a consultation with the coach, to grant the player a time-off in a calendar week, possibly cumulative, if it is not possible to grant leave regularly. Time-off is usually given in the middle or end of the competition period;
- (f) to provide continuous holidays for a period of twenty-eight calendar days without reduction in pay;
- (g) to compensate the player for damages suffered by a breach of legal obligations by the club;
- (h) to provide the player with a leave for managing private matters, upon written request, without cuts in monthly remuneration.

On the other hand, the rights of the clubs are implied in the following obligations of players:

- (a) to participate in training and perform the duties imposed by a coach in connection with participation in training;

⁹ T. Sluka, *Profesionální sportovec (právní a ekonomické aspekty)*, Prague, Havlíček Brain Team, 2007, 125.

¹⁰ *Ibid.*, 126.

- (b) to attend meetings and training camps, and perform the duties imposed in connection with these meetings and training camps;
- (c) within the performance of sporting activities, to make every effort to achieve the objectives of the sports team according to their capacity and abilities; to compete fairly in the matches;
- (d) to submit to the timing and organisational arrangements resulting from participation in competitions and from preparation for competitions and training process;
- (e) to actively assist in maintaining discipline in the team, speak in public in a spirit of moral principles, and to strengthen the reputation of the sports club;
- (f) to ensure their health and physical conditions, observe the principles of professional athlete's daily routine, proper nutrition and diet, hygiene, recovery and rehabilitation, to undergo a medical check and to avoid the use of doping in any form, to prevent injuries and follow the physician's instructions;
- (g) to protect the assets of the club, to care for the property of the club, and compensate the club if they cause damage in violation of their legal obligations;
- (h) to participate in community events and to speak in public, especially in mass media, while wearing clothing, footwear and other visible parts of clothing in the way prescribed by the club, in connection with the activities under the contract;
- (i) to maintain confidentiality on the facts related to activities of the club, as well as on all matters relating to club activities that the club would not wish to be disclosed;
- (j) to recognize and respect the statutes of the club, to act in accordance with these, and to submit to the authority of the club;
- (k) to submit to the provisions of the applicable disciplinary rules of the club, whereby the player agrees with sanctions contained in the disciplinary rules of the club;
- (l) not to participate personally or through others in betting, games and contests related to the results of the matches of their teams;
- (m) not to perform any other gainful activity without the consent of the club.¹¹

2.5 *Remuneration*

Under the Labour Code, the minimum remuneration represents an amount calculated from the minimum wage of 352 EUR (in 2014) using a coefficient depending on the nature and complexity of the dependent working activity. However, this rule is not applicable to the players as long as they are self-employed.

Under the SFA Directive for registration of professional and non-amateur contracts, as already mentioned, basic elements of the player's contracts include the requirement of a basic monthly remuneration of a professional player being not less than EUR 331.94 (lower than the current minimum wage); and in case of

¹¹ Ibid., 124.

minors, being not less than a minimum wage (352 EUR).

The minimum amount of compensation of the semi-professional (non-amateur) football player's expenses is 33.19 EUR.

2.6 Working time

Under the Labour Code, working time is limited to a maximum of forty hours per week. The employer is obliged to give employees a break for rest and meals for a period of thirty minutes after four hours of work at the latest. Continuous rest between shifts may be reduced to eight hours, but the standard is twelve hours. Such a system of allocating working hours is, however, absolutely unfit for sporting employment just like the regulation of overtimes or of work on holidays, because sporting events are often held during public holidays. Additionally, employees are entitled to holidays of the basic length of four weeks, and after fifteen years of work the entitlement extends to five weeks.

In sports, the contracts concluded with self-employed players do not contain any provisions on working time. The usual holiday period guaranteed in such contracts equals to four weeks.

2.7 The end of the employment relationship

Under the Labour Code, an employment contract expires in the following ways:

- (a) by an agreement in writing;
- (b) by notice of the employer or employee, whereas the notice period is at least two months;
- (c) by immediate termination of employment by the employer if an employee has been effectively convicted of committing a criminal act, or in case of serious breach of work discipline. An employee may terminate an employment for health reasons, or if the employer fails to pay their wages within fifteen days after the due date;
- (d) by termination of employment during the probationary period by any of the parties, in writing, for any reason or no reason;
- (e) in the case of a fixed-term employment relationship, by the expiration of the term.

Other cases of termination of employment are associated with the death of the employee, an administrative decision, or expiration of work permit in case of foreigners.

A problem would undoubtedly occur in the event of termination of employment during the sporting season in the case of sub-paragraph (b) and (c), which is contrary to the basic idea of contractual stability, introduced in order to avoid such situations. For the same reason, the institute of probationary period is not used in sports, which might have the same effect.

Within the specific sporting rules issued by the SFA, no specific regulation

on termination of contract is set. Not even termination for just reason or termination without just cause is discerned. Otherwise, contractual rules on termination are applicable. These usually allow for termination on notice by a player should the club be in arrears with two monthly remunerations.

2.8 *Disciplinary rules and sanctions*

An essential limit in respect of potential sporting employment in Slovakia would also be the principle of so-called *numerus clausus* of contract types in the Slovak labour law. It means that currently, labour law does not recognize atypical contracts, including e.g. arrangements on contractual penalties.¹² In the case of misconduct, the labour law in Slovakia does not therefore allow the imposition of fines on the employee. Cutting the employee's wages is possible only if a variable component of wages was agreed upon.

Still, while sportspeople are not considered employees, this restrictive labour law regulation is not applicable. The Act on Organisation and Promotion of Sports no. 300/2008 Coll., on the other hand, explicitly allows for disciplinary punishments and regulates specific disciplinary proceedings. The Act specifies the following disciplinary measures that may be imposed on athletes and sports experts:

- (a) oral or written reprimand,
- (b) fine,
- (c) a ban on participation in sporting competition,
- (d) exclusion from the sports representation.

The rates of sanctions are to be specified by the national sports associations in their by-laws. They should take into account the rules of international sports federations of which they are members.

Furthermore, with respect to rules on imposing the sanctions, the Act specifies that it is necessary to take into account seriousness of the misconduct, the consequences caused and the degree of fault as well as the past behaviour of the offender. The imposition of disciplinary measures may be waived if the disciplinary hearing alone is sufficient to correct the offender, taking into account a lesser significance or lower degree of fault, or if due to the previous behaviour it can be reasonably assumed that the misconduct would not repeat.

As a matter of example, the disciplinary proceedings in football are regulated by the SFA Statutes and the SFA Disciplinary Code of 2013. Based upon these standards, the SFA disciplinary authority is the Disciplinary Commission. Interestingly, the SFA Disciplinary Code enumerates more potential sanctions than recognized by the Act on Sports, following rather the patterns of FIFA and UEFA.

¹¹ *Ibid.*, 124.

¹² Cf. H. Barancová, *K přípustnosti atypických smluv v pracovnom práve*, *Právny obzor* 81, no. 6, 1998, 533–538; Karel Kudrna, *Přípustnost inominátních a smíšených smluv v českém právu soukromém*, *Právní rozhledy* 9, no. 11, 2001, 548–551.

The offender (individual or a club) may appeal against the decision of the Disciplinary Commission within seven days after notification of the decision. The appeal has a suspended effect. The Appellate Body shall review the appeal.

3. *Medical and doping issues*

The 2008 Act on Sports incorporated relatively detailed arrangements on the fight against doping, including the establishment of Slovak Anti-Doping Agency (SADA). In its Sec. 19 the Act prohibits the use and possession of doping substances, mishandling the samples to be tested; and specifically provides for the obligation to submit to doping control, as well as an obligation to communicate the place of residence (whereabouts information) for the purposes of testing. A specific procedure of doping checks is regulated by the ordinance of the Ministry of Education of the Slovak Republic no. 542/2008 Coll. on the procedure of implementing doping checks and on management of biological samples of athletes.

SADA plays an important role in doping checks. It carries out independent doping checks, plans and performs the in-competition doping checks and out-of-competition doping checks, especially in case of athletes who have significantly improved their performance.

The request to perform a check may come from:

- (a) an international sports federation or national sports association,
- (b) the organiser of a sporting competition or sports event organiser,
- (c) or it may be decided upon by the SADA itself.

In order to plan controls, the organisers of competitions and events are obliged to present a list of sporting events to be held in the following calendar year to SADA every year by 20th December.

A doping check is exercised under the authority of a Commissioner, authorized by the SADA statutory body. The Commissioner shall present a call for a doping check to the athlete, to be confirmed by the athlete's signature. If an athlete refuses to accept the call or refuses to acknowledge its acceptance by signing, the Commissioner shall indicate this fact in the invitation. The athlete must attend the place of doping check immediately, not later than one hour after receiving the call. In carrying out the doping check of a minor athlete, their legal representative or any accompanying person, who may be a member of the team of the athlete, must be present.

In the case of football, Art. 54 of the Disciplinary Code of the SFA contains a misdeed of doping, referring to WADA Anti-Doping Code, allowing to impose various additional disciplinary sanctions based on the SFA Disciplinary Code.

4. *Transfer of players*

4.1 *Transfer rules*

Slovak law does not recognize a specific transfer contract governing the transfer of players between sports clubs. It is again usually a contract concluded under Sec. 51 of the Civil Code or Sec. 269 (2) of the Commercial Code. According to J. Čorba: *“a transfer contract cannot be assessed under the provisions of the contract for sale or licensing contract for industrial property. There is namely no transfer of ownership or transfer of rights to any intellectual property present, but rather a sports club undertakes to perform certain acts which result in the registration of an athlete in a new club and the new club acquires the right to performance of the athlete”*.¹³

The nearest similar contracts in their form are agency contracts, regulated by the Commercial Code if the clubs are business companies. In the event that both clubs are private associations, they may still choose to apply the rules of the Commercial Code. This also applies to all similar relations arising between clubs in connection with the transfer of players, including loan contracts, transfer fees and training compensation.

In professional football, a period during which the player cannot make an application for transfer is set at six months after the approval of the previous transfer. During one year a player may be registered at three clubs consecutively, however, he can take part in matches for no more than two clubs.

The transfer of a player is usually associated with a monetary transaction, a so-called transfer fee, which serves to compensate the loss of a club (losing the player), especially since the player is still contractually bound to the club. The rules of the SFA to determine the amount of compensation for professional player serve as an auxiliary criterion for determining the amount of transfer fee by the Conciliation Commission of the SFA in case of failed negotiations between the clubs. The recommended amount for determining the amount of compensation for a player with a professional contract is 16,596.96EUR. For a player under eighteen years, the recommended amount is set at 9,958.18EUR. Other factors for determining the amount of the transfer fee are:

- (a) coefficient of age,
- (b) number of representation matches played,
- (c) number of league matches played.

The transfer fee upon moving to and from abroad is regulated by the “FIFA Regulations on the Status and Transfer of Players”.

A non-amateur or professional who ceases activities as a football player, remains registered for the following thirty months with the original club. Should

¹³ J. Čorba, *Obchodnoprávne a súťažnoprávne aspekty športu*, Košice, Univerzita Pavla Jozefa Šafárika, 2012, 103-107.

such a player like to play football again during that time – as a non-amateur or professional in another club, their original club would be entitled to a transfer fee.

4.2 *Labour issues*

Transfer rules do not show any interference with labour law rules, since the players are self-employed. Should they be employees, a labour issue could arise, e.g. with respect to transferring foreigners to Slovakia. In relation to nationals of Member States of the European Economic Area and Switzerland, however, it is accepted that such a citizen and their family members have equal status as a citizen of the Slovak Republic in relation to the right to work.

4.3 *Training compensation systems*

In professional football, according to the FIFA Regulations governing the status and transfer of players, clubs are also entitled to a payment within:

- (a) training compensation,
- (b) solidarity contribution.

These issues are governed by Art. 20 and 21 of the FIFA Regulations and are reflected in the Slovakian SFA Transfer Rules.¹⁴ In case of training compensation, the amount ranges from 165 EUR to 16.600 EUR in Slovakia.

4.4 *Player's agents*

So far, agents' activities are not regulated in Slovakia by any legislation. Only international sports federations such as FIFA have introduced their own internal rules relating to players' agents. In Slovakia, detailed arrangements on the activities of players' agents are to be found in the regulations of the SFA. The SFA has approved its "Rules for the activity of agents of players and clubs" which, however, to a great extent only reiterate the provisions of the FIFA Regulations. Based on these rules, the agents are obliged to:

- (a) submit to the statutes, directives, regulations and rules of the SFA, football confederations and FIFA;
- (b) ensure that any transaction that will result from their activities is in accordance with the standards referred to in paragraph (a);
- (c) never negotiate with a player who has a valid contract concluded in order to convince them to prematurely terminate the contract or violate the rights and obligations specified in their valid contract;
- (d) represent only one side in the negotiations when transferring;
- (e) upon request, provide to the competent authority of the SFA or FIFA all the necessary information and deliver the necessary documents;

¹⁴ A. Poruban, *K otázke náhrady za výchovu mladých hráčov futbalovým klubom*, *Justičná revue*, no. 5, 2010, 691-694.

- (f) ensure that their name, signature, as well as the name and signature of their client is entered in the contracts which are the result of any transaction in which they were involved;
- (g) act in accordance with applicable legal provisions regarding labour relations.

In Slovakia however the last point represents a problem since the players are not in an employment relationship, therefore agents do not perform an activity of work placement; and thus should not be subject to the applicable legislation of the Slovak Republic on work placement. However, the situation might be different when transferring a player abroad, where the players are considered employees.

Should the exercise of the activities of players' agents be considered a work placement, they would have to respect legal norms regulating provision of employment services for consideration under the Act on employment services, and would be allowed to do so only upon obtaining a special license. It is further stipulated in the Act on employment services that recruitment for consideration can be performed only by a person who has completed a university degree of at least the first level. Additionally, the contract on work placement for remuneration in abroad must contain specific essential elements. It must include in particular:

- (a) the name, address, employer identification number and type of economic activities of the employer;
- (b) the duration of the employment;
- (c) the type of work, wage or salary and other working conditions;
- (d) the manner and conditions of health insurance and social insurance;
- (e) the liability of an intermediary for non-compliance with the agreement;
- (f) the estimated cost of work placement for consideration.¹⁵

5. *Social security principles*

5.1 *Injuries, illness, and disability*

The social security system in the Slovak Republic consists of three pillars – social insurance (and pension savings schemes), state social support and social assistance.¹⁶ Athletes are not primarily concerned with state social support (it provides benefits such as child allowance), or social assistance (in case of social need). The most relevant for sportspeople are the provisions on social insurance. Social insurance includes sickness insurance, pension insurance, unemployment insurance, injury insurance and guarantee insurance.

Social insurance regulated by Act no. 461/2003 Coll. is administered by the Social Insurance Agency, a public institution.¹⁷ It covers both employees and self-employed persons.

Employees are automatically covered by sickness insurance, pension (old

¹⁵ T. Gábriš, *Sports Law in Slovakia*, Alphen, Wolters Kluwer, 2012, 150.

¹⁶ Cf. M. Lacko, *Slovak Social Security Law*, Plzeň, Aleš Čeněk, 2010.

¹⁷ J. Matlák et al., *Právo sociálneho zabezpečenia*, Plzeň, Aleš Čeněk, 2009.

age and disability) insurance and unemployment insurance. Insurance commences with the start of employment and ceases on termination of employment.

In case of an injury, and in case of insolvency of the employer, it is not employees who are insured, but rather the employer within the so-called injury insurance and guarantee insurance. Self-employed athletes have no employer; therefore, the athletes may be insured for injury only through private insurance schemes.

Self-employed persons, including sportspeople, are compulsorily insured within sickness and pension (old age and disability) insurance if their income in the previous calendar year was greater than 12-fold minimum monthly wage, applicable as of 1 July. Insurance in this case starts from 1st July and lasts to 30th June of the following calendar year. If the income in the previous year did not exceed the amount of 12-times the monthly minimum wage applicable as of 1 July, the self-employed person is not compulsorily insured for sickness and pension insurance for the next year, from 1 July to 30 June. Still, in case of sickness, pension, and unemployment insurance, there is also a possibility of voluntary insurance for the self-employed.

Besides the Social Insurance Act, health insurance¹⁸ is of major relevance for athletes. It is administered by several health insurance companies. These may be owned by private owners (shareholders), or the state. Health insurance is regulated by the Act no. 580/2004 Coll. and similarly to social insurance, it concerns both employees and self-employed persons. Mandatory health insurance is issued to any natural person that has permanent residence in Slovakia, with the exception of persons who have their residence in Slovakia but are insured abroad. Persons who do not have permanent residence in Slovakia, but are employed by an employer with a seat or permanent establishment in Slovakia, are also insured in Slovakia.

5.2 Unemployment benefits

Unemployment benefits are provided to those who are or were insured within the unemployment insurance (see *supra*). This mandatorily concerns all the employed, and from among the self-employed persons only those who were insured voluntarily.

5.3 Pension schemes

Pension schemes in the Slovak Republic comprise, besides the pension insurance administered by the Social Insurance Agency, also the so-called second and third pillar pension schemes which are not insurance, but rather funded savings schemes.¹⁹ Particularly in case of use of the freedom of movement within the EU, the issues of coordination and transportability of pension entitlements from these pillars may

¹⁸ *Ibid.*, 193–203.

¹⁹ T. Gábriš, *Dôchodkové zabezpečenie na Slovensku v kontexte medzinárodného a európskeho práva*, *Právny obzor* 93, no. 2, 2010, 101–116.

prove important.²⁰

The second pillar pension scheme is governed by the Act no.43/2004 Coll. on old-age pension saving and on amendments to certain acts. It takes the form of a funded scheme which is complementary to the first pillar (managed by the Social Insurance Agency). In general, it represents *contracting out* from the half of the first pillar in exchange for the possibility of saving on personal pension accounts under state control. Regarding the role of employers in this pillar, nowhere in the Act is an employer mentioned; which makes the scheme to appear not to be a supplementary pension scheme, which is usually run by employers. This is also indicated by the fact that the second pillar is, unlike the supplementary schemes in Western Europe, not limited only to employees. The personal scope of the Slovak second pillar is in fact the same as in the case of social insurance in the first pillar under the Act no. 461/2003 Coll.

The so-called third pillar is regulated by the Act no.650/2004 Coll. on supplementary pension saving. It represents a true supplementary occupational pillar.

5.4 *Careers funds*

No regulation of career funds exists in Slovakia.

5.5 *Clubs' insolvency and players' protection*

In the event of a company's insolvency and its winding up, the Social Insurance Agency provides for benefits arising under guarantee insurance, which is mandatory for every employer. This scheme allows for compensation of salaries which are due to the employees. However, due to the fact that sportspeople are not considered employees in Slovakia, and clubs are not employers in relation to the players; instead of the social insurance protection, only a protection provided by the internal norms of the SFA is of help here. This is the case of the Directive on legal-organisational changes in the clubs (2013) requiring that a legal successor of a club is obliged to take over all the outstanding dues of the club which is being transformed or wound-up.

6. *Labour Dispute settlement*

Disputes between employees and employers are heard and decided only by courts. The settlement of employment disputes in arbitration is not permitted. Thus, should sport (football) be considered dependent work, this provision would make it impossible to use the services of autonomous sports arbitration bodies, such as the

²⁰ T. Gábriš, *Transportabilita a zachovanie dôchodkových práv*, *Justičná revue* 62, no. 4, 2010, 467–492.

Arbitration Court of the Slovak Football Association, or the CAS in Lausanne.²¹ However, since athletes in the Slovak Republic in the vast majority of cases do not have employee status, but instead have the status of self-employed, the labour law regulation on dispute resolution is not applicable, and arbitration is freely available as a means of dispute resolution.

6.1 Mediation

In Slovakia, mediation is regulated by the Act no. 420/2004 Coll. on mediation. It is used mainly in civil law and family law matters. In business disputes it is used only informally, mostly without any formal recourse to the Act on Mediation. Within football, mediation is not used in a formal sense either.

6.2 Arbitration

Alternative dispute resolution in the form of arbitration is governed in Slovakia by a special Act no. 244/2002 Coll. Arbitration Act²² which governs:

- (a) the deciding of property disputes arising from domestic and international commercial and civil relations (but not e.g. labour disputes), if the place of arbitration is in the Slovak Republic;
- (b) the recognition and enforcement of domestic and foreign arbitration awards in the Slovak Republic.

According to the Arbitration Act, within the arbitration procedure only those disputes that the parties can conclude by settlement before the court may be decided. It is expressly prohibited to decide disputes:

- (a) concerning the establishment, modification or termination of ownership rights and other rights to immovable property;
- (b) concerning personal status;
- (c) associated with enforcement of a decision;
- (d) incurred during the bankruptcy and restructuring proceedings.

The same limits apply to the use of arbitration in sports. The use of arbitration services in sport is therefore allowed only when dealing with certain issues.

The Arbitration Act allows parties to agree on the person(s) of the arbitrator (arbitrators) or on a procedure for appointment of the arbitrator. This agreement should have a form of a written contract or of a contract clause. Additionally, any legal person may establish and maintain an arbitration court. Its establishment is notified in the Business Journal. A registry is kept by the Ministry of Justice and also published on its website.²³ Each arbitration court must have its own statute

²¹ T. Gábriš, *Sports Law in Slovakia*, Alphen, Wolters Kluwer, 2012, 103-105.

²² M. Števec, *Základné teoretické problémy a východiská rozhodcovského konania v Slovenskej republike*, in *Aktuálne problémy vo vývoji práva SR a ČR*, Bratislava, VO PraF UK, 2008, 114–121.

²³ www.justice.gov.sk/wfn.aspx?pg=l56&uc=adr/rozs, 6 January 2014.

and rules of procedure. Every arbitration court also maintains a list of arbitrators, although the parties to the arbitration may also appoint an unregistered person as an arbitrator.

At present, there is only one sporting arbitration court in Slovakia – the *Arbitration Court of the Slovak Football Association*. All other arbitration bodies of sports associations in Slovakia do not have an official character of an arbitration court under the Arbitration Act.

6.3 Courts

The standard way of dispute resolution in labour relations is through the services of ordinary courts. This method is also available to the sportspeople, even though the sports organisations, including the SFA insist on internal dispute resolution process instead of using the resort to courts.

Review process by courts is governed by the Slovak Civil Procedure Code no. 99/1963 Coll.,²⁴ specifying standards for protection and enforcement of laws and rights at all three levels of the court system in Slovakia – district, regional and Supreme Court. Exceptional dispute resolution by the Constitutional Court is governed by the Act no. 38/1993 Coll.

6.4 Sports special bodies

The sports movement is characterized by specific dispute resolution procedures and authorities. Sports organisations at the national and international levels seek to prevent the settlement of disputes before ordinary courts. Instead, the athletes and sports organisations are advised to turn to special dispute settlement bodies – the arbitration panels, or arbitration commissions. However, only rarely do these authorities have the nature of an arbitral authority under the Act on Arbitration. They are mostly internal sports bodies lacking the nature of a permanent arbitration court under the Arbitration Act. These are e.g. the SFA Disciplinary Committee, the SFA Appeals Committee or the SFA Licensing Bodies. In addition, in the Summer of 2014, a new body, analogous to the FIFA DRC, was established within the SFA – the national SFA Dispute Resolution Chamber, meeting the standards required by the FIFA rules on national dispute resolution chambers. Its task is to decide disputes between the clubs and players, the disputes between coaches and clubs, and disputes among the clubs within the SFA.

Conclusions

Labour law is not being applied to football players, or to players of any other collective sport in Slovakia. This is clearly in breach of the Labour Code.

²⁴ M. Števec et al., *Občiansky súdny poriadok : Komentár*, Prague, C.H.Beck, 2009.

Nevertheless, the situation is tacitly accepted by the courts, since the labour law in Slovakia is too rigid as to be applied onto the specific sector of sports. All the previous attempts to introduce a law that would specifically address the employment status of sportspeople have failed so far – partially due to the financial aspects, requiring the clubs as employers to pay the social security premiums for their employees – the players. Currently, a new draft of the Act on Sports is being prepared, again addressing the issue of the employment status of sportspeople and the various specificities that need to be taken into account with respect to the Slovakian labour law. However, the final outcome cannot be guaranteed yet as a strong wave of protests may again be expected against the proposal from the side of both the clubs and the players fearing raised costs on the one hand, and lower salaries on the other.

**EMPLOYMENT RELATIONSHIPS AT NATIONAL LEVEL:
SPAIN**

by *Juan de Dios Crespo Pérez**

SUMMARY: 1. Introduction – 2. Employment regulation – 3. Contents of the relationship – 4. Labour dispute

1. Introduction

The relationship between athletes and their clubs has for a long time been separated from employment legislation in Spain. Footballers have no specific legislation but are into the one for the rest of the professional sportsmen. It has to be said that there are only footballers, basketball players and cyclists who are officially considered as professional sportsmen in Spain, despite the fact that other sports have a clear professional standing.

This is a clear evidence of the fact that “professional” does not mean the same that “under employment contract” as it should be, but the administrative wording is somehow different that the labour one.

Thus, labour Courts will always take into consideration the “employment contract” of the employees and not the “professional” consideration by a club or a Federation.

This conception of sport as pure entertainment or physical activity and not as work was reflected in the rules which tried to discipline the sport. Indeed, these rules seek not only to exclude the qualification as professional of the relationship between athletes and their sport entities, but expressly excluded the possibility to appeal to the labor courts to resolve the disputes that may arise between athletes and sports organizations.

It was eventually included in the Employees’ Statute in article 2.1.d) as a special employment relationship, and the Government legislated on the special labor relationship of professional athletes through Royal Decree 1006/1985, dated 26th June.

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In the sport sector, we can distinguish two different kinds of employment relationships:

- Special employees: Those who professionally practice a sport activity under the direction of someone else maintain a special employment relationship with their employers (clubs, sport associations, etc.). The special employment relationship or special employment contract is a legal concept of the Spanish law, meaning that the relationship is of an employment nature but with a number of peculiarities. Thus, the special contract is regulated by a special regulation: the Royal Decree 1006/1985. In absence of specific provision in this regulation the general employment laws apply (non-peremptory legislation), among them the Employees' Statute of 1995.
Employees of this type are sportsmen and-women themselves but also trainers or coaches; case-law shows some doubts whether or not a physical or athletic trainer belongs in the special relationship.
- Common employees: on the other hand, these same clubs, federations, sport associations, etc. may establish general or common employment relationships with sport workers whose functions are not the practice of a sport activity. These other employment relationships are not regulated by the Royal Decree 1006/1985, but by the general employment laws (Employees' Statute of 1995 and other enactments).
Employees of this other kind are, for example, administrative staff, medical and sanitary staff and auxiliary and blue-collar employees not directly involved in the professional practice of sport.

1.1 *Collective bargaining agreements in Football*

Collective agreements are very important both for special and common employees. Nowadays many aspects of the employment relationship are given over by the laws and regulations to the collective autonomy of employers' and employees' associations.

In the Royal Decree 1006/1985, regulating professional athletes' special relationship, collective agreements are mentioned at least 11 times in just 21 articles.

In this regard we can highlight the football collective agreements in Spanish professional sport as one of the most important and which have had a lot of problematic.

- Collective Bargaining Agreement (CBA) for professional football activities signed between the National Professional Football League (LNFP) and the Spanish Footballers Association (AFE) on 25 July 2014. Its functional sphere is referred (art. 1) to "*the Professional Footballers who render services in the teams of the Football Clubs and Sports Incorporated Companies affiliated to the National Professional Football League*".
This CBA has been approved for the following two seasons, i.e. 2014/2015 and 2015/2016.

I will then finish on the 30th of June 2016 and will not be renewed automatically unless the parties agree in written.

- Collective Agreement for professional football activities in the National Second “B” Category, signed on 28 June 1989. Its functional scope is referred (art. 1) to “*the Professional Footballers... who render services in the Football Clubs or Sport Entities... ascribed to Second “B” Category*”.

2. Employment regulation

2.1 Sources of law

Professional athletes are defined in art. 1.2 of RD 1006/1985 as “*whoever, by virtue of a relationship established with a regular nature, voluntarily practice a sport on behalf of and within the scope of the organization and management of a club or a sporting entity in exchange for payment*”. The status of professional sportspeople is also held by coaches and trainers, but not national selectors and referees.

According to art. 1.5 RD 1006/85: “*The scope of application of this Royal Decree includes relationships of a regular nature established between pro-fessional sportspeople and companies in which the corporate object consists of the organization of sports events, as well as the contracting of professional sportspeople by commercial companies or firms, for the realization, in each case, of the sporting activities in accordance with the terms of the preceding point.*”

As stated by the Supreme Court illustrative Decision dated April 2, 2009 (RJ 2009\1848):

“3 -. *For proper definitional purposes, the only difference of the special relationship of professional athletes compared with the common labor relationship is the specificity of the service, because... requires the presence of all the premises which characterize the ordinary working link. Indeed, from the definition of art. 1.2 RD 1006/1985 arise that the substantive requirements of the sport employment contract are:*

a) Firstly, dedication to the ‘sport practice’, which excludes from the special relationship to those who provide services for sports organizations others than sport activity (cleaning staff, administrative services, security, medical...).

b) Secondly, voluntariness, note that excludes from the field of the special relation sporting activities mandatory imposed in some contexts (educational sport, prison, military ...).

c) Thirdly, the regularity or everydayness, which excludes occasional or marginal sports activities, and even the “isolated for a company or organizer of public entertainment” performed by a professional athlete (art. 1.4 RD 1006/1985).

d) Fourth, strangeness of the rendered service and dependence, understood identically as those aspects which are characteristic of the common labor relationship (“on behalf and within the scope of organization and direction” of who assumes the role of employer), so that its requirements eliminates from the scope of the special relationship the sports activities of autonomous nature. And

e) Finally, retribution (“in exchange a remuneration” says the provision), which is a result of the bilateral nature of the relationship and the onerous character of the mutual performance; requirement that precisely differentiates professional athletes versus amateur athletes.”

In order to establish the characterizing features of sports professionalism versus amateurism is useful to quote again the same Supreme Court Decision of April 2, 2009, as it consolidates and consecrate a body of doctrine which has been created by means of numerous previous judicial decisions.

“And in order to appreciate the indicated difference it can be adopted the following guidelines:

a) It’s irrelevant the legal qualification –as professional or as amateur- that the parties may have been agreed, since the nature of contracts derive from its real obligational content, according to the principle of primacy of reality.

b) The federative qualification of an athlete [as professional or as amateur] does not determine the existence of a special employment relationship, since such a classification has no effect on the legal employment sphere and therefore is not binding on the Labor Courts, and this is further affirmed when the federative regulations consider amateur the players of Third Division.

c) The employment nature of a relationship does not require that the activity provided constitutes an absolute dedication and the sole or primary livelihood, since the athlete may also develop other remunerated activities without his professionalism being undermined (this requirement we reject is not set forth in any provision of RD).

d) What really determines the professionalism... is the existence of a retribution in exchange for the services rendered, since the absence of wage determines the quality of amateur athlete, it being understood that ... the legal requirement does not refer to the minimum payment of the inter-professional wage (the rule merely requires “a fee”, without specifying an amount), which is the elementary consequence of the non-exclusivity of livelihood of professionalism..., just as if it were an ordinary employment relationship, where is feasible -and quite frequently- part-time employment.”

All this reasoning leads the Supreme Court to consider as professional athlete a footballer that perceived a fix monthly amount of 230 euros, reconsidering thus the usual threshold of the guaranteed minimum wage (645,30 euros/month for 2014) to define the scope of professional sport.

As said before, the definition also includes relations between professional athletes and organizations whose objective is the organization of sports shows, companies or commercial firms for the undertaking of sporting activities.

2.2 Excluded cases

- Athletes who receive compensation only for expenses derived from sports practice.
- Intermittent sports practice (e.g. professional tennis players or golfers).
- Relationships between professional athletes and national federations when they are members of teams, representations or selections organized by national federations.
- The professional athletes' status differs from that of high-level athletes as defined in the Sports Act 10/1990, as implemented by Royal Decree 971/2007 dated 13th July. High-level athletes are considered to be of interest to the state in the promotion of sport at grassroots level. These athletes are entitled to be included in the Self-Employment Special Regime.

2.3 Recruitment

2.3.1 Age

Nothing is set forth specifically in the RD 1006/85 about, so it shall be applied alternatively the Employers' Statute.

Children under 16 cannot legally work in Spain, even if they are foreigners (art. 6). People over 16 and under 18 need permission from their parents or legal guardians, unless the person is legally emancipated (art. 7).

2.3.2 Nationality

In respect the legal capacity regarding nationality for concluding labor contracts, art. 2 of RD 1006/85 states: "the current law for foreign workers in Spain shall apply on nationality issues, without prejudice to the application of specific rules about participation in official competitions and sports speciality provided in art. 14 of this Royal Decree".

Nationality quotas in Spanish football have not followed a stable pattern over the years.¹

They have been modified many times, in general as a response to the performances of the national team.

Nationality quotas are formally adopted by the Spanish FA as part of its regulations. In 1991 the Spanish government passed legislation whereby nationality quotas in sport ought to be negotiated between the federation, the professional league and the players union (Royal Decree 1835/1991, article 28.1).

In the football sector, nationality quotas have been incorporated as part

¹ Niemann, A., Garcia, B. and Grant, W., 2011 (eds.). *The transformation of European football: towards the Europeanisation of the national game*. Manchester: Manchester University Press, 1-19.

of the collective bargaining agreements signed between the football league and the players union.

Nationality quotas in Spanish football have been modified to different extremes, with almost no middle ground. The initial permissiveness when the League started in 1928 was followed by a very restrictive regime (only two players allowed) in 1934. The pattern was repeated in 1962, when five years of no quotas ended with a total ban on foreign players. The decision followed Spain's elimination at the group stage of the 1962 FIFA World Cup after defeats to Brazil and Czechoslovakia.

Following the Bosman ruling of 1995, the Spanish FA decided to lift the ban on EU nationals with almost immediate effect. Thus, EU nationals were considered as non-foreigners.

The reaction of the Spanish FA was of acquiescence. Yet, one can find a certain amount of resistance to change in the fact that the Spanish FA did not go beyond what was strictly necessary, unlike the cases of Germany or Austria for instance. The restrictions to citizens from the European Economic Area (EEA) were only abolished in 1999, five years after the ruling.

At the same time, the quotas for non EU players have been reduced from six players in 1997 to just three in 2004.

This resistance to change is specially illustrated in the case of nationals from third countries that have signed association agreements with the EU (the so-called Kolpak players). The Spanish FA has been extremely hesitant to incorporate the doctrine of the European Court of Justice (ECJ) in this respect. Indeed, the RFEF regulations in force at the time of writing do not contemplate the case of these players at all. Therefore, formally the Kolpak players should count towards their club's nationality quota.

In practice, however, the RFEF in the last couple of years started to register players from countries signatories of the Cotonou agreements as EU-EEA nationals. It is not clear, though, whether the RFEF is willing to do the same with players from other countries with similar agreements, such as Turkey or Russia.

Reinforcing the idea of a resistance to this particular aspect of Bosman I, Spanish football has been the origin of two cases in which the ECJ has reinforced its case law in favour of the non-discriminations of nationals from countries signatories of an association agreement. These two challenges originated in Spain were brought to the ECJ by Russian player Igor Simutenkov in 2005² and Turkish striker Nihat Kahveci in 2008.³

Igor Simutenkov was lawfully employed as professional foot-ball player by the Spanish club Deportivo Tenerife. In order to participate in the different national competitions as a member of a Spanish club, he must hold a licence from

² Igor Simutenkov v. Ministerio de Educación y Cultura and Real Federación Española de Fútbol (Case C-265/03 ECR [2005] I-2579).

³ *Real Sociedad de Fútbol SAD and Nihat Kahveci v. Consejo Superior de Deportes and Real Federación Española de Fútbol*, Case C-152/08, reasoned order of 25 July 2008.

the Royal Spanish Football Federation (RFEF). But, the Federation rules foresee that, as a national from a country outside the European Economic Area (EEA), he cannot hold the same licence as a national from an EEA State.

These rules also stipulate that in national competitions, only a limited number of non-EEA players may be employed by Spanish clubs and in each game, only a limited number of non-EEA players may be held simultaneously.

Aware of the Partnership and Cooperation Agreement, and more particularly of its provisions on “Labour Conditions”, Mr Simutenkov applied to the RFEF to convert his non-EEA licence into a licence identical to that held by EEA players. He relied in particular on Article 23 of the Partnership and Cooperation Agreement (PCA) with Russia, which provides in its first paragraph that “*subject to the laws, conditions and procedures applicable in each Member State, the Community and its Member States shall ensure that the treatment accorded to Russian nationals, legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals.*”

The RFEF however refused to upgrade Mr Simutenkov’s licence, in view of its General Regulations and an agreement it had concluded with the national professional football league. Simutenkov challenged this refusal before the Central Court for Contentious Administrative Proceedings (Juzgado Central de la Contencioso Administrativo) invoking his PCA right to equal treatment with respect to working conditions.

The action being dismissed, he lodged an appeal to the National High Court (Audiencia Nacional) which decided to refer a question to the European Court of Justice on the interpretation of the PCA. The Audiencia Nacional notably asked the Court of Justice to determine whether a rule of a sports federation whereby “*clubs may use in competitions at national level only a limited number of players from countries outside the European Economic Area*” is compatible with the provisions of Article 23 PCA.

Examining the provisions of Article 23(1) PCA, the Court of Justice found that they lay down “*in clear, precise and unconditional terms, a prohibition precluding any Member State from discriminating on grounds of nationality, against Russian workers vis-à-vis their own nationals*”. Indeed, the Court held that this rule of equal treatment lays down “*a precise obligation as to the results*”. It can thus be relied upon by a Russian national lawfully employed in the territory of a Member States before one of its courts as a basis for requesting that court to disapply discriminatory provisions.

The Court concluded that Article 23 PCA has direct effect, so that individuals to whom that provision applies are entitled to rely on it before Member States’ courts.

In Nihat case, a Turkish Footballer, the European Court of Justice finally answered the question on the 25th of July 2008 stating that the Agreement between the (then) EEC (now EU) and Turkey should be interpreted “*in the sense that it*

OPPOSES the application to a sportsman of Turkish nationality, legally contracted by a club established in a EU member State, of a rule adopted by a sporting federation of the same State, in which the clubs can only play, in competitions of State level, with a limited number of players from third States that are not a part of the European Economic Space”.

Similarly, Russian born footballer Valery Karpin (Real Sociedad) took his case to the Spanish national courts in 2005, although he did not reach the ECJ.

In all three cases the courts ruled in favour of the players and the RFEF was forced to register them under the EU-EEA category, so they do not count towards the nationality quota.

For our analysis it is interesting to see the resistance of the Spanish FA to extend the consequences of the Bosman ruling beyond what was strictly necessary. Yet, it is clear that, as a whole, the regulations on nationality quotas in Spanish football have been largely transformed following the Bosman ruling.

2.4 *Formalization of the agreement*

According to art. 3 of RD 1006/85, the agreement should be made in writing and in triplicate.

The Collective Agreement for professional football activities signed between the National Professional Football League (LNFP) and the Spanish Footballers Association (AFE) requires six copies: a copy for each party, the third for LNFP, the fourth for AFE, the fifth for RFEF and the sixth for INEM (former name of the Spanish Public Employment Service; currently, SEPE).

On the rare occasions when it was questioned the validity of a verbal agreement in the field of contracts for professional athletes, the interpretation of this provision has been consistent with the provisions of Article 8.2 of the Statute of Workers, accepting the Courts its validity, as in the judgment of the Labour Court no. No. 1 of Guipúzcoa 187/198, dated 5 May 1989 (Real Sociedad vs. Uralde case).

Therefore, footballers/professional athletes' employment contracts may be in writing or verbal, but a verbal contract is very unusual.

As minimum content of the contract, the same art. 3 RD 1006/85 requires:

- a) Identification of the parties.
- b) Object of the contract.
- c) The agreed retribution, with expression of the different concepts, and, if applicable, the corresponding review clauses, and the days, terms and place in which it should be paid.
- d) Duration of the agreement.

2.5 *Duration and probation period*

The employment contract of sport special employees is always a fixed-term contract

(art. 6). Its duration shall always be definite, either by reference to a precise date or by reference to a competition or season. Thus, if a contract is made for a season, it may be reconsidered at its end.

According to art. 6 of RD 1006/85, "*prolongations of the contract, for a fix-tem as well, may take place through subsequent agreements once the duration initially agreed has expired*".

In this regard, art. 14.2 of the Collective Agreement for professional football activities signed between the LNFP and AFE states that "*by mutual agreement between the Club/SAD and the footballer, the contract may be extended according to art. 6 of Royal Decree 1006/85*".

A probation period may be agreed on, which should not exceed more than three months, although this period may be reduced in the different Collective Agreements (art. 5 RD 1006/85).

Accordingly, article 13 of Collective Agreement between LNFP and AFE states that this probation period may only be established in writing once the official competition has begun, and it shall not have a duration of more than 15 days.

During the probationary period, the working relationship may be terminated by either of the parties for any reason, without giving any notice and without any compensation, unless otherwise agreed.

The probationary period is included when calculating seniority and workers have the same rights and obligations as other workers on the workforce during that period.

3. *Contents of the relationship*

3.1 *General rights and obligations*

The athletes' rights and obligations (art. 7 RD 1006/85):

- a) The athlete is obliged to carry out the sports activity in accordance with the instructions from the representatives of the club or sports organization.
- b) He is entitled to freely express his opinions about topics relating to his profession, in accordance with the law and contractual obligations, and without prejudice to the limitations that may be established in the collective agreement, provided that they are justified on sports grounds.
- c) He is entitled to effective employment and may not be excluded from training or any other preparatory activities to practice the sport, except in the case of disciplinary action or injury.

It should be noted that the Decision of the Labour Chamber of the Supreme Court dated 28 April 2010 (Unification Doctrine Appeal 238/2008), has definitely confirmed an already well-established doctrine of the Superior Courts in the sense that "*the refusal of a Club to which a professional player belongs to register his federative license constitutes a substantial change in his employment conditions and a breach of the right to effective employment.*"

- d) He is entitled to have a share in the profits derived from the commercial use of his image, except in the case of direct recruitment by a commercial firm.
- e) The rights and basic duties set out in the Workers' Statute apply.

Art. 18 of RD 1006 refers to the collective rights recognized generally in the legislation in force, in the form and conditions agreed in the collective agreements. In this area, the Collective Agreement LNFP-AFE (article 40) refers, inter alia, to the right to:

- *“choose the members of the squad for representing them before the Club/SAD to deal with matters related to their employment regime and the conditions under which it is carried out”* and,
- *“Establish labor union sections in the Clubs/Sad to which the professional footballers' affiliated to the AFE provide services, represented, for all purposes, by two union delegates.”*

3.2 Remuneration

The remuneration is that set out in the collective agreement or in the individual agreement. Any income that the athlete receives, including the bonus for being signed up by a club or sports organization, is considered as remuneration (art. 8 RD 1006/85).

According to art. 20 of Collective Agreement LNFP-AFE, the salary items which integrate the remuneration of a professional Footballer are: signing-on fee or recruitment bonus, match bonus, monthly salary, extraordinary payments, seniority bonus and exploitation image rights, if applicable.

The same Collective Agreement establishes the guaranteed minimum income in art. 21, defined as the minimum amounts which a professional player shall perceive each season of duration of his contract, determined by reference to each Division and season in Annex II.

It should also be noted that according to art. 33 Collective Agreement LNFP-AFE, *“the Professional Footballer who during the term of the contract was temporarily unable to work, for any reason, shall be entitled to perceive the one hundred percent (100%) of his remuneration from Club/SAD, completing thus the latter the Social Security or company's mutual work accident benefits, keeping this situation until his discharge or the expiry of the contractual period”*.

We'll refer hereinafter to the different salary items as defined in Collective Agreement LNFP-AFE.

3.2.1 Signing or recruitment bonus (art. 22)

It is the amount stipulated by mutual agreement between the Club/SAD and the Professional Footballer due to the fact of signing the employment contract.

3.2.2 Match bonus (art. 23)

The amount and conditions of perception of this premium will be agreed by each Club/SAD with its squad of Professional Footballers or with each Professional Footballer individually, and must be evidenced in writing and signed by the representative of the Club/SAD and the Footballer or representative of the squad.

3.2.3 Monthly salary (art. 24) and minimum guaranteed (Annex II)

It is the amount received by the Professional Footballer regardless whether or not he plays in the matches his Club/SAD take part. For season 2014/2015 it will be 5,375 Euro per month in first division and 3,335 Euro per month in second division with the increase of the Consumer Price Index of the previous season for 2015/2016.

The minimum guaranteed wage is 129,000 Euro and 64.500 Euro for the first and second division respectively for season 2014/2015, with an increase of the Consumer Price Index for the following season 15/16.

3.2.4 Extraordinary payments (25)

The Professional Footballers shall be entitled to perceive two extraordinary payments each season, in addition to the twelve monthly wages, in the amount each one of the monthly salary agreed.

These extraordinary payments are to be paid during the first twenty days of June and December. The Footballers with a shorter stay shall be entitled to perceive the corresponding proportional part.

3.2.5 Seniority bonus (27)

It is the amount received by the player for the years of stay in the same Club/SAD once he terminates his contractual relationship with that club. The amount will be, for season 2014/2015 the following:

- For 9 or more seasons..... 64,500 Euro.
- For 8 seasons..... 37,950 Euro
- For 7 seasons 26,900 Euro
- For 6 seasons.....16,550 Euro
- For season 2015/2016, the amount will have an increase equivalent to the Consumer Price Index of the previous season.

3.2.6 Remuneration during temporary injury

The footballer will receive 100% of his remuneration until he is recovered or until the end of his contract if he finishes prior to his recovering. The 100% will be paid

by the Social Security System and if it does not reach that percentage, the club is obliged to complete the amount up to the 100%.

3.2.7 *Indemnity in case of death or impossibility to play*

Apart of the indemnities that could exist due to insurance policies, if a football player dies or cannot play anymore due to an incident coming from his football practice, the club shall compensate him or his heirs with an amount of 98,000 Euro for season 2014/2015 and with an increase of the Consumer Price Index for season 2015/2016.

3.2.8 *Image rights*

The assignment of image rights within the framework of the employment relationship of professional athletes.⁴

There are many cases in which a business, during the exercise of its management powers, requires its employees to adjust, to a certain extent, their image to the aesthetic directives of the company, without this in itself representing a violation of the workers' rights to their own image. In this sense, for example, it is normal for a football club to require all of its players to wear the same kit.

This is the case of certain activities, such as sporting activities, that due to their very nature involve a certain restriction of the right to one's own image, which implies the capture and reproduction of the image of this type of employee. Although the Statute of Workers' Rights does not contain express regulations in this regard (except for the general regulations regarding the privacy of workers, contained in article 4.2.e of this regulation); this has been confirmed by the Constitutional Court, (among others) in its well-known Decision number 99/1994, dated 11th April (First Chamber), according to which:

“it is clear that there are activities that involve, due to a relationship of necessary connection, a restriction of the image rights of those that must carry them out, due to their very nature, such as activities that involve having contact with or being accessible to the public. When this occurs, persons that agreed to carry out this type of tasks cannot later invoke the fundamental right to avoid carrying them out, if the restriction imposed is not aggravated by damaging important parts of the persons dignity (article 10.1 of the SC) or their privacy”.

Consequently, whenever the nature of a job requires the capture and reproduction of the image of a worker for the effective performance of this job, it is not even necessary to gain the worker's consent, as this is a consequence of the work carried out in accordance with the employment relationship. This is the case of the majority of professional athletes (the main actors at any sports event), without

⁴ Yago Vázquez Moraga and Andreu Sarrias, “*Sports Image Rights in Spain*”. The International Sports Law Journal no. 3/4 (2010).

which there could not be any competition at all.

The general rule applicable to the exploitation of the image rights of professional sportspeople can be found in RD 1006/1985, which, when regulating the rights and obligations of the parties of a work contract (article 7.3) states:

“with regard to the sharing of the profits resulting from the commercial exploitation of the image of sportspeople, this shall be as determined by Collective agreement or individual pact, except in the event of contracting by commercial companies or firms envisaged in point 5 of article 1 of this Royal Decree”. I.e. the regime applicable to the image rights of professional sportspeople shall be that envisaged in the Collective Agreement applicable, or that agreed between the athlete and the employer in the corresponding work contract.

Firstly, it should be noted that the aforementioned article 7.3. is incomplete in terms of its content and format, leaving certain doubts as to its interpretation. Secondly, due to its general lack of definition, it does not specify the extent of the assignment that the professional athlete grants to their employing club or Sports Corporation, or what limits or powers are included therein. Furthermore, it also fails to determine the legal nature of the financial income resulting from the exploitation of the image rights of athlete, which may or may not be considered part of their salary.

In fact, one of the main discussions regarding doctrine that have arisen regarding the interpretation of article 7.3 of RD 1006/1985 is related to the legal nature of the financial provisions received by professional athletes for the exploitation of their image rights by their employing clubs/Sports Corporations.

In this sense, according to some doctrines, this retribution is not considered part of their salary, but rather it is considered financial compensation for the use of the image rights of the sportsperson by the club, due to the non-contractual profits that are generated for the latter, which should be shared with the athlete.

On the other hand, other doctrines have considered image rights as a salary, arguing that the amounts received by professional sportspeople for the assignment of the rights to exploit their image when this assignment is a product and direct consequence of sporting activity are fully incorporated into the salary, regardless of whether their work contracts or collective agreements make a distinction in this regard, and regardless of whether this assignment is carried out by means of an independent employment contract.

In any case, as explained by Professor González Del Rio, mentioning the position of Professor Tovillas Morán,

“the reference that article 7.3 of RD 1006/1985 makes to an individual pact between the parties or what is agreed within the framework of a Collective agreement means that it can be concluded that the regulation does not contain any actual rule regarding the possible financial exploitation of image rights and that it simply recognises this possibility, which must be expressly developed using a Collective agreement or an individual contract between the sportsperson and their sporting entity as a legal instrument”.

Furthermore, the literal content of the article appears to mean that there is no particular legal obligation to share with the professional sportspeople the profits that their employer may obtain from the exploitation of their image rights, which can undoubtedly lead to unfair situations where there is no applicable agreement (or an agreement that does not mention this matter) or individual pact, especially in the cases of medium-level sportspeople, which do not enjoy the privileges of superstars and the so-called “cracks”.

The aforementioned regulation means that professional sportspeople may assign their image within the scope of the collective regulation or that of the work contract. Furthermore, *a contrario sensu* interpretation of article 7.3 makes it possible to consider that image rights can be left outside the employment relationship, as they cannot be assigned or be assigned partially (as is common). Therefore, the mere signing of a work contract between a professional sportsperson and a team, club or Sports Corporation is not sufficient to allow the commercial exploitation of the athlete’s image, but rather, in accordance with the regulation envisaged in Organic Law 1/1982, there should be express consent empowering this assignment and commercial exploitation.

All of this brings us to an initial conclusion: that, given the lack of a true and uniform general regime applicable to professional athletes regarding image rights, we should study the general regulations envisaged in the collective agreements that exist for each of the different sports, always taking into account that this regime should be complemented with the specific legal relationship that each athlete has with their employing club/Sports Corporation.

The current Collective agreement signed between the LNFP and the AFE states (art. 28):

“in the event that the Footballer exploits their image rights on their own behalf, as these have not been temporarily or indefinitely assigned to third parties, the amount that the Club/SAD pays the latter for the use of their image, name or figure for financial purposes shall be considered part of their salary, in accordance with the provisions of article 20. In this case, the amount agreed should be recorded in writing, either at an individual or Club/Sports Corporation workforce level”.

Two conclusions can be deduced from this provision.

A) Firstly, that when image rights are exploited directly by the player (by means of their assignment to the employing club/SAD), the amounts received shall be considered part of their salary. On the other hand, if the player has assigned their image rights to a company, the profits that this company receives for their exploitation shall be considered, in principle, of a commercial nature.

This is supported by Case Law including, among others, the Decisions of the High Court of Justice of Andalusia (Seville) dated 18th January 2.005, or that of the High Court of Justice of the Canary Islands (Santa Cruz de Tenerife), dated 14th March 1005, which declared that it is not appropriate to consider amounts that companies receive from sporting entities by virtue of the work contracts that an athlete signs with their employer as salary items.

In this case, this assignment shall always be unrelated to the professional footballers employment contract.

Furthermore, although it is not common, this regulation does not prevent the professional athlete from autonomously exploiting their image rights, without assigning them to any Club/SAD or any third party.

The formula of assignment of image rights through third parties, which is possibly the most commonly used for team sport, takes the form of a double contract with the Club/Sports Corporation:

- On the one hand, the player signs a work contract with the club that employs them, through which they are paid for their professional services.
- On the other hand, the player signs a contract for the assignment of image rights with a third party (normally a company).
- In turn, this third party assigns these rights to the employing Club/Sports Corporation, by virtue of a contract for the assignment of image rights of a commercial nature.

This system benefits both the sportsperson and the sporting entity that hires them, as:

- (a) The professional negotiates their salary in “net” amounts:
- (b) The Club / Sports Corporation reduces the tax payable on the amounts paid to the sportsperson.

Sometimes clubs and sportspeople, when using the aforementioned contractual system (which is completely legal) have gone too far when applying it and have committed excesses (simulation of contracts, assignment of rights without a price or at a ridiculously low price, etc.) which have led to problems with the Spanish Tax Authorities. An example is the decision passed by the Supreme Court on 1st July 2008, regarding a particular case in which the implementation of this system was actually a contractual simulation, in which the High Court stated that:

“The Club benefits from the use of nominee companies. The athlete, particularly foreigners, negotiate their overall remuneration with the clubs in net terms, i. e. after tax, which means that they demand higher payment if a withholding is applied; in short, they transfer the tax charge for withholdings to the Club. If by means of nominee mechanisms, this withholding can be avoided it is obvious that this benefits the Club.

Apart from this circumstantial evidence, there are specific cases that immediately demonstrate the Club’s participation in the creation and use of nominee companies:

This observation is important as it proves that the Club is not unaware of the simulating mechanism created and that its statements regarding its lack of knowledge of these relationships is not credible.”

B) Finally, as an exception to this general regime, the Agreement envisages an exceptional collective assignment: that agreed for the commercialization by the AFE and the LNFP of sticker collections, Stick Stacks, Pop Ups, Trading Cards and similar items. In this sense, in its article 38.1, the Agreement establishes that:

“The AFE and the LNFP agree, during the seasons of validity of this Collective Agreement, to the joint exploitation for commercial purposes of the image of the different names and emblems of the Clubs and Sports Corporations affiliated with the LNFP, as well as the image of the footballers on each team of the aforementioned Clubs/Sports Corporations, with regard exclusively to the manufacture, distribution, promotion and sale of stickers, stick stacks, pop ups, trading cards and similar items, with the respective albums to collect them, containing the images and names of the aforementioned footballers with the clothing, emblems and symbols of the Clubs that they belong to.”

The profit obtained from this exploitation shall be shared between the LNFP and the AFE at a ratio of 65% and 35%, respectively.

Again, the brevity of this regulation means that it is easy for there to be conflicts related to the exploitation of the image rights of the professional footballers, as, because the Agreement does not specify the scope of the image rights which (if applicable) the professional player assigns to their employing Club/Sports Corporation, it is possible for there to be conflicts between the image rights that have been assigned to the Club/Sports Corporation and those that the player may exploit by themselves or by means of a third party. Therefore, the regulations that the parties establish in the contracts governing the assignment of the footballers image rights (regardless of whether this is done via a work or commercial contract) are key, as they should determine the scope and content of this assignment, in order to avoid the type of conflicts mentioned above.

3.2.9 *Freedom of speech*

The professional players have the right to express their thoughts and feelings on every matter, and specially on those of their football activity, with no other limits but those of the law and the respect to the other individuals.

3.2.10 *Syndicalism*

The professional players can be members of a syndicate and to elect their representative within the team.

3.3 *Working Day*

The athlete’s working day includes his actual performance before the public and the time in which he is under the direct orders of the club or sports organization for the purpose of training or physical and technical preparation.

According to art. 7 of the Collective Agreement LNFP-AFE, it shall never exceed seven hours per day.

Nevertheless, the maximum working day neither take into account pre-match preparation prior to sporting events, nor the time spent travelling. In this sense, art. 8 of Collective Agreement LNFP-AFE states:

“The footballer is obliged to attend the pre-match preparation which the Club/SAD may determine, but it shall not exceed 36 hours immediately previous to the start of the match when it is played at home. In away-matches, the pre-match preparation shall not exceed 72 hours (travelling time included), taking into account as reference the kick-off as well”.

3.4 *Rest and holidays*

The sportsperson is entitled to a day and a half of rest per week. If due to sport related reasons the rest period can not be completed without interruption, the part that has not been enjoyed may be moved to a different day. When the sportsperson is required to participate in immediate sports events, the weekly rest may amount to 36 hours.

When, due to sport related reasons, public holidays cannot be enjoyed, the day of rest shall be moved to another day of the week.

The sportsperson is entitled to 30 days paid holidays per year. It is possible to spread them out over the year, and the time of the year in which the holiday must be taken is set by the Collective Agreement or the individual contract. Some Collective Agreements provide for longer holiday periods.

3.5 *Temporary loans*

During the term of the agreement, the clubs and sports organizations may temporarily loan the player to another club or organization with his express consent.

The club is obliged to consent to a temporary loan when the services of the sportsperson have not been used to participate in official public competitions for over a season.

The term of the loan will be stated explicitly in the loan agreement. It may not exceed the remaining term of the employment contract.

The assignee will be subrogated in the rights and obligations of the assignor, with both parties being jointly and severally liable for the performance of employment and Social Security obligations.

If the player is loaned in return for a consideration, the athlete shall be entitled to receive the amount agreed, which may not be less than 15 per cent gross of the stipulated amount. In the event of reciprocal loan of sportspeople, each will be entitled to receive from their initial club at least one monthly payment of their salary plus one twelfth of the quality and quantity money paid during the year.

3.6 *Termination of the employment contract*

The employment relationship will be terminated for the following reasons:

a) *By mutual agreement.*

As well as in case of loan transfer, if the player is transferred in return for a consideration, the athlete shall be entitled to receive the amount agreed, which

may not be less than 15 per cent gross of the stipulated amount.

The recent decision of the Superior Court of Justice of Madrid dated December 9, 2013 (“Boateng” case) restores, along with the contradictory decision of the Superior Court of Justice of Galicia dated April 2, 2012 (“Luque” case), the dispute about which Club should pay, in the absence of an agreement, the due percentage when a professional footballer is transferred from a Spanish club to a foreign club, and the related discussions on the applicability in such cases of Article 17.3 of the Collective Bargaining Agreement for the activity of professional football.

In our view, although pending appeal for unification of doctrine before the Supreme Court against the first decision, filed precisely on the basis of the second decision as contrast decision, the decision issued in Boateng’s case, both in first and in second instance, remains the most successful approach, which is the criteria held by the majority of the doctrine, and whose arguments should lead to reflection within the bargaining committee of a future collective agreement.

- b) Expiry of the agreed term. In the case that after the termination of the agreement upon expiry, the sportsperson enters into a new agreement with another club or sports organization, the parties may, on the basis of the collective agreement, agree upon the payment of consideration for the sportsperson’s preparation or training, to be paid by the new club to the original club.
- c) Full performance of contract.
- d) Death or injury leading to permanent total or absolute disability, or major disability. In such cases, the sportsperson or his beneficiaries shall be entitled to receive compensation equal to at least six monthly installments if the death or injury arose from the practice of the sport, without prejudice to the Social Security benefits to which he may be entitled.
- e) Dissolution or liquidation of the club by resolution of a General Meeting of Members. The collective redundancy procedure set out in article 51 of the Statute applies.
- f) Economic crisis that justifies a restructuring of staff; article 51 of the Workers’ Statute relative to collective redundancy for economic reasons is also applicable.
- g) Causes validly laid down in the agreement, except in the case that they constitute a misuse of law by the club.
- h) Dismissal of the sportsperson, which may be:
 - Fair dismissal: When the dismissal is due to a breach of contract on the part of the athlete, and the dismissal is held to be fair, there is no right to compensation. In the absence of an agreement between the parties, the judge may order the athlete to pay compensation to the club based on the loss caused.
 - Unfair dismissal: The athlete shall be entitled to receive compensation, which is set by the Court in the absence of an agreement, equal to at least two monthly installments of his salary, plus the proportion of the quality

and quantity money paid during the year. The amount of compensation will be calculated taking into account current circumstances, especially the shortfall in earnings resulting from the termination of the contract. The sports person is not entitled to any back pay and may not be reinstated (except where agreed otherwise by the parties).

- Null and void: When the dismissal is based upon any of the categories of discrimination prohibited by the Constitution or by law, or where dismissal occurs in breach of fundamental rights and civil liberties, the employee must be reinstated immediately and receive any unpaid salaries.
- i) Termination by the athlete's will:
 - Based on a breach of contract by the employer for any of the reasons stated in article 50 of the Workers' Statute and with the same effects as unfair dismissal without reinstatement.
 - Without causes attributable to the club: the club shall be entitled to compensation, which is set by an employment Court in the absence of an agreement between the parties, based on the sporting circumstances, the loss caused to the organization, the grounds for termination and any other elements considered by the court. If the athlete is signed by another club within a year, said club shall have subsidiary responsibility for the payment of the above-mentioned compensation

3.7 The arbitral commission

This commission is established by the CBA in order to take care of any litigation or discrepancy between the parties during the time of the agreement.

It is constituted by six individuals, which will be nominated half by each of the signing parties of the CBA (LNFP and AFE).

The main novelty is that the commission is entitled to analyze the economic situation of each of the clubs of the first and second division as well as in regard of the duties towards the players.

3.8 Training compensation

This is a very interesting issue as the training compensation is not included in the Statutes or any other Regulations of the Spanish FA but on the CBA, which I think is special among the other countries. Anyway, and contrary to other foreign regulations too, this training compensation does not come from the FIFA Regulations but from the very same Royal Decree 1006/1985 which, in its article 14.1 stipulates that when a player has terminated his contract, and he signs a new one, the new club shall pay a compensation that compensation (training compensation).

The Royal Decree was a pre-Bosman law and it is really interesting to see there the roots of the FIFA regulations (and the training compensation).

The parties, in article 18 of the CBA, have agreed that the future former

club shall notify the LNFP and the AFE, on or before the 1st of March of the season when the player ends his contract, if it wants the footballer to be included in the so-called “list of compensation”. Thus, this is not mandatory (as if FIFA Regulations, but only a right to be used or not).

The player should be less than 23 years old before the 30th of June of that very same season in order to be included in the said “list”. It must be underlined that the previous CBA had 24 years old as for the age of the inclusion in the list, so the new one as reduced it in one year.

The future former club shall indicate the amount of the compensation, so there is no such agreed amount like in FIFA Regulations, and this is a strange concept of training as any club has the right to seek for any amount...

But, if no club is willing to pay such an amount, the current club shall offer the player a new contract of one year with an increase of 7% based on the sought compensation. Thus, there is a possibility that if a club asks for too much an amount, the new contract would be highly increased. For instance, if you ask for 10 million compensation, you would have to pay 700,000 Euro more the following year, so the freedom that seemed to exist is limited thanks to the 7% increase which exists.

Furthermore, if a new contract is signed with a new club, the player will have the right to receive 15% of the sought compensation amount, which is also something to take into consideration when asking for such amount.

3.9 *The Joint Committee*

A Joint Committee is created in order to control the clubs debts towards the players and to seek for legal registration of the clubs in the LNFP (first and second Spanish divisions).

The point is then to see if the clubs have no debts towards their players or if they have, that they are under guarantee. If not, the Joint Committed might decide not to accept the registration of a club in the competition.

3.10 *Guaranteed Wages Fund*

The LNFP guarantees the payment of the outstanding debts (if they met the criteria below) of the clubs for seasons 14/15 and 15/16 up to the following:

- First division:
 - a) For those clubs that have participated in European Competitions in any of the two previous seasons before their administrative relegation (for non-payment of debts): 420,000 Euro per player.
 - b) For the rest of the clubs: 295,000 Euro per player.
- Second division:
 - a) For those clubs that have participated in European Competitions in any of the two previous seasons before their entering into Bankruptcy: 255,000 Euro per player.

b) For the rest of the clubs: 170,000 Euro per player.

The payment by the LFNP will be made within six months from the relegation due to administrative reasons (non-payment of debts).

3.11 A short conclusion

As it can be seen, there is a lot of protection for football player in the legal Spanish system as well as in the Collective Bargaining Agreement.

This is due to the long history of clubs' bankruptcies which have jeopardized Spanish football in the last years when there was almost no protection and the players, mostly foreign, tended to avoid coming to Spain at least in the "middle class" clubs.

Now you can certificate that Spain has one of the most protective system for the football players.

4. Labour Dispute

In Spain the legal system is clear: there is only one way to solve disputes and is to go to the Labour Courts (Magistraturas de Trabajo). Arbitration forbidden by the law as labour disputes are considered as public order issues.

That is why FIFA does not admit, if a Spanish club maintains the legal position of non-arbitration of employment-related disputes, any claim brought by foreign players at the Players Status Committee.

Thus, the only way is to use the Labour Courts, which have an appeal before a Higher Court of Justice (Tribunal Superior de Justicia) and finally before the Supreme Court (Tribunal Supremo).

EMPLOYMENT RELATIONSHIPS AT NATIONAL LEVEL: SWITZERLAND

by *Lucien W. Valloni** and *Beat Wicki***

SUMMARY: 1. Introduction – 2. Employment regulation and football structures – 3. Individual employment relations in professional football – 4. Doping issues – 5. Transfer of players – 6. Social security principles – 7. Labor dispute settlement

1. Introduction

Sport may be one of the greatest pastimes in the world, but it does not remain undisturbed from commercialization, professionalization, globalization and juridification, especially when it comes to football. The football club's monopoly position and the specificity of sport in general take effect on employment relationships between football clubs and their players. This article should provide a general overview of provisions in Swiss labor law and its related fields of law that are relevant for professional football players. The article cannot deal with individual questions. It rather makes available to the reader a first orientation on the areas and sources of law that have to be considered in connection with the employment relationship with a professional football player in Switzerland. Provided that the authors refer to the terms "employee" and "employer", the relevant explanations also regard employment relationships between football players and their clubs. For the sake of clarity, this article is restricted to the statutory sources of the Swiss Football Association and the Swiss Football League when it comes to regulations within the associations. The sources of law of international associations like the FIFA or the UEFA as well as of subordinated national leagues are intentionally excluded to a large extent. They are only mentioned if such regulations play a crucial role for the employment relationship.

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2. Employment regulations and football structures

2.1 Sources of law

In Swiss law, there are no special statutory sources to regulate an employment relationship for football players and other athletes. Therefore, employment contracts with athletes have to be assessed on the basis of the employment contract between the athlete and the sports club, the general rules provided by Swiss labor law according to art. 319 et. sqq. of the Swiss Code of Obligations (CO) and the Federal Act on Labor in Manufacturing, Business and Trade (Labor Act). Furthermore, regulations of the respective sports clubs and of associations that the club is a member of or that athletes submit themselves to have to be considered.¹ In this context, the Swiss Football League (SFL), which enacts the regulations that are relevant for professional football in Switzerland, should especially be highlighted.² Such regulations have yet to be considered only, if they do not violate mandatory law.³

Swiss law does not provide for special statutory sources that are applicable on athletes and their employment relationships. On the one hand, this could be due to the fact that Swiss labor law is structured liberally *per se*. On the other hand, professional athletes in Switzerland are faced with the fact that their activity is still not always accepted as a conventional profession.⁴ This situation occasionally leads to unsatisfying results. For example, professional football players with employment contracts are governed by the Labor Act's protection provisions.⁵ This law and its safeguarding provisions are geared to standard weekly hours. For athletes, who – in many cases – work on weekends or in the evening (training and competition), this is in many respects not appropriate (see also chapter 3.2.5).⁶ Art. 27 Labor Act contains a solution for this problem. The provision allows certain groups of businesses or employees to be excluded from certain safeguarding provisions entirely or partially and to be governed by special provisions. Yet, this possibility has not been exercised in Switzerland so far. This could – among other things – be due to the fact that flexible working hours for athletes are generally accepted.⁷

2.2 Applicable law

The question, whether a legal dispute between an athlete and his sports club is

¹ See L. W. Valloni/T. Pachmann, *Sports Law in Switzerland*, Alphen aan den Rijn, Wolters Kluwer, 2014, n 227.

² See J. Kleiner, *Der Spielervertrag im Berufsfussball*, Zürich/Basel/Genf, Schulthess, 2013, 33.

³ See L. W. Valloni/T. Pachmann, *Sports Law in Switzerland*, Alphen aan den Rijn, Wolters Kluwer, 2014, n 227.

⁴ See L. W. Valloni/T. Pachmann, *Sportrecht in a nutshell*, Zürich/St. Gallen, Dike, 2012, 76.

⁵ See J. Kleiner, *Der Spielervertrag im Berufsfussball*, Zürich/Basel/Genf, Schulthess, 2013, 129.

⁶ See L. W. Valloni/T. Pachmann, *Sports Law in Switzerland*, Alphen aan den Rijn, Wolters Kluwer, 2014, n 228.

⁷ See L. W. Valloni/T. Pachmann, *Sports Law in Switzerland*, Alphen aan den Rijn, Wolters Kluwer, 2014, n 228.

governed by Swiss law, is in case the issue is brought before a Swiss judge, to be decided according to the Federal Act on International Private Law (PILA). In a first step, it is analyzed if the employment contract between the athlete and his sports club provides a choice of the applicable law.⁸ According to Swiss international private law, such a choice of law is restricted to the legal systems of those states, where the employee permanently resides or the employer has his domicile. If there is no (valid) choice of law, the employment contract is governed by the law of the state, in which the employee habitually carries out his work.⁹ If the employee carries out his work habitually in several states – which is possibly the case with regard to professional athletes – the employment contract is governed by the rules of law of the state, in which the employer has his domicile.¹⁰

2.3 Structure of National Football

2.3.1 Swiss Football Association

The Swiss Football Association (SFV) is the national federation for professional and grassroots football.¹¹ It is the umbrella organization of all Swiss football clubs. The SFV was founded in 1895 and is nowadays probably the most important sports association in Switzerland. At the moment, the association contains 1'431 sports clubs, 13'811 teams and 250'779 players.¹² It is, among others, member of the international football associations FIFA and UEFA.¹³ The SFV is one of the seven national football associations which launched the FIFA in 1904.¹⁴

The SFV is an association as defined by art. 60 et sqq. of the Swiss Civil Code (CC) with its registered office in Berne.¹⁵ The association is divided into three sections, namely into the Swiss Football League (SFL), the First League and the Amateur League (AL). All of these sections have an own legal personality as well as own bodies and permanent commissions established by them.¹⁶

2.3.2 Swiss Football League

As already mentioned, the SFL¹⁷ is of particular interest for the article at hand. According to its statutes, the SFL intends, among other things, the organization of “non-amateur-football”.¹⁸ Similar to the SFV, the SFL is an association as defined

⁸ Art. 121 para. 3 PILA.

⁹ Art. 121 para. 2 PILA.

¹⁰ Art. 121 para. 2 PILA.

¹¹ www.football.ch.

¹² www.football.ch.

¹³ Art. 4 para. 1 statutes of the SFV.

¹⁴ www.football.ch.

¹⁵ Art. 1 statutes of the SFV.

¹⁶ Art. 17 para. 1 and 2 statutes of the SFV.

¹⁷ www.sfl.ch.

¹⁸ Art. 3 statutes of the SFL.

by Swiss law with its registered office in Berne.¹⁹

Since the 2012/2013 season, the SFL has been composed of 20 clubs: 10 clubs in the (Raiffeisen) Super League and 10 clubs in the Challenge League.²⁰ Because of its competences, the SFL plays a central role in Swiss professional football: On the one hand, it is responsible for the legal framework. On the other hand, it is in charge of the organization and realization of professional football in Switzerland via the operational management of the SFL's committee.²¹

2.3.3 Additional National Leagues

The First League, the Amateur League (AL) as well as 13 regional associations are affiliated with the SFV.²²

The First League²³ is the highest amateur league in Swiss football. It is divided into the First League Promotion consisting of 16 football clubs and the First League Classic consisting of 42 football clubs, which play in three different groups.²⁴

The Amateur League (AL)²⁵ contains all clubs of the SFV, whose first squad – according to the SFV's competition regulation – is neither playing in the SFL nor in the First League.²⁶ At present, the Amateur League (AL) is composed of 6 groups with 14 teams each. For a better implementation of its tasks, the Amateur League is divided into 13 regional associations.²⁷

3. Individual employment relations in professional football

3.1 Basic principles

Athletes are generally connected with their sports clubs by means of a membership according to Swiss association law (art. 70 et sqq. CC). Besides such a corporate relationship, there can be a contractual or at least a quasi-contractual relationship between a sports club and an athlete.²⁸ Correspondent agreements are often concluded in order that sports clubs are able to subordinate their athletes to their rules and standards (or the rules and standards of associations that these sports

¹⁹ Art. 1 and 4 statutes of the SFL.

²⁰ Art. 8 statutes of the SFL.

²¹ See J. Kleiner, *Der Spielervertrag im Berufsfussball*, Zürich/Basel/Genf, Schulthess, 2013, 33 et sqq.

²² www.football.ch.

²³ www.el-pl.ch.

²⁴ www.el-pl.ch.

²⁵ www.al-la.ch.

²⁶ Art. 2 para. 1 statutes of the Amateur Liga.

²⁷ Art. 29 para. 1 statutes of the Amateur Liga.

²⁸ See L. W. Valloni/T. Pachmann, *Sports Law in Switzerland*, Alphen aan den Rijn, Wolters Kluwer, 2014, n. 216 et sqq.

clubs are members of) and to tie their athletes more strongly.²⁹ In this regard, one basically has to differentiate between three forms of agreements: (i) individual contracts, (ii) athletes' agreements and (iii) athletes' declarations.³⁰ These three forms of athletes contracts are discussed in depth below, whereas the topic individual contracts is being dealt with in the chapter "Employment Contracts" (see chapter 3.2). The content of athletes' contracts is diverse. Yet, one typically agrees on aspects like the subordination to a certain anti-doping statute, arbitration clauses, liability issues, marketing rights and – as already mentioned – the subordination to the rules and standards that are relevant for the respective sports club.³¹

3.2 *Employment contracts*

3.2.1 *Basic principles*

It comes along with the commercialization of sports that many athletes no longer practice their sport exclusively as a hobby, but also earn a living with it. It is due to this development that the importance of employment contracts in sports increased. It has to be analyzed in every individual case, if there is in fact an employment contract between an athlete and a sports club.

According to art. 319 para. 1 CO, an employment contract necessarily contains the following four elements: (i) the performance of work (work performance) during (ii) a certain or uncertain time period (time element) (iii) of an employee to an employer (subordination) (iv) the payment of a salary (remuneration). Especially in team sports like football, it is nowadays common to conclude employment contracts according to art. 319 et sqq. CO, given that there is a certain level professionalism.³² The fact that athletes – if they perform team sports – are generally integrated into a (labor) organization, for example into a legal entity in the form of an association, causes a crucial difference compared to individual sports: For the latter, a subordination is missing in the majority of cases and thus the conclusion of an employment contract is not possible.³³

Since June 2012, there is a duty in Swiss football to use the Standard Employment Contract for Non-Amateur Players of Clubs of the SFV, if contracts are concluded with non-amateurs.³⁴ If the standard contract does not explicitly

²⁹ See L. W. Valloni/T. Pachmann, *Sports Law in Switzerland*, Alphen aan den Rijn, Wolters Kluwer, 2014, n. 219.

³⁰ See D. Thaler, *Athletenvereinbarungen und Athletenerklärungen*, in: O. Arter/M. Baddeley (ed.), *Sport und Recht*, Bern, Stämpfli, 2007, 21.

³¹ See L. W. Valloni/T. Pachmann, *Sports Law in Switzerland*, Alphen van den Rijn, Wolters Kluwer, 2014, n. 220.

³² See C. Jenny, *Arbeitsverträge von Sportlern*, in: O. Arter (ed.), *Sport und Recht*, Bern, Stämpfli, 2005, 176.

³³ See C. Jenny, *Arbeitsverträge von Sportlern*, in: O. Arter (ed.), *Sport und Recht*, Bern, Stämpfli, 2005, 177 et sqq.

³⁴ See J. Kleiner, *Der Spielervertrag im Berufsfussball*, Zürich/Basel/Genf, Schulthess, 2013, 57.

provide for, the parties are not allowed to deviate from the contract's content.³⁵

3.2.2 Duties of the player

Swiss labor law provides for the following duties of the employee that are of paramount importance for the article at hand: (i) duty to carry out the contractually assumed tasks in person (art. 321 CO), (ii) duty of care and loyalty (art. 321a CO) and (iii) compliance with general directives and instructions (art. 321d CO).

3.2.3 Duty to carry out the contractually assumed tasks in person

According to art. 321 CO, the employee must – as a general principle – carry out the assumed tasks in person. It is not a compulsory regulation though, because the law explicitly allows the parties to reach a different agreement or that another solution results from the circumstances given. It is yet evident that, especially with regard to employment contracts in professional sport, that an athlete is only engaged by a club due to his person and particularly his (sporting) competences.³⁶ The presence of an associate or a substitute would therefore contradict with the reason of every employment contract with a professional athlete. In return, this conclusion leads to the fact that the professional athlete has no duty to look for alternatives, if he would not be able for any reason to carry out its work in person.³⁷

3.2.3.1 Duty of care and loyalty

According to art. 321a para. 1 CO, the employee must carry out the work assigned to him with due care and loyally safeguard the employer's legitimate interests. This means amongst other things that, relating to a professional football player in an employment relationship, the athlete must be in the position to trigger physical and mental top performances, both for trainings and competitions. This even means that a professional athlete is expected to change his private life in so far as it does contravene with such performances.³⁸ On the contrary, the athlete has no duty to achieve a certain work success, for example to realize a goal scoring opportunity or to win a game. A careful course of action is owed, which for example means that the shot on goal has to be executed in a way that the chance to score is as high as

³⁵ Art. 1 para. 1 Standard Employment Contract for Non-Amateur Players of Clubs of the SFV.

³⁶ See R. E. Aebi-Müller/M. Rüfenacht, *Die Arbeits- und Treuepflicht des Sportlers: Welche Pflichten treffen den angestellten Sportler?*, in: O. Arter/M. Baddeley (ed.), *Sport und Recht*, Bern, Stämpfli, 2007, 118.

³⁷ See R. E. Aebi-Müller/M. Rüfenacht, *Die Arbeits- und Treuepflicht des Sportlers: Welche Pflichten treffen den angestellten Sportler?*, in: O. Arter/M. Baddeley (ed.), *Sport und Recht*, Bern, Stämpfli, 2007, 118.

³⁸ See R. E. Aebi-Müller/M. Rüfenacht, *Die Arbeits- und Treuepflicht des Sportlers: Welche Pflichten treffen den angestellten Sportler?*, in: O. Arter/M. Baddeley (ed.), *Sport und Recht*, Bern, Stämpfli, 2007, 123.

possible.³⁹ It is obvious that, especially in the area of sport, the respective differentiation can be very difficult. This becomes apparent in light of the betting scandals that frequently shock the football world and that left also its traces in Switzerland:⁴⁰ *inter alia* with the help of football players, who thereby obviously violated their loyalty to their sports clubs, in recent years an immense number of games have been manipulated in favor of and initiated by an international betting mafia. The respective schemes have not been detected though, because the “foul play” of the particular players was exposed. In fact, the schemes were detected, because the betting mafia involved, executed a lot of dubious betting processes.⁴¹

The Standard Employment Contract for Non-Amateur Players of Clubs of the SFV contains certain duties in its art. 8 regarding the behavior of football players. These duties would most likely fall within the scope of the employee’s duty of loyalty. The respective duties are concretized by a code of behavior that is attached to the contract as appendix 7.

3.2.3.2 Compliance with general directives and instructions

According to art. 321d para. 2 CO, the employee must comply in good faith with the employer’s general directives and specific instructions. This also applies to football players who are in an employment relationship with a football club. In this regard, art. 6 para. 1 Standard Employment Contract for Non-Amateur Players of Clubs of the SFV provides that a player has to be at the employer’s disposal and is obligated to take part in all trainings, meetings, games etc. during the contractual period. Especially with regard to sport, the authority to give directives has a particular importance: e.g. training sessions have to be performed as instructed and the player has to comply with strategic and tactic decisions of the coach.⁴² The example of coach Roy Hodgson, who declared a (controversial) visiting ban for the wives of the Swiss national football team’s players during the period of the football world cup 1994 in the US, shows that the authority to give directives can be rather far-reaching.⁴³ However, the authority to give directives is limited by statutory requirements, by respective contractual agreements between club and player as well as by the employer’s duty of care.⁴⁴

³⁹ See L. W. Valloni/T. Pachmann, *Sports Law in Switzerland*, Alphen van den Rijn, Wolters Kluwer, 2014, n. 234.

⁴⁰ See for example www.tagesanzeiger.ch/panorama/vermischtes/Wie-die-Wettmafia-im-Schweizer-Fussball-grosse-Kasse-machte/story/18885023, last visited on the 16th of April 2014.

⁴¹ On the 13th of November 2012, the Federal Criminal Court in Bellinzona for the first time rendered a decision regarding sports betting fraud. The indicted were acquitted from all charges, see *Bundesstrafgerichtsurteile* Nr. SK 2011.21 and SK 2011.33.

⁴² See R. E. Aebi-Müller/M. Rufenacht, *Die Arbeits- und Treuepflicht des Sportlers: Welche Pflichten treffen den angestellten Sportler?*, in: O. Arter/M. Baddeley (ed.), *Sport und Recht*, Bern, Stämpfli, 2007, 132.

⁴³ www.srf.ch/player/tv/10vor10/video/20-jahre-nach-dem-fussball-wunder?id=54f5014b-9fad-45f1-b00a-54718fffd753, last visited on the 16th of April 2014.

⁴⁴ See R. E. Aebi-Müller/M. Rufenacht, *Die Arbeits- und Treuepflicht des Sportlers: Welche*

3.2.4 Duties of the club

The most important duties of a sports club in an employment relationship with its athletes are (i) the athlete's compensation (art. 322 CO) and (ii) the protection of the athlete's personal rights (art. 328 CO). In addition, there is usually a duty of the club to support the player by means of a professional training operation, which is in the majority of cases agreed upon implicitly.⁴⁵

3.2.4.1 Obligation to pay salaries

It is common in top-level sport that athletes are being paid for their performances, whereas it has to be differentiated between team sports and individual sports. If the legal relationship between a club and a player is being qualified as an employment contract, the club as employer has to pay the player as employee. This is the main contractual obligation of the club as employer. If the salary has not been defined explicitly, it has to be determined according to practice or at most, according to equity.⁴⁶ In case there is no other agreement, the defined salary shall be deemed as gross salary. From this amount, the employer has to subtract social security contributions and if need be, the withholding tax.⁴⁷ According to art. 327a CO, the employer must further reimburse the employee's expenses, if there is a direct connection to the employee's duty to work. Such expenses will occur rather rarely in professional football, because the club usually provides for sport equipment, transport etc.⁴⁸

Especially in the area of professional sport, premiums are an important salary component. Depending on the contractual agreement or the reference to a premium scheme, premiums are being paid for the achievement of a certain position in the championship, a certain amount of points, for the number of scored goals or other factors. From a legal standpoint, such premiums are qualified as incentive salary.⁴⁹

Finally, one has to mention the so-called "signing fees", which are premiums that are being paid for the conclusion of a contract with an athlete. According to a decision of the Court of Appeals of the Canton of Zurich, such

Pflichten treffen den angestellten Sportler?, in: O. Arter/M. Baddeley (ed.), *Sport und Recht*, Bern, Stämpfli, 2007, 133.

⁴⁵ See J. Kleiner, *Der Spielervertrag im Berufsfussball*, Zürich/Basel/Genf, Schulthess, 2013, 649.

⁴⁶ See F. Emmel, *Handkommentar zum Schweizer Privatrecht*, Zürich/Basel/Genf, Schulthess 2012, Art. 322 CO n 1.

⁴⁷ See F. Emmel, *Handkommentar zum Schweizer Privatrecht*, Zürich/Basel/Genf, Schulthess 2012, Art. 322 CO n 2.

⁴⁸ See M. Balmelli, *Entschädigung von Sportlern: Erscheinungsformen, rechtliche Qualifikation und Vertragsgestaltung*, in: O. Arter/M. Baddeley (ed.) *Sport und Recht*, Bern, Stämpfli, 2007, 148.

⁴⁹ See M. Balmelli, *Entschädigung von Sportlern: Erscheinungsformen, rechtliche Qualifikation und Vertragsgestaltung*, in: O. Arter/M. Baddeley (ed.) *Sport und Recht*, Bern, Stämpfli, 2007, 149.

claims are qualified as claims of the employee resulting from an employment relationship. For this reason, a statute of limitation of only five years based on art. 128 section 3 CO is applicable to such claims.⁵⁰ If a “signing fee” is agreed upon in case of a revenue caused by a future transfer, the respective claim is qualified as a special form of commission in terms of art. 322b CO.⁵¹

The players’ payment is regulated in art. 19-21 of the Standard Employment Contract for Non-Amateur Players of Clubs of the SFV, whereas particulars are set out in appendix 3 of the contract.

3.2.4.2 Duty of care

The employer’s duty of care has special implications with regard to the “special case sport”: Contrary to conventional employment relationships, in the area of sport, there is a duty to keep the employee occupied.⁵² Particularly with reference to professional athletes, an actual employment in terms of participating in training sessions and competitions is fundamental to keep up their skills and market value. It is difficult though to enforce this employment requirement in practice, especially regarding the participation in competitions.⁵³ Moreover, the duty of care restricts the employer’s authority to give directives. Prohibited are those directives, which violate the athlete’s personality, do not serve objectively justified interests of the employer or cannot be observed by the athlete, taking into account his personal circumstances.⁵⁴

3.2.5 Working time

The determination of working times in employment relationships is generally at the disposition of the parties. However, the parties have to comply with statutory provisions. The Labor Act, which is – as already mentioned – applicable to athletes’ employment relationships, deserves special attention in this context (see chapter 2.1).

A prior consent on the workload is indispensable in order to affirm the existence of an employment relationship. The parties are yet at least entitled to determine the working hours variably, which is especially important in sport. This

⁵⁰ See L. W. Valloni/T. Pachmann, *Sports Law in Switzerland*, Alphen van den Rijn, Wolters Kluwer, 2014, N 253 and footnote 207.

⁵¹ See M. Balmelli, *Entschädigung von Sportlern: Erscheinungsformen, rechtliche Qualifikation und Vertragsgestaltung*, in: O. Arter/M. Baddeley (ed.) *Sport und Recht*, Bern, Stämpfli, 2007, 150.

⁵² See C. Jenny, *Arbeitsverträge von Sportlern*, in: O. Arter (ed.), *Sport und Recht*, Bern, Stämpfli, 2005, 184.

⁵³ See C. Jenny, *Arbeitsverträge von Sportlern*, in: O. Arter (ed.), *Sport und Recht*, Bern, Stämpfli, 2005, 184 et sqq.

⁵⁴ See R. E. Aebi-Müller/M. Rüfenacht, *Die Arbeits- und Treuepflicht des Sportlers: Welche Pflichten treffen den angestellten Sportler?*, in: O. Arter/M. Baddeley (ed.), *Sport und Recht*, Bern, Stämpfli, 2007, 133.

flexibility is necessary because of factors like the circumstance that it is not clear from the outset, how many games a team has to play in a championship, how many training sessions are necessary and, of course, that the working hours are seasonal. This liberty is limited though, where working prohibitions for Sundays and holidays stipulated by public law are applicable.⁵⁵ It has to be further noticed that athletes have to comply with the maximum weekly working time of 50 hours as defined in art. 9 para. 1 litera b. Labor Act. In general this should not cause problems with the exception of away games. In these cases work is not performed at the normal workplace and thus waiting time and travel time are also considered as working hours.⁵⁶ More restrictions are caused by the ban on night work pursuant to art. 16 Labor Act in connection with art. 10 and 17 Labor Act, which defines that it is generally not allowed to work between 11pm and 6am. With consent of the employees' representatives in a company or, if there are no employees' representatives, with consent of the employees' majority, an adjustment until midnight is allowed. In this case too, an operational working time during the day and in the evening of overall 17 hours must not be exceeded.⁵⁷ Finally, the working prohibition for Sundays pursuant to art. 18 Labor Act has to be mentioned. To this effect, there are no special rules for work performances of sportsmen in terms of art. 27 Labor Act and sporting events on Sundays would therefore be subject to an explicit authorization.⁵⁸ However, in practice it is common that the clubs desist from obtaining the relevant permissions.⁵⁹

Art. 329 para. 1 CO as a relatively compulsory provision, i.e. it must not be modified to the disadvantage of the employee,⁶⁰ is another provision that has to be considered. The provision determines that the employer must afford the employee at least one day off per week. Art. 329a para. 1 CO is another relatively compulsory regulation, which determines the employees' vacation entitlement. Employees not older than 20 years have an entitlement of paid vacation in the amount of 5 weeks per year, which is reduced to 4 weeks after an employee has reached the age of 20. This rule is also stipulated in art. 26 of the Standard Employment Contract for Non-Amateur Players of Clubs of the SFV.

3.2.6 Termination of the employment relationship

3.2.6.1 Differentiation between limited and unlimited employment relationships

Regarding the termination of employment relationships, Swiss labor law differentiates

⁵⁵ See T. Geiser, *Arbeitsverträge mit Sportlern*, in: O. Arter/M. Baddeley (ed.), *Sport und Recht*, Bern, Stämpfli, 2007, in: *Sport und Recht*, Bern 2007, 87 et sqq.

⁵⁶ See T. Geiser, *Arbeitsverträge mit Sportlern*, in: O. Arter/M. Baddeley (ed.), *Sport und Recht*, Bern, Stämpfli, 2007, in: *Sport und Recht*, Bern 2007, 92.

⁵⁷ Art. 10 para. 2 Labor Act.

⁵⁸ Art. 19 Labor Act.

⁵⁹ See J. Kleiner, *Der Spielervertrag im Berufsfussball*, Zürich/Basel/Genf, Schulthess, 2013, 130.

⁶⁰ Art. 362 CO.

between limited employment relationships⁶¹ and unlimited employment relationships.⁶² As a general rule, football players most likely enter into limited employment contracts with their clubs.

According to art. 334 para. 1 CO, limited employment relationships end without termination after the expiry of the agreed term. If the employment relationship is yet implicitly perpetuated after the expiry of this term, it will be considered as an unlimited employment relationship.⁶³ It is to be mentioned that the parties have also with regard to limited employment relationships, the possibility to agree on termination periods. If the parties abstained from doing so, a termination without notice pursuant to art. 337 et sqq. CO is the only way to unilaterally terminate the employment contract. Besides that, the parties have the possibility to end the employment relationship by means of a termination agreement.

Unlimited employment relationships can be terminated by the parties according to the contractually agreed termination periods or, if there are no such termination periods, in accordance with the respective statutory provisions.⁶⁴ It is possible too, to terminate the contract with immediate effect for good cause or to dissolve the contract by means of a termination agreement.

3.2.6.2 *Termination for good cause*

Both the employer and the employee can terminate the employment relationship with immediate effect for good cause at any time.⁶⁵ Good cause can be affirmed, if the facts at hand lead to the situation that the party terminating the contract cannot be expected in good faith to continue the employment relationship any longer.⁶⁶ Yet, the requirements for a termination with immediate effect are being assumed only reluctantly and will only be affirmed, if there is serious misconduct of one of the parties involved.⁶⁷

3.2.6.3 *Termination With Immediate Effect Without Good Cause*

If there is no good cause for a termination with immediate effect, art. 337c et sqq. CO stipulates the consequences of such a termination. It has to be differentiated between a termination by the employer and a termination by the employee.

If the termination without good cause was turned in by the employer, the employee is, according to art. 337c CO, entitled to damages in the amount he would have earned had the employment relationship ended after the required notice period or on expiry of its agreed duration. The employer therefore owes the employee

⁶¹ Art. 334 CO.

⁶² Art. 335 CO.

⁶³ Art. 334 para. 2 CO.

⁶⁴ Art. 355a et sqq. CO.

⁶⁵ Art. 337 para. 1 CO.

⁶⁶ Art. 337 para. 2 CO.

⁶⁷ BGE 110 III 213, E. 3.1.

in particular outstanding salaries, but also other remunerations like the 13th monthly salary, gratuities, fixed expenses etc.⁶⁸ Such damages are reduced by any amounts that the employee saved as a result of the termination of the employment relationship or that he earned by performing other work or would have earned had he not intentionally foregone such work.⁶⁹ Additionally, the judge can oblige the employer to pay the employee a compensation in the amount of up to six monthly salaries.⁷⁰ The employee has yet no right to reemployment.

If the termination without good cause was turned in by the employee or if the employee fails to take up his post, the employer is entitled to compensation equal to one-quarter of the employee's monthly salary.⁷¹ If the employee is able though to prove that the employer did not or only marginally suffer damages due to his behavior, the compensation can be reduced at the discretion of the judge.⁷² In return, the employer can claim additional damages, that is damages exceeding one-quarter of the salary for one month.⁷³

According to art. 4 para. 1 Standard Employment Contract for Non-Amateur Players of Clubs of the SFV, in case of a termination of the employment contract with immediate effect and without good cause, damages have to comply with the law (i.e. art. 337c and art. 337d CO respectively) in due consideration of the regulations of the rules of the SFV on the status of non-amateurs and of art. 17 FIFA Regulations on the Status and Transfer of Players and their interpretation by the Tribunal Arbitral du Sport (TAS) (see also chapter 5.1). In the authors' view, art. 337c and art. 337d CO respectively and the associated findings of jurisdiction and academia are readily applicable, that is even without a correspondent reference in the Standard Employment Contract for Non-Amateur Players of Clubs of the SFV, if compensations are being calculated pursuant to art. 17 FIFA Regulations on the Status and Transfer of Players. The TAS-decisions in the cases "Matuzalem"⁷⁴ and "De Sanctis"⁷⁵ however deviate – partly in a fundamental manner – from the respective rules, whereas it has to be criticized particularly how the court conducted the respective calculations of damage claims.⁷⁶

⁶⁸ U. Streiff/A. von Kaenel, *Arbeitsvertrag, Praxiskommentar zu Art. 319-362 OR*, Zürich/Basel/Genf, Schulthess, 2012, art. 337c CO, n 2.

⁶⁹ Art. 337c para. 2 CO.

⁷⁰ Art. 337c para. 3 CO.

⁷¹ Art. 337d para. 1 CO.

⁷² Art. 337d para. 2 CO.

⁷³ Art. 337d para. 1 *in fine* CO.

⁷⁴ Shaktar Donetsk v/ Matuzalem Francelino da Silva & Real Zaragoza SAD & FIFA TAS 2008/A/1519, TAS 2008/A/1520.

⁷⁵ Udinese Calcio S.p.A. v/ Morgan de Sanctis & Sevilla FC SAD TAS 2010/A/2145, TAS 2010/A/2146, TAS 2010/A/2147.

⁷⁶ See L. W. Valloni/B. Wicki, *Compensation in case of breach of contract according to Swiss law*, in: *European Sports Law and Policy Bulletin*, Brussels, Sports Law and Policy Centre, Issue I-2011, 145 et sqq.

3.2.6.4 Wrongful Termination and Termination at an Inopportune Juncture

Art. 336 et sqq. CO stipulate rules regarding the protection against unlawful dismissals in Swiss labor law. Art. 336 CO contains a non-exhaustive catalogue of facts that are qualified as wrongful reasons for terminations. A termination is wrongful if it infringes the principle of good faith pursuant to art. 2 para. 2 CC. In case of a wrongful termination, the employee has no right to reemployment.⁷⁷ The party affected by the wrongful termination has a right to compensation though. The amount is determined by the judge, who has to consider all circumstances of the case at hand. However, such compensation may not exceed the amount of six (art. 336a para. 2 CO) respectively two monthly (art. 336a para. 3 CO) salaries.⁷⁸

The wrongful termination has to be differentiated from the termination at an inopportune juncture. The latter refers to cases where the termination took place during a barred period as stated in art. 336c para. 1 CO and art. 336d para. 1 CO (for example during mandatory military service or during absence of work due to illness or accident). Any notice of termination given during the barred periods is void by law.⁷⁹

3.2.7 Disciplinary Measures and Sanctions

If an athlete violates directives or orders, the employer can – without further ado – pronounce disciplinary measures like, for example, warnings or reprimands.⁸⁰ If the athlete refuses to work at all without being able to give legal justifications, the employer can stop paying the salary. The employee is obliged to perform in advance, which means that the salary payment is only due after the work performance.⁸¹ Salary cuts because of insufficient performances of the player are yet not allowed. Occasionally, this leads to delimitation problems. In the field of top-level sport this problem, however, is usually settled by the implementation of performance-related components (premiums) into the salary of athletes.⁸²

If disciplinary measures go beyond reprimands or warnings (for example contractual penalties), they have to be set forth in the company rules or agreed upon in the athlete's employment contract. The latter option is only admissible, if the contractual penalty has a penal character but not, if its motive is to make up for any economic disadvantages.⁸³ If a player causes his club any loss or damage by

⁷⁷ See F. Emmel, *Handkommentar zum Schweizer Privatrecht*, Zürich/Basel/Genf, Schulthess, 2012, art. 326 CO, n 2.

⁷⁸ Art. 336a para. 2 CO.

⁷⁹ Art. 336c para. 2 CO.

⁸⁰ See C. Jenny, *Arbeitsverträge von Sportlern*, in: O. Arter (ed.), *Sport und Recht*, Bern, Stämpfli, 2005, 186.

⁸¹ T. Geiser/R. Müller, *Arbeitsrecht in der Schweiz*, Bern, Stämpfli, 2012, n 420.

⁸² See R. E. Aebi-Müller/M. Rüfenacht, *Die Arbeits- und Treuepflicht des Sportlers: Welche Pflichten treffen den angestellten Sportler?*, in: O. Arter/M. Baddeley (ed.), *Sport und Recht*, Bern, Stämpfli, 2007, 135 et sqq.

⁸³ See R. E. Aebi-Müller/M. Rüfenacht, *Die Arbeits- und Treuepflicht des Sportlers: Welche*

means of his behavior, a respective damage has to be compensated by the employee's liability stated in art. 321e CO.

As sanction in terms of an *ultima ratio*, one can consider the player's dismissal with immediate effect. This implies of course that the requirements of art. 337 para. 1 CO have to be fulfilled and it contains the respective risks of compensation (see chapter 3.2.6.2. and 3.2.6.3.).

Finally, one has to mention those sanctions that a federation pronounces based on respective regulations. Such sanctions have a certain proximity to sanctions of an association.⁸⁴ They especially have to accommodate the principle of legality and the principle of proportionality. With regard to the latter principle and to Swiss football, one has to not least consider the SFV's monopoly and the consequences on the players that are connected therewith.⁸⁵

The topic disciplinary measures is dealt with in the art. 38 et sqq. and in appendix 6 of the Standard Employment Contract for Non-Amateur players of clubs of the SFV. From a dogmatic legal standpoint, these sanctions are contractual penalties in terms of the art. 160 et sqq. CO.⁸⁶

3.3 Athletes' agreements

Athletes' agreements are bilateral contracts that are pre-formulated by a sports club or a sports association. Athletes' agreements are being qualified as innominate contracts.⁸⁷ According to Swiss legal conception, innominate contracts are contracts that are neither specifically regulated in the special part of the CO nor in special laws.⁸⁸ The qualification as innominate contract leads to the fact that special rules for the interpretation of the contract apply, if a dispute between the parties occurs.⁸⁹

Athletes' agreements are characterized not least by the fact that an athlete is normally forced to adopt the predetermined agreement completely without having room to negotiate its terms. This may be true at least for professional athletes who practice a sport that is *de facto* dominated by a monopolistic sports organization.⁹⁰⁻⁹¹

Pflichten treffen den angestellten Sportler?, in: O. Arter/M. Baddeley (ed.), *Sport und Recht*, Bern, Stämpfli, 2007, 136 et sqq.

⁸⁴ See J. Kleiner, *Der Spielervertrag im Berufsfussball*, Zürich/Basel/Genf, Schulthess, 2013, 150.

⁸⁵ See J. Kleiner, *Der Spielervertrag im Berufsfussball*, Zürich/Basel/Genf, Schulthess, 2013, 151 et sqq.

⁸⁶ See J. Kleiner, *Der Spielervertrag im Berufsfussball*, Zürich/Basel/Genf, Schulthess, 2013, footnote 2732.

⁸⁷ See D. Thaler, *Athletenvereinbarungen und Athletenerklärungen*, in: O. Arter/M. Baddeley (ed.), *Sport und Recht*, Bern, Stämpfli, 2007, 30 et sqq.

⁸⁸ See M. Amstutz/A. Morin/W. R. Schluëpp, *Basler Kommentar zum Obligationenrecht*, Basel, Helbing Lichtenhahn, 2011, Einl. vor. art. 184 et sqq., n 5.

⁸⁹ See M. Amstutz/A. Morin/W. R. Schluëpp, *Basler Kommentar zum Obligationenrecht*, Basel, Helbing Lichtenhahn, 2011, Einl. vor. art. 184 et sqq., n 13 et sqq.

⁹⁰ I.e. especially the national umbrella organizations for sports.

⁹¹ See D. Thaler, *Athletenvereinbarungen und Athletenerklärungen*, in: O. Arter/M. Baddeley (ed.), *Sport und Recht*, Bern, Stämpfli, 2007, 30 et sqq.

This characteristic leads to the fact that there is an imbalance between athletes and sports associations regarding the negotiating positions, generally in favor of the association, which is thus able to put its own interests in front of the athlete's interests. This imbalance can – at least theoretically – be adjusted by means of the athlete's protection of privacy⁹² and by the constitutionally guaranteed principle of economic freedom which also includes the freedom to choose an occupation.⁹³ If an association has a monopoly, its conduct has to be analyzed in the perspective of antitrust law as well.⁹⁴

With regards to content, athletes' agreements differ depending on the circumstances. As a general rule though, they contain the athlete's duty to take part in squad sessions as well as training camps and training sessions. Another subject matter may be the athlete's participation in competitions. Furthermore, advertising restrictions and utilization rights to the athlete's name and image can be regulated. In return, the association obliges itself to boost the athlete's development as a sportsman by ensuring an appropriate practice infrastructure and sport scientific coaching. In certain circumstances, the athletes' agreement regulates the athlete's financial compensation too.⁹⁵

3.4 Athletes' Declarations

Athletes' declarations are qualified as so-called innominate contracts (see chapter 3.3).⁹⁶ In many cases, they are described as playing permission or license too, because the submission by the athlete and the acceptance by the responsible association or organizer is a prerequisite for the participation in a competition.⁹⁷ The athletes' declaration differs from the athletes' agreement insofar, as the declaration is signed by the athlete only, who submits the document to the association as requirement for the participation in a competition.⁹⁸ In the majority of cases, the athlete – by filing the athletes' declaration – submits himself to the competition rules that are applicable to a competition.

In practice, athletes' declarations have also an important function in connection with the regulation of liability. As a general rule, these declarations contain a disclaimer in favor of the association and the competition's organizer

⁹² Art. 27 et sqq. CC.

⁹³ Art. 27 of the Federal Constitution of the Swiss Confederation.

⁹⁴ See L. W. Valloni/T. Pachmann, *Sports Law in Switzerland*, Alphen van den Rijn, Wolters Kluwer, 2014, n 225.

⁹⁵ See L. W. Valloni/T. Pachmann, *Sports Law in Switzerland*, Alphen aan den Rijn, Wolters Kluwer, 2014, n 222.

⁹⁶ See D. Thaler, *Athletenvereinbarungen und Athletenerklärungen*, in: O. Arter/M. Baddeley (ed.), *Sport und Recht*, Bern, Stämpfli, 2007, 31; for an example see athletes-declaration for the Stockholm Half Marathon, <http://www.stockhorn-halbmarathon.ch/index.php/informationen-zum-lauf/athletenerklaerung>, last visited on the 16th of April 2014.

⁹⁷ See L. W. Valloni/T. Pachmann, *Sportrecht in a nutshell*, Zürich/St. Gallen, Dike, 2012, 74.

⁹⁸ See D. Thaler, *Athletenvereinbarungen und Athletenerklärungen*, in: O. Arter/M. Baddeley (ed.), *Sport und Recht*, Bern, Stämpfli, 2007, 31.

respectively and serve for the clarification and delimitation of the liability sphere of the parties.⁹⁹

Yet, no athletes' declaration is given if the athlete solely submits a declaration to clarify his position as a member vis-à-vis his sports club or -association and therefore no additional rights and obligations arise between the parties involved. In such a case (which is rather seldom), only a relationship governed by association law (in the sense of a membership) between the athlete and the sports club is being established and the rules of art. 66 et sqq. CC will apply to this legal relationship.¹⁰⁰

4. *Doping issues*

There are many statutory sources to fight doping in Switzerland. On the level of international law, for Switzerland, on January 1st 1993, the Anti-Doping Convention¹⁰¹ that was concluded by member states of the Council of Europe and other contractual states entered into force. Since March 1st 2008, Switzerland has been bound by the International Agreement of October 19th 2005 against Doping in Sports.¹⁰² Furthermore, art. 68 para. 1 BV postulates the encouragement of sports by the Swiss Confederation. Based on this constitutional mandate, the Federal Act on Sports (SpoFöG) and the respective ordinances contain provisions that define measures against doping.¹⁰³ For example, people get punished with prison sentences of up to three years¹⁰⁴ or fines, if they produce, purchase, import, export, pass, arrange, distribute, prescribe, put on the market, dispense or own mediums for doping purposes or apply respective methods on third persons.¹⁰⁵

From an institutional perspective, the World Anti-Doping Agency (WADA) has to be mentioned. The WADA is a foundation under Swiss law according to art. 80 et sqq. CC with its registered office in Lausanne. WADA's purpose is – among other things – “to promote and coordinate at international level the fight against doping in sport in all its forms [...]”.¹⁰⁶ The most important instrument to achieve this goal is the WADA Anti-Doping Code, which was revised recently and whose new version comes into effect in 2015.¹⁰⁷ On a national level, the Foundation Antidoping Switzerland has to be mentioned. It is a foundation according to Swiss law too, with its registered office in Ittingen and which describes itself as “the

⁹⁹ See D. Thaler, *Athletenvereinbarungen und Athletenerklärungen*, in: O. Arter/M. Baddeley (ed.), *Sport und Recht*, Bern, Stämpfli, 2007, 65 et sqq.

¹⁰⁰ See D. Thaler, *Athletenvereinbarungen und Athletenerklärungen*, in: O. Arter/M. Baddeley (ed.), *Sport und Recht*, Bern, Stämpfli, 2007, 32.

¹⁰¹ SR 0.812.122.1.

¹⁰² SR 0.812.122.2.

¹⁰³ Art. 19 et sqq. SpoFöG.

¹⁰⁴ Or 5 years respectively and a fine in severe cases, see art. 22 para. 2 and 3 SpoFöG.

¹⁰⁵ Art. 22 para. 1 SpoFöG.

¹⁰⁶ Art. 4 para. 1 WADA Statutes.

¹⁰⁷ See www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/The-Code/Code-Review/Code-Version-4-0/, last visited on the 16th of April 2014.

independent competence center for the fight against doping in Switzerland”.¹⁰⁸ The most important working basis for Foundation Antidoping Switzerland is the Doping-Statute 2009 that was issued by Swiss Olympic to implement the WADA Anti-Doping Code.

The sanctioning of doping abuse under Swiss private law is primarily based on the Doping-Statute 2009, whereas the art. 2 and 10 are particularly relevant.¹⁰⁹ It has to be mentioned as a distinctive feature that – contrary to regulations within associations – self-doping is not punishable under national legislation. The emphasis rather lies on those persons who assist in doping violations.¹¹⁰ This becomes, *inter alia*, apparent from art. 22 para. 4 SpoFöG, which stipulates that the offender remains unpunished if the production, purchase, import, export, passing or owning happens exclusively for *purposes of own consumption*.

In the Standard Employment Contract for Non-Amateur Players of Clubs of the SFV, doping issues are dealt with in appendixes 7 and 9, whereas, among other things, a ban on the use of doping substances is set forth.

5. Transfer of players

5.1 Transfer rules

The registration periods, which have to be determined by the relevant association pursuant to art. 6 FIFA Regulations on the Status and Transfer of Players, are regulated by the SFV in art. 144 (for amateurs) and 145 (for non-amateurs) of its Competition Regulation. In addition, the art. 150 et sqq. of the Competition Regulation stipulate the requirements for definitive national transfers and the art. 152 et sqq. Competition Regulation stipulate the requirements for temporary transfers. In this context, the Regulation on the Status of Non-Amateurs of the SFV is also relevant. With respect to the topic of contractual stability, its art. 4 refers to the FIFA Regulations on the Status and Transfer of Players, at least as far as the Regulation on the Status of Non-Amateurs of the SFV or the Standard Employment Contract for Non-Amateur Players of Clubs of the SFV do not allow for differing provisions (see also chapter 3.2.1).

5.2 Labor law aspects

The Agreement on the Free Movement of Persons between Switzerland and the European Union (EU) that entered into force on the 1st of June 2002 and was

¹⁰⁸ See www.antidoping.ch/general/about_us/, last visited on the 16th of April 2014.

¹⁰⁹ See Marco Steiner, *Doping – Privatrechtliche Erfassung und Sanktionierung in der Schweiz*, in: O. Arter/Jan Kleiner/M. Baddaley (ed.), *Sportrecht*, Bern, Stämpfli, 2013, 430.

¹¹⁰ See Jan Kleiner/Michele Bernasconi, *Betrügerische Machenschaften rund um Sportveranstaltungen: Eine kurze Einführung*, in: *Anwalts Revue*, Bern, Stämpfli, 2013, 337.

gradually amended since then allows to citizens of Switzerland and the EU to freely choose their residence and place of work within the boundaries of the contractual territory. The principle of non-discrimination that goes along with it has important effects on sport, because athletes are thereby able to freely pursue their professional activity within the EU and Switzerland. In this context, courts on national level have already decided several times¹¹¹ that restrictions regarding the permitted number of foreign athletes at competitions or in teams in general violate the principle of non-discrimination and are therefore unlawful.¹¹² Whether the approval by the Swiss people of the popular initiative “Against Mass Immigration” on the 9th of February 2014 will have any effects on those freedoms, cannot be said until the concrete implementation of the initiative is known.

Foreign players need an employment and a residence permit (the latter is also necessary for players, who are residents of an EU-state), for entering into an employment relationship with a Swiss football club.¹¹³ In its art. 33 para. 2, the Standard Employment Contract for Non-Amateur Players of Clubs of the SFV stipulates that the club – after the signing of an employment contract – has to initiate the necessary steps in order to obtain the required employment and residence permits. If the respective permits are being denied, the contract shall terminate automatically and with immediate effect. Thereby, the SFV goes even further than Swiss case law, which does not make the validity of an employment contract with a foreign employee dependent on the possession or the availability of an employment permit.¹¹⁴

5.3 *Players' agents*

According to Swiss legal understanding, the mere placement of an athlete may generally be assessed according to the rules of the brokerage contract.¹¹⁵⁻¹¹⁶ Further, the work of a players' agent is governed by the Federal Act on Employment Services (AVG) and the respective ordinances, if the players' agent works in this area on a regular basis and against the payment of a fee.¹¹⁷ This leads to the fact that a

¹¹¹ Decision Nr. S-0395/II/2003 of the Appellationshof of the Canton of Berne, II. Zivilkammer, 15th of November 2003 “Basel Magic vs. Schweizerischer Unihockey Verband” and Decision of the Gerichtskreis Bern Laupen, 13th of June 2008 “CEP Cortaillod vs. Swiss Athletics”.

¹¹² See L. W. Valloni/T. Pachmann, *Sports Law in Switzerland*, Alphen aan den Rijn, Wolters Kluwer, 2014, n 304 et sqq.

¹¹³ See J. Kleiner, *Der Spielervertrag im Berufsfussball*, Zürich/Basel/Genf, Schulthess, 2013, 487.

¹¹⁴ This is at least true, if the parties did not make the conclusion of the contract dependent on the issuance of the work permit (BGer 4C.27/2004, E. 3.2.1) or there is no predominant interest in the issuance of a permit (BGE 122 III 110, E. 4.e).

¹¹⁵ Art. 412 et sqq. CO.

¹¹⁶ See Urs Scherrer, *Rechtliche Grundlagen des Sportler-Managements und der Sportler-Vermittlung*, in: O. Arter/Jan Kleiner/M. Baddeley (ed.), *Sportrecht*, Bern, Stämpfli, 2013, 198 with additional information.

¹¹⁷ See Urs Scherrer, *Rechtliche Grundlagen des Sportler-Managements und der Sportler-Vermittlung*, in: O. Arter/Jan Kleiner/M. Baddeley (ed.), *Sportrecht*, Bern, Stämpfli, 2013, 201.

players' agent under certain circumstances needs an operating permit of the cantonal labor authorities for his profession.¹¹⁸ If, in addition, work is placed in foreign countries or from foreign countries on a regular basis, the players' agent needs a permit from the State Secretariat of Economic Affairs in addition to the cantonal operating permit.¹¹⁹ Further, the AVG imposes special duties on the agent for the placement. The AVG defines the mandatory minimal content of the placement contract and specifies that the commission must not exceed 5% of the placed employee's gross yearly salary.

Based on FIFA's Players' Agents Regulation and on the art. 78 et sqq. of the statutes of the SFV, the SFV issued an own players' agents regulation. The regulation governs the issuance of the SFV's players' agents license, the activity of players' agents as well as the players' rights and obligations in this context.¹²⁰ Interested parties in a license have to submit a written application and later on, have to pass a written exam.¹²¹ Further, the players' agent has to sign a professional codex after passing successfully the exam and submit it to the SFV.¹²² The professional codex states that the TAS has jurisdiction over all disputes on civil matters between the players' agent and a club or between a player and another players' agent, under the exclusion of the jurisdiction of ordinary courts.¹²³ Another condition is the existence of a professional liability insurance within the meaning of art. 9 of the Players' Agent Regulation of the FIFA.¹²⁴ The FIFA is planning to change the system radically and to leave the supervision over the players' agents to the associations or leagues.

6. Social security principles

6.1 Illness, injuries and invalidity

Art. 324a CO provides that where the employee is prevented from working by personal circumstances for which he is not at fault, the employer must pay him his salary. This provision is a relatively compulsory and thus cannot be modified to the disadvantage of the employee.¹²⁵ The topics illness and injury are of course of great importance in the field of professional sport. The SFV regulates these aspects in its Standard Employment Contract for Non-Amateur Players of Clubs of the SFV with two provisions: art. 22 regarding illness and art. 23 for accidents.

In the case of an illness, it is agreed in the Standard Employment Contract

¹¹⁸ Art. 2 para. 1 AVG.

¹¹⁹ Art. 2 para. 3 AVG.

¹²⁰ Art. 1 para. 1 Players' Agents Regulation of the SFV.

¹²¹ Art. 5 et sqq. Players' Agents Regulation of the SFV and art. 9 et sqq. Players' Agents Regulation of the SFV.

¹²² Art. 15 lit. b Players' Agents Regulation of the SFV.

¹²³ Art. 15 lit. c Players' Agents Regulation of the SFV.

¹²⁴ Art. 15 lit. a Players' Agents Regulation of the SFV.

¹²⁵ Art. 362 CO.

for Non-Amateur Players of Clubs of the SFV whether the statutory rules according to art. 324a CO should be applicable (i.e. obligation to pay the salary to the employee during at least 3 weeks) or whether the wage loss should be covered by a collective wage loss insurance or a collective health insurance.¹²⁶

If the player has an accident and is not at fault, the player is insured within the framework of the Federal Act on Accident Insurance. However, the employer may have to perform complementary payments in this case according to art. 324b CO if the conditions are met, i.e. in particular when the insurance benefits paid out represent less than 4/5 of the wage loss. The employer can decide to take out additional insurances in favor of the employee to cover this risk.

Art. 25 of the Standard Employment Contract for Non-Amateur Players of Clubs of the SFV clarifies that players are subject to the compulsory Swiss retirement provision according to the Federal Act on the Old-age, Survivors' and Invalidity Insurance (BVG). This is at least true if the player is older than 17 and earns a yearly wage of more than CHF 21'060.¹²⁷ If this is not the case the player has to consider a private insurance. The Swiss invalidity insurance (IV), to which the working population in Switzerland aged 18 and more in general is liable to contribute, offers the primary protection against the financial consequences of invalidity.¹²⁸

6.2 Unemployment insurance

The financial consequences of unemployment are covered in Switzerland by the unemployment insurance (ALV). This insurance is a mandatory social insurance to which employees in Switzerland aged 18 or more in general are liable to contribute.¹²⁹

6.3 Retirement provision

The retirement provision in Switzerland is based on a three pillars principle. The first pillar is the old-age and survivors' insurance (AHV). Employees in Switzerland are liable to contribute for it when they reach the age of 18.¹³⁰ The AHV's purpose is to cover basic costs of living in the old-age. The BVG is the second pillar and it aims to preserve the current standard of living. In general, the employee is liable to contribute to the occupational pension plan for retirement benefits when he reaches the age of 25 and earns a yearly minimal wage of CHF 21'060.¹³¹ The third pillar is divided in pillar 3a (restricted private pension plan for persons earning an income, tax-privileged) and 3b (free / unrestricted pension plan for everyone, less tax

¹²⁶ Art.22 of the Standard Employment Contract for Non-Amateur Players of Clubs of the SFV.

¹²⁷ Art. 2 para. 1 BVG.

¹²⁸ Art. 2 IVG in connection with art. 3 para. 1 and 2 lit. a of the Federal Act on Old-age and Survivors' Insurance (AHVG).

¹²⁹ Art. 2 para. 1 lit. a AVIG in connection with art. 3 para. 1 and 2 lit. a AHVG.

¹³⁰ Art. 3 para. 1 and 2 lit. a AHVG.

¹³¹ Art. 7 para. 1 BVG.

advantages than for pillar 3a). It is a form of voluntary private pension plan – so-called individual saving – and aims the coverage of gaps in the first and second pillars resp. to preserve the current standard of living or even to increase it.¹³²

6.4 *Insolvency of clubs and protection of players*

If insolvency proceedings are opened over an employer, the Federal Act on Debt Enforcement and Bankruptcy (SchKG) provides a privileged claim for the employee. Employees' claims arising out of the employment relationship which did not incur or did become due prior to six months before the bankruptcy ruling are treated in a privileged way. However, only claims up to the amount of the maximum income insured according to the compulsory federal accident insurance (i.e. max. CHF 126'000) are covered by this provision.¹³³ A crucial condition for this privileged treatment is that there was a subordinated employment relationship between the employee and the employer.¹³⁴

In the light of the above, most of the sportsmen in Switzerland should enjoy the claim privilege of art. 219 para. 4 lit. a SchKG in the case where insolvency proceedings are opened over their employer. However, one opinion among the legal scholars argues that athletes with high salaries, who moreover benefit from additional premiums and supplementary benefits and who are often well informed about the financial situation of their club (and the impact of their salaries on this said financial situation), should not benefit from this kind of wage protection. This not least because in the event of insolvency, claim losses are inventoried and usually the "normal earners" in a club have to renounce to a part of their claims.¹³⁵ Nevertheless, this legal opinion cannot be followed as (i) the (social) concern of protection behind this provision is sufficiently preserved by means of the condition that a subordinated relationship exists¹³⁶ and (ii) that the maximal amount for a privileged claim is limited by law as set out above.

7. *Labor dispute settlement*

7.1 *Mediation*

The Swiss Civil Procedure Code (CPC) provides that litigation shall be preceded by an attempt at conciliation before a conciliation authority.¹³⁷ If all the parties so request, the conciliation proceedings can be replaced by mediation.¹³⁸ The SFL

¹³² See overview in T. Geiser/R. Müller, *Arbeitsrecht in der Schweiz*, Berne, Stämpfli, 2012, S. 377.

¹³³ Art. 219 para. 4 lit. a SchKG.

¹³⁴ BGer 5A_461/2009, E. 2.1.

¹³⁵ See C. Jenny, *Arbeitsverträge von Sportlern*, in: O. Arter (ed.), *Sport und Recht*, Bern, Stämpfli, 2005, 191 et seqq.

¹³⁶ See BGE 118 III 46, E. 2.

¹³⁷ Art. 197 CPC.

¹³⁸ Art. 213 et seqq. CPC.

offers its own conciliation proceeding, which is however unfortunately barely regulated.¹³⁹ Pursuant to art. 40 para. 1 lit. b of the Standard Employment Contract for Non-Amateur Players of Clubs of the SFV, the players are required to undergo this mediation proceedings and disciplinary actions can be taken against them if they not do so, provided that no other legal commission¹⁴⁰ has jurisdiction over the dispute at stake.¹⁴¹ JAN KLEINER expressed doubts regarding the binding character of this obligation – even in view of the principle that the internal association appeal system has to be fully used before a state court or an arbitration tribunal can be called (see chapter 7.3). He argues that the conciliation commission of the SFL cannot issue any binding decisions.¹⁴² However, it might be taken as common sense that the said conciliation proceeding is not very useful, as in most of the cases, the parties will not be able to conclude a settlement and it is connected with an unnecessary loss of time.

7.2 Arbitration tribunal

Art. 354 et sqq. CPC resp. art. 176 et sqq. PILA in international disputes indicate whether a dispute between a player and a club can be submitted to an arbitration tribunal instead of a state court. In international disputes, the arbitrability of a dispute between sportsmen and sport clubs in general will be affirmed, as the PILA in this respect only requires a pecuniary dispute.¹⁴³ In cases where the CPC is applicable, the arbitrability of a dispute is regulated differently, i.e. that the parties must have the right to freely dispose over the claim at stake.¹⁴⁴ This condition regularly will not be met in labor related disputes, as they often concern claims which are based on compulsory provisions and the parties therefore are not allowed to dispose over them freely.¹⁴⁵

If the parties decide to settle a dispute before an arbitration tribunal instead of the state courts, they have to conclude an arbitration clause. In professional football, as it is very common in professional sports, the contracts with the athletes usually contain an arbitration clause.¹⁴⁶ The Standard Employment Contract for Non-Amateur Players of Clubs of the SFV (art. 40) as well as most of the regulations of national and international sport associations do provide respective provisions.¹⁴⁷ However, it has to be assessed in every individual case whether these clauses

¹³⁹ See J. Kleiner, *Der Spielervertrag im Berufsfussball*, Zürich/Basel/Genf, Schulthess, 2013, 359.

¹⁴⁰ As of today, the authors are not aware of the existence of any respective commissions.

¹⁴¹ Art. 6 para. 1 of the Regulation on the Status of Non-Amateurs of the SFV refers to this rule and requires from the departments of the SFV to appoint a conciliation authority for employment related disputes between clubs and their non-amateurs.

¹⁴² See J. Kleiner, *Der Spielervertrag im Berufsfussball*, Zürich/Basel/Genf, Schulthess, 2013, 362 et seqq.

¹⁴³ Art. 177 para.1 PILA.

¹⁴⁴ Art. 354 CPC.

¹⁴⁵ See J. Kleiner, *Der Spielervertrag im Berufsfussball*, Zürich/Basel/Genf, Schulthess, 2013, 211.

¹⁴⁶ See J. Kleiner, *Der Spielervertrag im Berufsfussball*, Zürich/Basel/Genf, Schulthess, 2013, 215.

¹⁴⁷ See art. 89 of the statutes of the SFV or art. 7 of the statutes of the SFL.

comply with the formal and material requirements set forth in the CPC and the PILA.

If a party wants to appeal the award of an arbitration tribunal before the Swiss Federal Supreme Court, it has to be determined first whether the matter at stake is a national or international dispute. Pursuant to art. 393 CPC, arbitration awards in national disputes may be contested on the following grounds (i) the single arbitrator was appointed or the arbitration tribunal composed in an irregular manner, (ii) the arbitration tribunal wrongly declared itself to have or not to have jurisdiction, (iii) the arbitration tribunal decided issues that were not submitted to it or failed to decide on a prayer for relief, (iv) the principles of equal treatment of the parties or the right to be heard were violated, (v) the award is arbitrary in its result because it is based on findings that are obviously contrary to the facts as stated in the case files or because it constitutes an obvious violation of law or equity or (vi) the costs and compensation fixed by the arbitral tribunal are obviously excessive. The scope of the contestation grounds according to CPC is distinctly larger than in the PILA. Pursuant to art. 190 PILA, the arbitration award may only be contested (i) if the sole arbitrator was not properly appointed or if the arbitration tribunal was not properly constituted, (ii) if the arbitration tribunal wrongly accepted or declined jurisdiction, (iii) if the arbitration tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim, (iv) if the principle of equal treatment of the parties or the right of the parties to be heard was violated, (v) if the award is incompatible with public policy.

In timely urgent cases, where there is an irrevocable damage and a positive prognosis for the main proceedings, it is also possible to request before the Swiss Federal Supreme Court (i) suspensory effect of the appeal and/or (ii) provisional measures.¹⁴⁸ In particular, this can be necessary and extremely helpful in cases concerning doping allegations.¹⁴⁹

7.3 State courts

According to the Swiss jurisprudence, a member of an association is only allowed to file a claim with the state courts once he made unsuccessfully use of all legal remedies provided by the respective association. Only internal decisions of the delegated assembly, which cannot be internally appealed, can be directly contested before the state courts.¹⁵⁰

In general, the claims at stake in the proceedings between clubs and their players will be qualified as employment disputes. In such cases and if the state courts are seized, the CPC provides a protection of the employees with a special

¹⁴⁸ L. W. Valloni/T. Pachmann, *Sports Law in Switzerland*, Alphen aan den Rijn, Wolters Kluwer, 2014, n 431.

¹⁴⁹ See the case of the speed skater Claudia Pechstein, Decision of the Swiss Federal Supreme Court dated 7th December 2009 in the case number 4A_612/2009.

¹⁵⁰ BGE 132 III 503, E. 3.2.

jurisdiction (at the domicile or registered office of the defendant or where the employee normally carries out his or her work¹⁵¹) and the employee cannot waive this jurisdiction before the emergence of the dispute. In addition, no court fees are charged when the value at dispute is under CHF 30'000.¹⁵² The appeal of court decisions in employment disputes does follow any special rules which would be of relevance for the present contribution.

7.4 Associations' internal institutions

In conflicts between a club of the SFL and its players, there is an obligation to submit the dispute in first instance before the chamber of conciliation of the SFL resp. before the competent legal commission (see Chapter 7.1).

Further, art. 7 para. 1 of the Regulation on the Status of Non-Amateurs provide that disputes between clubs and non-amateurs regarding compensation due to the breach of the provisions on the protection of the contractual stability have to be settled before the control and disciplinary commission of the SFV. Based on the systematic of the Regulation on the Status of Non-Amateurs, it can be said that the control and disciplinary commission of the SFV in such a case has priority over the conciliation commission of the SFL.¹⁵³ The control and disciplinary commission can also – provided that it is competent – decide on compensation and disciplinary sanctions according to the statutes of the SFV because of a breach of the provisions on the protection of the contractual stability.¹⁵⁴

Decisions of the control and disciplinary commission on compensation and disciplinary sanctions because of a breach of the provisions on the protection of the contractual stability can be appealed before the appeal court of the SFV according to the disciplinary regulations of the SFV.¹⁵⁵ The proceedings before the appeal court are governed by the disciplinary regulations of the SFV.¹⁵⁶

¹⁵¹ Art. 34 CPC.

¹⁵² Art. 113 para. 2 lit. d CPC.

¹⁵³ See J. Kleiner, *Der Spielervertrag im Berufsfussball*, Zürich/Basel/Genf, Schulthess, 2013, 343.

¹⁵⁴ Art. 7 of the Regulation on the Status of Non-Amateurs.

¹⁵⁵ Art. 16 para. 1 of the Regulation on the Status of Non-Amateurs.

¹⁵⁶ Art. 16 para. 2 of the Regulation on the Status of Non-Amateurs.

**EMPLOYMENT RELATIONSHIPS AT NATIONAL LEVEL:
REPUBLIC OF TURKEY**

by *Anil Gürsoy Artan* and *Murat Artan**

SUMMARY: Introduction – 1. Employment regulation and football structures – 2. Individual employment relations in professional football – 3. Medical and doping issues – 4. Transfer of players – 5. Social security principles – 6. Labor dispute settlement – Conclusions

Abstract:

This text is dedicated to employment relationship between the players and clubs. Since football is the sole professional sport and the most developed and popular sport in Turkey, we'll focus mainly on football but also give some brief information about amateur sports.

Introduction

According to Art. 4/g of the Labour Code, players are exempt from this Code and therefore their employment relations are not governed by labour law. The Code of Obligations is applicable to players and their employment relationship. However we are of the opinion that Turkey urgently needs a special law regarding sports labour. The sports federations individually regulate their own employment relations applicable to their affiliates. However, since all sports federations have not developed equally, the ones who did not regulate the employment status of players are more numerous than the ones that did regulate it.

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1. Employment regulation and football structures

1.1 Sources of law and approaches

Turkish Labour Code, Law No. 4857, entered into force on 22 May 2003, Art. 4/g:

“Article 4 – The Labour Code is not applicable to the following jobs and employment relationship;

g) Players”.

The employment relationship between the players and clubs is subject to Code of Obligations. In Article 313 of the Code of Obligations, an employment contract is defined as:

“An individual employment contract is a contract whereby the employee is obligated to perform work in the employer’s service for either a fixed or an indefinite period of time, and the employer is obligated to pay wages based either on time periods or on the work performed”.

When it comes to the classification of the legal character of the players’ contracts, academics do not share the same point of view. Some of them argue that since the wages are astronomically high, players are ‘entrepreneurs’; others name it as a quasi labour contract. We are of the opinion that the criterion of being paid an astronomically high wage should not lead us to such a conclusion, especially when we consider how wages vary among players in different sport branches and leagues. The Turkish Supreme Court also defines the contract as an employment contract.¹

1.2 Specific laws on sport and football

Being a social state, the Turkish Constitution gives the duty to govern sports to the State as follows:

“A. Protection of the Youth

Article 58 – The state shall take measures to ensure the training and development of the youth into whose keeping our state, independence, and our Republic are entrusted, in the light of the contemporary science, in line with the principles and reforms of Atatürk, and in opposition to ideas aiming at the destruction of the indivisible integrity of the state with its territory and nation.

The state shall take necessary measures to protect the youth from addiction to alcohol, drug addiction, crime, gambling, and similar vices and ignorance.

B. Development of Sports and Arbitration

Article 59 – The state shall take measures to develop the physical and mental health of Turkish citizen of all ages and encourage the spread of sports

¹The first decision is; 10th Civil Chamber of Supreme Court, 24 January 1974 Docket no. 1974/199, Decision No. 1974/1274.

among masses.

The state shall protect successful athletes”.

By the power and duty given to the State, the State has established a ministry called the “Ministry of Youth and Sports”. Under this ministry, a General Directorate has been established with a law: “Law No 3289 - Law Regarding the Organization and Duties of General Directorate of Sports”. According to this Law, all the sports except football shall be governed by this law.

In principle all the sports federations are under the authority of the above mentioned General Directorate. Only the sports federations which have an “independent” or “autonomous” nature are under the supervision of General Directorate. Therefore the independence of these federations is doubtful. There are two important issues which put sports federations’ autonomy in question.

All the federations except the Turkish Football Federation are supported financially by the General Directorate. Since the legislation obliges the State to audit all its expenses, the federations and their budgets are subject to auditing.

The second issue is that the representatives of the General Directorate are direct members of the sports federations’ general assemblies. They have the equal rights with other members of the general assembly which means they have right to vote for presidency.

Being in need of financial support and having representatives from General Directorate at the general assembly directly affects the decision taking mechanisms of the sports federations therefore we believe that they are not fully independent or autonomous.

The only exception among sports federations is the Turkish Football Federation. Football has its own law: “Law No 5894 Law on Establishment and Duties of the Turkish Football Federation”. This law gives the autonomy of football to the Federation and the Turkish Football Federation is the sole authority in the administration of football activity both amateur and professional. The General Directorate of Sports has no power over TFF.

1.3 Football structures

The Turkish Football Federation (TFF) was established and gained its autonomy through a special law. By having a special law, the TFF constitutes one of the rare examples throughout FIFA member associations.

On 17 June 2002, the Turkish Parliament enacted Law No. 3813: “Law of Establishment and Objectives of TFF”. Being a part of Continental Law, the Law regulates the Federation and function, bodies, incomes, outcomes, etc. thereof has been enacted in detail. Between 2002 and 2009 several amendments were made to Law no 3813, on 16 May 2009, a legal framework was enacted and this is still in force.

Bodies and Functions

Article 4 having the title ‘Organization’ of Law No. 5894 states that:

- (1) *The organization of the TFF shall be set out in the TFF Statutes.*
- (2) *The organization of the TFF shall be composed of its Head-office and both affiliated domestic and overseas offices. The Head-office of the TFF is in Ankara.*
- (3) *All football organizations in Turkey shall be legally subordinated to the TFF and their respective rights and responsibilities shall be described by the TFF Statutes and regulations.*
- (4) *TFF is a member of both FIFA and UEFA.*
- (5) *The central organization of the TFF shall consist of at least the following organs:*
 - a) *General Assembly*
 - b) *President*
 - c) *Executive Board*
 - ç) *Emergency Committee*
 - d) *Legal committees*
 - e) *Audit Committee*
 - f) *General Secretary*
- (6) *The consultative and administrative units of TFF shall consist of the following bodies:*
 - a) *General Secretariat*
 - b) *Standing and Ad Hoc committees*
- (7) *The members of the TFF organs and committees shall either be appointed or elected in accordance with the TFF Statute.*
- (8) *Elections for all TFF organs shall be held by means of free and independent democratic procedures.*

A. General Assembly²

The General Assembly has only been named in the Law and the principles set out in the Statute. The General Assembly takes place once every year before the 31st July. The electoral General Assembly holds its ordinary meeting once every four years within forty-ûve days from the registration date of the Turkish Football Leagues, at a date which is decided by the Executive Committee.

At the yearly General Assembly meetings, the activity programme and budget of the TFF is approved, the Executive Committee is authorized to make modifications to the budget when necessary, and the Executive Committee and the President are approved.

The General Assembly’s duties are listed under Article 23 of the Statute. The most important duties can be summarized as: to elect the president and the

²The Statutes of Turkish Football Federation Article 21.

Assembly has only been named in the Law and the principles set out executive board members, to establish and amend Statute, authorize the Executive Committee for the purchase and sale of property, to approve the Audit report issued by the Auditing Committee every year etc.

The members of the General Assembly are listed under Article 22 of the Statute. All the Clubs which are competing in the Super League, First League, Second League and Third League have the right to be represented at the General Assembly. However, the representation is not equal; for example, a Super League club is represented by seven delegates, a First League club is represented by two delegates and Second League and Third League clubs are represented by their presidents. Delegates from the Amateur Sports Clubs Federation, past TFF presidents, Professional Footballers' Association, presidents of the disabled federations, etc. are also represented at the General Assembly. In every General Assembly the number of the members varies, however, the estimated list of members is around 290 – 43% of the members are the representatives of the Super League Clubs, 12% of the members are the representatives of the First League Clubs, 12% of the members are the representatives of the Second League, 18% of the members are the representatives of the Third League Clubs, and the remaining 15% of the members are the representatives of the other football stakeholders.

The clubs holds the majority with the percentage of 85%. The football players are represented by 2%, the technical directors represented by 2%, amateur football is represented by 3% and the referees are represented by 3%. These numbers help us to understand how fairly the other stakeholders of football are represented at the General Assembly of their Federation.

B. Presidency³

The term of office for the President is four years. The election of the President is held before the election of the fourteen members of the Executive Committee at the General Assembly.

The most important duties of the president are: to represent the Federation; to chair the executive committee; to propose to the Executive the formation and nominees for the subsidiary committees, the president, the principal and substitute members of the Referees' Committee and the president and members of the Appeals Committee and the president of the Dispute Resolution Chamber etc.

C. Executive Committee⁴

The Executive Committee is composed of fifteen members, including the President of the Federation and fourteen members elected by the General Assembly.

The General Assembly elects an equal number of substitute members.

³ The Statutes of Turkish Football Federation Article 37.

⁴ The Statutes of Turkish Football Federation Article 33.

The term of the Executive Committee is four years.

The most important duties of the executive committee are: to register the football clubs; to classify them into divisions and groups; to determine the names of the leagues; to organize the leagues; to determine the conditions of promotion and relegation; to ratify the result of the matches; to postpone the matches; to adjust the dates; to decide on the matches which are unfinished, fixed and with incidents; to arrange and audit all commercial and financial rights for television and radio; to decide on the applications of clubs, football players, technical managers and coaches, referees, match officials and other personnel working related to football who are not in the jurisdiction of Dispute Resolution Chamber and Disciplinary Committees; to prepare the budget; to appoint the president, the principal and substitute members of the Referee's Committee and the president and members of the Appeals Committee and the president of the Dispute Resolution Chamber proposed by the President etc.

In addition, an Emergency Committee is defined under the Statute to deal with all matters requiring immediate settlement between two Executive Committee meetings. The Emergency Committee consists of the President of TFF, the Vice-Presidents and two Executive Committee members to be appointed by the President. The term of office of the Emergency Committee is limited to that of the Executive Committee. Decisions passed by the Emergency Committee meetings take effect immediately and are approved by the Executive Committee at its next meeting.

D. Auditing Committee⁵

Auditing Committee is composed of five members and five substitute members who have expertise in financial matters and are elected by the General Assembly for the term of four years.

The Auditing Committee audits the financial activities of the Federation, prepared by the Executive Committee and accepted by the General Assembly according to the regulation, on behalf of the General Assembly.

E. Appeals Committee

The Appeals Committee will be explained in detail in section VI *infra*.

F. Referees' Committee⁶

The Referees' Committee is composed of nine members and nine substitute members including a president, from the pool of those referees who have been inactive for at least one year, nominated upon the proposal of the President of Federation and by

⁵ The Statutes of Turkish Football Federation Article 41.

⁶ The Statutes of Turkish Football Federation Article 64.

approval of the Executive Committee. Also persons who did not perform as referees but have experience in sports may be nominated to serve in the Referee's Committee; however, the number of these nominees shall not exceed three.

The Referees' Committee manages the official and friendly matches between football clubs, resolves technical disputes related to the laws of the game, establishes the Provincial and County Referees' Committees, educates and classifies the referees, sets out the conditions for promotion and relegation and performs other duties set forth in the statutes and regulations.

Moreover, the Referees' Committee performs its functions independently. Unless a member resigns or is deemed to have resigned, they may not be replaced.

G. Dispute Resolution Chamber

The Dispute Resolution Chamber will be explained in detail in Section VI - *infra*.

H. Disciplinary Committees

Disciplinary Committees will be explained in details in Section II - *infra*.

I. Standing Committees⁷

The president and the members of the Standing Committees necessary to perform the activities and transactions of the Federation are appointed by the president of the Federation with the approval of the Executive Committee. The Executive Committee may, if necessary, create ad-hoc committees for special duties and for a limited period of time. The Executive Committee appoints its members and approves its terms of reference.

Standing Committees are as follows:

- (a) Referees' Committee
- (b) Committee of Delegates
- (c) Sports Medical Committee
- (d) International Relations Committee
- (e) Committee of Social Responsibility and Fair Play
- (f) Other Standing Committees

J. General Secretariat⁸

The General Secretary is the chief executive of the General Secretariat and is responsible to the Executive Committee. The General Secretary shall be appointed by the Executive Committee upon the proposal of the President of the TFF.

⁷The Statutes of Turkish Football Federation Article 42.

⁸The Statutes of Turkish Football Federation Article 49.

IV. Regulations

With the power and duty given by Law, the TFF's Executive Committee has to set out all the necessary regulations in order to operate the TFF. Today, the TFF has thirty six regulations in force. The names of the most important ones and a brief explanation of some of them are outlined below:

- Football Competition Regulation (August 2013)
- Regulations for the Status and Transfer of Professional Players (June 2010)
- Disciplinary Code (August 2013)
- Regulation Governing the Procedure of the Appeals Committee (April 2008)
- Regulation Governing the Procedure of the Dispute Resolution Chamber (August 2011)
- TFF Club Licensing Manual (December 2012)
- Stadium and Security Committee's Regulation (August 2006)
- Accreditation Regulation (August 2013)
- Regulation Governing the Expenditure of Funds (July 2009)
- Media Regulation (August 2013)
- Kit and Advertisement Regulation (July 2012)
- Anti-Doping Regulation (August 2009)
- Regulation Governing the Registration of Football Clubs (June 2009)
- Amateur Players' License and Transfer Regulation (October 2008)
- Jubilee Regulation of Professional Players (June 2009)
- Regulation for the Technical Coaches' Statute and Working Conditions (June 2009)
- Regulation for the Technical Coaches' Education and Classification (August 2010)
- Referee's Committee Regulation (April 2013)
- Officers' Committee Regulation (August 2010)
- Provincial Representative and Organization Committees Regulation (August 2006)
- Fair Play Regulation (September 1999)
- Medical Crew Regulation (June 2009)
- Player's Agent Regulation (March 2010)
- Football for Everyone Regulation (February 2009)
- Regulation for Friendly Games and Tournaments (December 2008)
- Ethics Committee Regulation (December 2009)
- Regulation of Football Academies (April 2010).

1.3.1 Professionals

As a member of FIFA, the TFF is obligated to harmonise its Regulation for the Status and Transfer of Professional Players in conformity with the FIFA Regulations. The Regulation for the Status and Transfer of Professional Player regulates the status of the players and their employment relationship with the clubs. Every club

and player is subject to this regulation.

The regulation begins with a clear definition of the status of the player. A professional player is defined as:

“Article 3- Professional Players

A professional is a player who has a written contract with a club and is paid more for his footballing activity than the expenses he effectively incurs.”

It can easily be understood that this is a word to word translation of FIFA’s Regulation Article 2.2.

1.3.2 Amateurs

Amateur players are defined more in detail than in FIFA’s regulation:

“Article 4- Amateur Players

(1) The players who are other than the ones defined in Article 3 are accepted as amateur players.

(2) The costs related with a match such as accommodation, insurance, kit and training shall not affect the player’s amateur status.

(3) Amateur players shall not play in the professional league and cup tournaments.

The amateurs are those players who are accepted to be the new generation of professional footballers or those players who are older and may be less talented but play football for fun or health reasons. For the past few years the TFF has been paying more attention to amateur football and has been planning new projects in order to increase the number of licensed amateur players.

1.3.3 Semi-professionals

There is no semi-professional or non-amateur status in Turkey. A player is either a professional or an amateur.

1.4 Discrimination law and equal treatment

There is no specific law that has been dedicated to anti-discrimination. The Constitution Art. 10 states that:

“X. Equality before the law

ARTICLE 10- Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds.

Men and women have equal rights. The State has the obligation to ensure that this equality exists in practice. Measures taken for this purpose shall not be interpreted as contrary to the principle of equality.

Measures to be taken for children, the elderly, disabled people, widows and orphans of martyrs as well as for the invalid and veterans shall not be considered as violation of the principle of equality.

No privilege shall be granted to any individual, family, group or class. State organs and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings”.

Also, Law No 6222: “Law Regarding the Prevention of Violence and Disorderliness in Sport” has an article regarding discrimination as follows:

“Insulting Cheering

Article 14 – (1) Anyone who says something or does any act in or around a sport area which can be understood as an insult by the people who see or hear it, without taking into account whether the words or act are directed towards a specific person, shall be sanctioned, if this act does not require a heavier sanction and without need of a complaint, with a fine which shall not be less than fifteen days of judicial fine.

(2) Anyone who says something or does any act in or around a sport area which discriminates against part of a community by religion, language, race, ethnic root, sex or religious sect shall be sanctioned, if this act does not require a heavier sanction and without need of a complaint, with imprisonment from three months to one year.

As it can be seen, if the content of an insulting act has a discriminatory nature then sanction of a judicial fine turns into imprisonment.

For football, being parallel to UEFA and FIFA Disciplinary Codes, the Disciplinary Code of the TFF has a specific article regarding discrimination and the sanction for the discriminatory act is extremely high.

2. Individual employment relations in professional football

2.1 Essential elements and legal qualification

Since players are not subject to the Labour Code, they are legally classified as an employee by means of the Code of Obligations. Regulation for the Status and Transfer of Professional Player of the TFF does not reveal the legal status of a player.

2.2 The employment contract

The Turkish Football Federation has prepared a standard contract for all professional players.⁹ In order to register a player, his standard contract should have been filled in and signed by both parties: player and club. If any player’s agent is involved, his signature is also needed.

This contract is called a “Professional Player’s Transfer Contract”. If the transfer is a loan then the name changes into “Professional Player’s Temporal¹⁰ Contract”.

⁹ www.tff.org.tr/default.aspx?pageID=128.

¹⁰ The term “loan” is not preferred by TFF because of a very naïve approach; the term “loan” is being

The parties are entitled to add other articles to the contract as an annex to the standard contract.

The Employment Contract is defined under Art. 19 of the said Regulation as follows:

“Article 19 – General Conditions

- (1) Parties are obligated to register the contract they signed to the TFF.*
- (2) A contract shall be signed for a maximum period of five years. Players under the age of 18 may not sign a professional contract for a term longer than three years.*
- (3) The ending date of the contract shall be 31st of May. If official games continue after the ending date of the contract then the contract shall be deemed as extended until the end of the games.*
- (4) The validity of a contract may not be made subject to a successful medical examination and/or the grant of a work permit.*
- (5) Any communication between the parties shall be done via registered mail. Parties shall inform each other and the TFF in the event of a change of address. Otherwise, the notification done at the old address shall be deemed as a proper notification.*
- (6) A club intending to conclude a contract with a professional must inform the player’s current club in writing before entering into negotiations with him. Any party who breaches this provision shall be subject to disciplinary proceedings and the Football Disciplinary Code shall be applied”.*

2.3 Players’ rights and obligations

Article 25 of the said Regulation, on the subject of obligations of the player, states that:

“Any player who signs a contract with a club shall fulfil his obligations other than those stated in the contract which are:

- a) To follow up, complete and ensure the necessary documents and other transactions in order to participate in the matches,*
- b) To participate in courses, lessons or seminars prepared by the club or the TFF,*
- c) In the case of illness or injury, transmit his health and injury reports to his club and the Federation within ten days (any player failing to do so shall not be entitled to claim any rights arising from such illness or injury).*
- d) When the club imposes a fine on the player, he shall appeal against the decision to Dispute Resolution Chamber in thirty days,”*

The players have fewer obligations than the clubs. Sub-paragraphs (c) and (d) are the most important ones.

used for properties in daily life. TFF believes that using the term “loan” for players would classify them as a property and this insults human being. Because a human being cannot be loaned from one to another like a property therefore “temporal” term is being used.

Sub-paragraph (c) came about after a number of serious abuses. In order to have a better contract, football players invented all kinds of methods like leaving one club without giving any notice for the other club's trial training sessions and then returning home if the new club does not wish to sign a contract with him. The first thing that comes to their mind is to lie about their absence, and the most common lie is to state that they were ill. Unfortunately, they have a 'good' relationship with the medical staff and therefore they can obtain a fake sick report easily. In order to avoid this kind of abuse, the TFF gives ten-day period to the player to notify the club and the Federation.

Sub-paragraph (d) limits the time to object to the club's decision on imposing a fine on the player. This sub-article is new in the Regulation. In the previous versions there were no time limits to object to the club's decisions. The players had the right to object to the decision whenever they wanted. This new sub-article quite clearly limits the rights of the player. If the player fails to object to the decision, then the decision becomes final. However, the Dispute Resolution Chamber shall have the right to intervene in the said decisions although the player has forgotten to object, otherwise players might have faced the danger of paying exaggerated and unjustified fines.

2.4 Club's rights and obligations

Article 24 of the said Regulation, on the subject of the Obligation of Clubs, states that:

“Any club which signs contracts with professional players shall fulfil its obligations other than stated in the contracts, which are:

a) In order to safeguard players' health and education, a club shall hire professional technical and medical staff;

b) To maintain all the necessary sporting kit for the players;

c) Any club who wishes to apply internal disciplinary regulations for the upcoming season shall notify the TFF with a copy thereof at least one week prior to the beginning of the season. To submit the internal disciplinary regulations to the players in hand or send it via public notary,

d) In cases where it imposes a fine on any of its players, provide such player and the Federation with a notarized copy of its decision. While doing so, the information about the amount of fine and the reason shall be given and this notification shall be sent within 15 days of the decision of the Executive Committee of the club

f) If the club's Executive Committee decides to exclude a player from the squad because of his misbehaviour, then the club has to appoint at least a coach and a training facility for him. The club should also notify the program to the player via public notary.

g) To prepare necessary documents with the player and submit it to the TFF in the matter of military duty”.

Some of the above given obligations of the clubs are quite rare in European regulations. A brief explanation of the most important sub-articles is outlined below.

Unfortunately, it is very common for Turkish Clubs to impose fines on players without any justified reason. In the past years there have been examples of players not even having any knowledge about this fine or the reason thereof. The first aim of the article is to make sure that the player and the TFF are aware of the fine. The second is to prevent any bad faith by setting a deadline for notification. The document is again requested to be notarized in order to fix the date and prevent those who may falsify previous executive committee documents.

The clubs commonly impose fines with the purpose of deducting the fine from a player's fee. When a player challenges the decision of the club before the Dispute Resolution Chamber or civil court this bad faith of clubs is evaluated by the Chamber or the Judge and said kind of fines are fully annulled.

From the previous versions of the Regulation until today, sub-article (d) has helped football players to reduce abuses of this manner.

Sub-article (e) is also another problem for players. When a player is not content with his club, he may constitute a problem for the whole team. After the failure of several attempts to win him back for the team, then the only way remaining is to exclude him from the squad in order to maintain the order in the team. However, this sanction or precaution could seriously damage the players' professional life and no one has the right to end someone's career in this way. Therefore, the TFF, by forcing Clubs to appoint a coach and a training facility for the excluded player, has tried to reduce the possible damages for the player's professional life.

Sub-article (f) came about because of such grievous experiences. Before this system was recognized the players had no insurance for accidents, injuries etc. More than fifteen years ago, this system worked perfectly, however, in the last few years the clubs began to complain about the high premium amounts. As a first step, the TFF centralized the system and opened a bid for more than 1,000 professional player's insurance premiums. This bidding process really lowered the premium and the Clubs were satisfied by the result. From the season 2006–2007, by a decision of the then Executive Committee, the TFF began to pay for all the premiums and the following Executive Committees did not disturb this tradition.

2.5 *Remuneration*

According to Social Security Law, anyone who works should receive a minimum wage. Therefore all the professional players should be paid minimum wage.¹¹

Under the Labour Code, the minimum remuneration represents an amount calculated from the minimum wage of 352 EUR (in 2014) using a coefficient depending on the nature and complexity of the dependent working activity. However, this rule is not applicable to the players as long as they are self-employed.

¹¹ The minimum wage is determined by the State every year. For 2014 the minimum wage is around • 375.

Under the SFA Directive for registration of professional and non-amateur contracts, as already mentioned, basic elements of the player's contracts include the requirement of a basic monthly remuneration of a professional player being not less than EUR 331.94 (lower than the current minimum wage), and in case of minors, being not less than a minimum wage (352 EUR).

The minimum amount of compensation of the semi-professional (non-amateur) football player's expenses is 33.19 EUR.

2.6 Working time

The working time is not defined under any regulations of the TFF, therefore parties may decide the working time in their contracts. However an article defining the working time is very rare in Turkey.

In principle the players are given permission by their coaches for one week of holiday in the winter break and four or five weeks in the summer.

2.7 *The end of the employment relationship, Termination for just cause and without just cause and its consequences*

If a party of a contract fails to fulfil his liabilities, such as making a payment to the other party, the Code of Obligations gives a clear right to the party to terminate the contract immediately:

"b) Immediate Termination

Article 107 – There is no need for giving an extension period under the circumstances listed below.

...

3. If the debt should have been paid after a certain period of time as it is stated in the contract."

As an exception to the Code of Obligations, termination of a professional player's contract can only be registered if the said termination has been done in conformity with the procedure that has been set out by the regulation of the TFF.

It was inevitable that a procedure for termination would be set; an unstable league would be unacceptable. If the TFF hadn't set a procedure for the termination, the clubs would have never have known their squad for the next game. The relevant articles of the regulation are as follows:

"VI. Termination of the Contract and Consequences Thereof

Article 26 – Termination by Mutual Consent

In order to register the termination of the contract by mutual consent the documents given below shall be submitted to the TFF:

a) Notarized list of authorized signatures of the club representatives

b) Notarized declaration of the player that he/she is willing to terminate the contract with 'the' club containing the signature of the player. This notarized document will be used for the termination of this contract. This notarized declaration of the player shall be issued a maximum of thirty

days before the termination of the contract between the Club and the Player”.

“Article 27 – Club’s Right of Termination

(1) The circumstances listed below constitute just cause for the termination:

- a) Any kind of illness or injury of the player which exceeds six months,*
- b) If the player is banned for at least six months by the Disciplinary Committees*
- c) Serious breach of Article 25¹² by the player*

(2) If the player is in default of his contractual liabilities to the club, and if the club is willing to terminate the contract, then the club should send a notarized warning letter to the player and give him a certain period of time to act appropriate to the contract. If, despite having received the notarized letter, the player does not fulfil his obligations, then the club has the right to terminate the contract in seven days following the end of the given time period”.

“Article 28-Player’s Right of Termination

(1) If the club is in default of paying the player’s fee, and if the player is willing to terminate the contract, then the player should send a notarized warning to the club and give the club thirty days of time to pay his dues. If, despite having received the notarized letter, the club does not fulfil its obligations, then the player has the right to terminate the contract in seven days following the end of the given time period.

(2) If the Club is in default of its other contractual liabilities, and if the player is willing to terminate the contract, then the player should send a notarized warning to the club and give a reasonable time to act appropriate with the contract. If, despite having received the notarized letter, the club does not fulfil his obligations then the player has the right to terminate the contract in seven days following the end of the given time period.

(3) The above mentioned time limits shall not be changed to the detriment of the player.

(4) After receiving the notification set out in paragraph (1), the TFF, shall notify the club at the latest in 7 days via facsimile or any type of communication. The time limits set out in paragraph (1) shall begin from whichever comes first: either the TFF’s notification or the public notary’s notification. Moreover, the TFF shall send the document evidencing the notification date to the player or his attorney.

(5) Any player older than 23 years old 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.

¹² Article 25, regulates the obligation of the Players.

(6) A player may only terminate his contract on this basis in the fifteen days following the last official match of the club with which he is registered”.

“Article 29 – Procedure of Termination

(1) The terminating party shall declare its will with a notarized letter of notice and shall send one copy of the letter to the TFF.

(2) When the TFF receives the termination letter, it shall register it and notify this transaction to the parties.

(3) In case of a termination, a player shall only transfer to a new club if the new club accepts to be liable severally with the player in writing”.

It is quite evident that the regulation has no balance between the club and the player. The previous versions of the regulation were more protective of the player. It is quite naive to expect a player to notify and give thirty days of time to the club and maintain his sporting career in peace. The clubs may fall into a habit of not paying the fees until receiving a notification letter from the player and/or paying it on the twenty-ninth day.

After the thirty-day period ends then the player has the right to terminate the contract within seven days. Seven days is quite a short time in the context of a season, think of a player who has to join a two-day camp programme before an away match, plus one day for the trip, the next day is the match day, the following day is the return journey and he suddenly finds himself on the sixth day, has to check the bank account and only after that can he go to the public notary and send the club a letter of termination.

In the past, only non-payment of salaries was a reason for termination for just cause, however in recent years, non-payment of social security premiums, maltreatment etc also constitute a just cause for termination of the employment contract between players and their clubs.

In cases of termination the balance between the parties of the contract shall be set in this new version of the regulation.

After the TFF receives the letter of termination of a player, the TFF registers the contract as ‘terminated’ and the file forwarded directly to the Dispute Resolution Chamber to decide on whether the termination is with or without just cause. The consequences of terminating a contract without just cause are outlined below:

Article 30 – Sporting Sanctions

(1) In addition to the obligation to pay compensation, sporting sanctions shall also be imposed on any player who is found to be terminating the contract without just cause during the protected period.

(2) If a player terminates his contract without just cause in the above mentioned protected period, a sporting sanction of six months shall be imposed on him/her. In the case of aggravating circumstances, the sporting sanction shall last 12 months. This sporting sanction shall be notified to the player and related clubs. The execution of the sanction shall begin from the first official match to be played after the mid-season break, if the

sanction has been given after the expiry of the football season then the execution shall begin from the following new season's first official match.

(3) A unilateral breach without just cause or sporting just cause after the protected period shall not result in sporting sanctions. Disciplinary measures may, however, be imposed outside the protected period for failure to give notice of termination within fifteen days of the last official match of the season (including national cups) to the club with which the player is registered.

(4) The protected period starts again when, whilst renewing the contract, the duration of the previous contract is extended.

(5) In addition to the obligation to pay compensation, sporting sanctions shall be imposed on any club found to be in breach of contract or found to be inducing a breach of contract during the protected period. It shall be presumed, unless established to the contrary, that any club signing a professional who has terminated his contract without just cause has induced that professional to commit a breach. The club shall be banned from registering any new players, either nationally or internationally, for two registration periods.

(6) Any person (club officials, players' agents, players, etc.) 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.

(7) Sporting sanctions shall be imposed by the Dispute Resolution Chamber if requested. Therefore sporting sanctions shall be requested until the end of transfer period which is followed by the receipt of the notification by the TFF mentioned in Art. 26. This period is a strict time limit.

By foreseeing heavy sporting sanctions the termination of contracts without just cause, or players being induced to terminate their contracts, were attempted to be prevented. However, adopting international transfer rules in the national league might cause problems. In Article 30(5), the new club of the player is presumed to be the inducing party; however, it is predictable that national transfers are higher than international transfers in number. It is normal for a professional player to sign a new contract with a new club in the national league. For national transfers, the burden of proof should have been diverted to the sporting sanction requesting party. Today, the applicability of Article 30(5) is doubtful, if the Dispute Resolution Chamber strictly interprets the rule, most of the clubs would not be able to transfer new players for the following two transfer periods.

One of the differences between FIFA RSTTP and the TFF RSTTP is the time limit defined for sporting sanction claims. According to the TFF's regulations, the claim should be requested until the end of following transfer period. At a first glance such time limit might be seem to constitute a restriction to the right of seeking justice. However, in order to maintain the order and stability of the team and the league, such a time limit is welcomed by the football family.

2.8 *Disciplinary rules and sanctions*

Disciplinary Rules and sanctions in employment relation

Disciplinary rules to be applied in the employment relationship have been given above. According to the Regulations of the TFF, a club should prepare and notify both the TFF and the player before the beginning of the season.

The clubs are free to determine the content of their internal disciplinary regulations, however, according to the jurisprudence of the National Dispute Resolution Chamber and Civil Courts, fines given without just cause will be declared as null and void or be cancelled by the judging authority.

Disciplinary Rules and sanctions in the TFF

Every year the TFF prepares Disciplinary Rules applicable to both professional and amateur football. The sanctions which are applicable to players are: reprimand, fine, return of awards, ban from playing football for a certain number of games and ban from any football activity.

Some examples of the violations and the sanctions regulated by the Disciplinary Code are listed below:

If a player tackles his opponent they will receive a 2 to 4 game ban from playing football.

If a player receives a card sanction from the referee on purpose then they will receive the sanction of a 2 game ban from playing football.

If a player makes a public statement which is against the spirit of sport and football then he will receive the sanction of a 2 to 6 game ban from playing football

If a player insults other players, they will receive the sanction of a 2 to 5 game ban from playing football. If this act is committed against an official then the ban will be from 3 to 7 games.

If a player commits a racist act then they will receive the sanction of a 4 to 8 game ban from playing.

3. *Medical and doping issues*

Turkey adopted the Anti-doping Convention of the European Council dated 16 November 1989 on 12 October 1993.¹³ Also, at the World Conference Doping in Sports, which was held on 5th March 2003 in Copenhagen, the Minister of the State and TUMOK signed the Copenhagen Declaration. Turkey is also a party to UNESCO's International Convention against Doping in Sport, which was signed on 19 October 2005 in Paris.¹⁴

¹³ Anti-doping Convention, date of Council of Ministers' Decision: 8 Sep. 1993, No. 93/4813, Official Bulletin dated 12 Oct. 1993.

¹⁴ Law No. 5721, Law Regarding the Approval of the International Convention against Doping in

On the 24th May 2011 a protocol between the General Directorate of Youth and Sports and the Turkish National Olympic Committee (NOC) was signed. With this protocol, the General Directorate delegated its authority to investigate all anti-doping activities to the Turkish National Olympic Committee.

The Turkish NOC has established a commission called the Turkish Anti-Doping Commission. The commission has been recognized by WADA and as of November 2011, Turkey has become one of the code compliant countries.

The Commission is composed of seven members. The criteria to become a member are: holding a university degree specializing in the field of law or sports and having practiced them for at least five years. The Commission enacted the Turkish Anti – Doping Code in September 2011. The Code is adopted from the Model Rules of WADA. All the sports federations except the Turkish Football Federation have accepted the authority of the Turkish Anti –Doping Commission. However, the Turkish Football Federation has begun to work with the Commission and both parties have agreed on a harmonization calendar.

Finally, Turkey has fulfilled its duties as set forth in Conventions. However there are still some issues that need to be addressed. Unfortunately, limiting the sale of doping pharmaceuticals is still a problem. Also, dietary supplements are freely being sold in Turkey. The upcoming steps towards legislating the sale and consumption of those substances must be taken.

4. Transfer of players

4.1 Transfer rules

According to the Turkish Football Federation’s Regulations on the Status and Transfer of Players, a player can only be transferred either with a loan contract or permanent contract. The maximum period to sign a contract with a minor is three years and five years with adults.

If a player and a club want to engage into an employment contract they must sign a standard contract which is prepared by the TFF. Additionally, every contract must end on the 31st of May. Although parties are obligated to sign a standard contract, they are free to add special articles which they must submit to the TFF as an annex to the standard contract.

There are certain extra rules concerning foreign players. There is a foreign player quota for the Super League and First League. For the leagues under the First League, foreign players are not allowed. The quota for Super League clubs is eight players; however, only five of them can be fielded at the same time. The quota for the First League clubs is three foreign players. There is a special condition for players from Azerbaijan, Kazakhstan, Uzbekistan, Turkmenistan and Kirgizstan. First League clubs are allowed to sign two more foreign players from amongst these countries’ citizens. In total, five foreign players are allowed to register for

First League Clubs. Whilst fielding foreign players two of them must be citizens of the above given states and the rest should be foreign players from other states.

There is no special rule for citizens of European Union.

4.2 *Training compensation systems*

The Turkish Football Federation has established its own training compensation system. Even if it borrows heavily from FIFA's Regulations; it has more complex rules than FIFA's.

According to Article 16 of the TFF's Regulation, a player's training period covers his ages from 12 to 23.

The Clubs have been categorized in four categories and every year the Executive Committee declares the values of the each category. For 2014 – 2015 season the categories and their values have been declared as follows;

First Category	Super League Clubs	100.000.-TRL
Second Category	1 st League Clubs	50.000.-TRL
Third Category	2 nd League Clubs	20.000.-TRL
Fourth Category	3 rd League Clubs and Amateur Clubs	10.000.-TRL

The most important difference from FIFA's system is that it is compulsory for the new and old club to agree on training compensation and submit the document thereof to the TFF at the application of registration phase. The thirty-day period in FIFA's regulation is not given to the new club at the TFF's regulation.

Furthermore, there are some precautions that have been enacted in order to prevent clubs from cheating the system by transferring a player to a lower category and then transferring him back the following season and/or signing a loan agreement in order to avoid paying the training compensation.

Since the training compensation is obligatory and has been implemented without any concession, the clubs generally agree upon an amount or a protocol for receiving a certain percentage of a player's further transfers.

From the first day of this regulation until now, none of the parties have challenged the training system before the Executive Committee or the Appeals Committee. Today it is still unknown what the Dispute Resolution Chamber's decision would be if a club contested that a player had completed his/her training period before the age of 23.

4.4 *Player's agents*

Player's agents are regulated by the TFF as it is regulated by FIFA. The regulation is fully adopted from FIFA's Players Agent Regulations.

5. Social security principles

5.1 Injuries, illness, and disability

The insurance for players has been introduced to the system after some unfortunate incidents namely that a few players lost their lives during training sessions or on the way to an away game. In the beginning the TFF, obligated clubs to buy private insurance policies; however, the prices of policies were high and clubs cheated the system. The TFF centralized the insurance system and opened a call for insurance companies to buy more than 1,000 insurance policies for the players. This bidding process really lowered the premium and the clubs were satisfied with the result. From the 2006–2007 season, by a decision of the then Executive Committee, the TFF began to pay for all the premiums and the following Executive Committees did not disturb this tradition.

As of 2006 – 2007 the players are covered by two insurance policies - the first one is the State's insurance and the second is the private companies.

5.2 Unemployment benefits

Unemployment benefits are not provided in the Turkish system.

5.3 Pension schemes

There are two pension schemes for the football players in Turkey.

The first one is the State's pension scheme. According to Law No 5510, "Social Security and General Health Insurance Act" art. 28: any man who reaches the age of 55 and has a minimum 9000 days of insurance is entitled to receive a pension for retirement. There is also special condition for retirement due to disability.

The second pension scheme is for the Turkish citizen football players, a fund established under the TFF and called the Turkish Football Federation Social Aid and Solidarity Fund in the year 1999. Every Turkish citizen player must join the system. In order to be registered for a Club and for the issuing of a license, each football player has to pay a premium for each season played. According to the Fund's rules the first payment has to be made in the year 2011. Any player who has been in the system for at least ten years is entitled to receive an amount of money which varies depending on contributions.

The premium for this season has been declared by the Executive Committee as follows;

Super League Clubs	1.500.-TRL
1 st League Clubs	1.000.-TRL
2 nd League Clubs	6.00.-TRL
3 rd League Clubs	3.00.-TRL

6. *Labour Dispute settlement*

Employment contract disputes between players and clubs can be resolved either by civil courts or by the TFF's National Dispute Resolution Chamber. Before the 2011-2012 season, all disputes between players and clubs were under the TFF's National Dispute Resolution Chamber's exclusive jurisdiction. However before the beginning of the 2011-2012 season, the dispute resolution system was changed and the Chamber became an ordinary arbitration. After this system has been changed the disputes between players and clubs began to be resolved before Civil Courts. Since judges at the Civil Courts are not specialized in football, we have begun to receive too many decisions which are against the spirit and the mechanics of the game.

Since civil courts have a heavy workload and numerous cases, it takes at least one year to receive a decision from the first instance court; the clubs appeal these decisions to the Court of Appeals. It takes another 1,5 – 2 years to receive a decision from the Court of Appeals. The clubs use the slowness of the system as a cheap credit.

It is obvious that a fast and specialized system should be introduced for football disputes. However, it is disappointing to see that there have been no studies begun to build such a jurisdiction system.

6.1 *Mediation*

Although mediation is regulated under Law No 6100, "Civil Procedural Code"; mediation has never been used as a way of solving football disputes.

6.2 *Arbitration*

According to Law No. 3813 Article 12/A, the TFF Dispute Resolution Chamber has the sole jurisdiction to decide on the contractual disputes between clubs; clubs and players, technical directors, coaches, player agents, physiotherapists; player's agents and players, technical directors and coaches. Civil courts of law do not have any jurisdiction over said disputes.

With Law No 5894, the Dispute Resolution Chamber's legal nature was changed. Before this Law the Chamber was a mandatory arbitral chamber, however as of new Law, the Dispute Resolution Chamber has become a normal arbitral chamber. This operational change was introduced to the community as a legal need to harmonize the system with the Constitutional Court's decision. However the main intent was to save clubs from this effective chamber's quick and fair decisions.

After this amendment, parties who wish to carry the dispute to the Dispute Resolution Chamber must confirm their will to do so once the dispute is carried to the Dispute Resolution Chamber. Even though the parties put an arbitration clause into their contracts and refer their disputes to the TFF's Dispute Resolution Chamber,

once the dispute is carried to the Dispute Resolution Chamber the Chamber asks the opposing party once again if it accepts this arbitration. If the opposing party simply changes its mind and does not want the case to be resolved by the Dispute Resolution Chamber, the arbitration is denied and the case is closed. Then the claimant will only have one chance to carry the dispute to ordinary courts of law. The lack of expertise and the heavy workload in ordinary courts of law is a big disadvantage to the players who were not paid and seek justice. As to its new procedure, the Executive Board of the TFF declares a list of arbitrators which is composed of lawyers who are nominated by clubs, bar associations and universities. The arbitrators are chosen from this closed list. The remaining procedure runs as it runs in an arbitral tribunal.

The Dispute Resolution Chamber has an exclusive jurisdiction over the disputes regarding training compensation and claims of sporting sanctions.

6.3 Courts

As we have stated above, civil courts also have the jurisdiction over the disputes between players and clubs. However, since the players are exempt from the Labour Code, the Civil Courts of First Instance have the jurisdiction.

While deciding on the case, the courts refer the case to experts and decide after receiving expert reports. However, the slowness and lack of expertise is to the detriment of players.

6.4 Sports special bodies

As we have stated above, the General Directorate of Sports is the sole special body of all sports in Turkey. The General Directorate is responsible for all the sporting activities and facilities in Turkey. The General Directorate governs all sports federations. Today there are 59 sports federations in Turkey. Most of them are autonomous, only the ones who are not able to finance their own activities are directly governed by the General Directorate. However, with the exception of the Turkish Football Federation, all the federations including the “autonomous” ones receive financial aid from the state via the General Directorate.

As for judicial bodies, there is an appeals committee established under the General Directorate. Disciplinary or administrative decisions of any sport federation – except the TFF – are under the General Directorate’s jurisdiction. The decisions of this Committee are final and binding.

There is also an appeals committee established under the TFF. It examines and renders the final decisions upon the appeals lodged by the related parties against the decisions of the Executive Committee in disputes between the Federation and clubs, referees, players, technical directors, coaches, player’s agent and other relevant people; disciplinary committees; and the Dispute Resolution Chamber. This committee’s decisions are also final and binding.

Conclusions

The labour system for players in Turkey urgently needs to be established. Not being subject to Labour Code is a big disadvantage for players. As we have stated at the beginning of our essay, a special law should be enacted for players. Professional sports have to be defined. Players' employment issues and their social rights have to be regulated.

An arbitration tribunal like the CAS should be introduced to the system and the disputes should be taken out of the civil courts. Only by adopting such a system would the exploitation of players' labour be put to an end.

**THE EUROPEAN SECTORAL SOCIAL DIALOGUE COMMITTEE
IN THE PROFESSIONAL FOOTBALL SECTOR**

by *Arnout Geeraert**

SUMMARY: 1. Introduction – 2. European sectoral social dialogue – 3. European social dialogue in professional football – 4. Conclusion

Abstract:

This chapter aims to present a dual analysis of the European Sectoral Social Dialogue Committee in the Professional Football Sector, exploring its limits and opportunities both from a legal and a political point of view. It is shown that the legal context of the SDCPF poses several limitations, while the recent agreement on Minimum Requirements for Standard Players' Contracts does not have immediate far-reaching (legal) consequences. The political analysis uncovers that FIFPro is the only actor in the SDCPF for which European social dialogue has a clear and indisputable added value. As long as they do not have far-reaching consequences for the signatories and their constituents, new agreements however may be produced by the committee.

1. Introduction

In July 2008, following the signing of the Rules of Procedure by the participating parties, the European Sectoral Social Dialogue Committee in the Professional Football Sector (SDCPF) was established. Professional football is the first sport where a social dialogue, a means to conclude agreements and to foster cooperation between employers and employees, has been set up at the EU-level, paving the way for other sports. The committee brings together representatives from UEFA, European Professional Football Leagues (EPFL), European Club Association (ECA),

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and Fédération Internationale des Associations de Footballeurs Professionnels (FIFPro) – division Europe.¹ In April 2012, the committee produced its first concrete output in the form of an agreement on Minimum Requirements for Standard Players' Contracts.

The erosion of FIFA and UEFA's powers to hierarchically govern football implies that policy in professional football is increasingly produced by a network of actors that negotiate and bargain with each other.² Conflicts within this network often pertain employment issues and, as such, are centred on the relationship between players, clubs and football's governing bodies. In such conflicts, the EU plays an important mediating role. Firstly, stakeholders can (threaten to) find recourse with the CJEU or the Commission when their conflict with FIFA and/or UEFA falls within the realm of EU free movement or competition law. Secondly, the EU may influence policy in professional football through sports policy.

In this light, the SDCPF was established as a result of long standing attempts by the European Commission to foster dialogue between football's governing bodies, players and clubs following the 1995 *Bosman* ruling by the Court of Justice of the European Union (CJEU). Via the SDCPF, the EU hopes to improve relationships – and, thus, decrease conflicts – between clubs, players and UEFA on employment issues. This automatically raises important questions on the limits and opportunities of the SDCPF as a vehicle to foster cooperative industrial relations within the professional football sector.

This chapter aims to present a dual analysis of the SDCPF, exploring its limits and opportunities both from a legal and a political point of view. As such, it proceeds as follows. The first section focuses on the European sectoral social dialogue in general by looking into both the legal framework in which it is embedded and how this framework is translated into outcomes in practice. The next section turns to the European social dialogue in professional football and provides general background information before falling into two parts. The first part offers an exploration of the legal implications of the agreement on Minimum Requirements for Standard Players' Contracts and a general legal analysis of the committee's legal limits and opportunities. The next sub-section presents a political assessment of the limits and opportunities of the SDCPF by exploring the added value of European social dialogue in professional football for the involved parties, before highlighting the role of the Commission in the steering of the committee. The final section summarises the main findings and explores the way forward.

2. *European sectoral social dialogue*

At the EU-level, social dialogue can take two main forms: a tripartite dialogue

¹ Hereinafter 'FIFPro'.

² A. Geeraert, 'The governance of international sport organisations', in B. Houlihan and D. Malcolm (eds.), *Sport in Society*, London, Sage, forthcoming.

involving the public authorities,³ and a bipartite dialogue limited to the European employers and trade union organisations.⁴ European tripartite social dialogue takes place within the Tripartite Social Summit for Growth and Employment. European bipartite social dialogue takes place within the cross-industry social dialogue committee and sectoral social dialogue committees.⁵ This section explores the European sectoral social dialogue by focusing on both the legal framework in which it is embedded and how this framework is translated into outcomes in practice.

2.1 The legal framework

Provisions on the EU's social policy are at present to be found under title X of the TFEU, which captures the important role for the social partners as representatives of management and labour in the governance of the EU.⁶ Pursuant to article 152 TFEU, 'The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy'.⁷

Aimed at strengthening the sectoral dimension of the European social dialogue, sectoral social dialogue committees were established by the Commission's Decision of 20 May 1998.⁸ Pursuant to this decision, organisations representing both sides of industry that make a joint request to take part in a sectoral social dialogue at the European level must fulfill the following criteria:

- '(a) they shall relate to specific sectors or categories and be organized at European level;
- (b) they shall consist of organizations which are themselves an integral and recognized part of Member States' social partner structures and have the capacity to negotiate agreements, and which are representative of several Member States; (c) they shall have adequate structures to ensure their effective participation in the work of the Committees'.⁹

³ S. Smismans 'The European Social Dialogue between Constitutional and Labour Law', *European Law Review*, vol. 32, 2007, 342.

⁴ Commission of the European Union, *Social Dialogue*, (see <http://ec.europa.eu/social/main.jsp?catId=329&langId=en>).

⁵ Commission of the European Union, Communication from the Commission: Partnership for change in an enlarged Europe - Enhancing the contribution of European social dialogue, COM (2004) 557 final, 12.

⁶ This Social Chapter of the Treaty was introduced with the amendment of the Treaty of the European Community (TEC) by the Treaties of Amsterdam and Nice (Articles 136 ff. TEC, now articles 151 ff. TFEU), and incorporated the Agreement on Social Policy of 31 October 1991 between 11 of the then 12 Member States (the U.K. was not party to the Agreement), which proposed a radical change in the Community legislative process in the sphere of social policy.

⁷ Consolidated Version of the Treaty on the Functioning of the European Union article 152(1), 2008 O.J. C 115/47 [hereinafter TFEU].

⁸ Commission of the European Union, Commission Decision on the establishment of Sectoral Dialogue Committees promoting the dialogue between the social partners at European level, 20 May 1998 COM (1998) 500 final.

⁹ *Id.*, art. 1.

The Commission, assessing whether these criteria are fulfilled, makes the final decision with regard to the establishment of sectoral social dialogue committees. Once a committee is established, pursuant to article 154 TFEU, it can fulfil both consultative and legislative functions. On the basis of article 154(1) TFEU, the European Commission has a special role in taking action to support social dialogue in general and promoting the consultation of social partners. With every legislative proposal in the social policy field, the Commission has to consult the relevant social partners twice. First, about the possible direction of EU measures, and, in a second phase, about the content of the Commission's proposal. Pursuant to articles 154(2) and 154(3) TFEU, the involved social partners may make recommendations or opinions in each of these steps.

The role of the committees is, however, not limited to a consultative function. Pursuant to article 154(4) TFEU, the social partners have the possibility to autonomously start formal negotiations concerning the Commission's legislative initiative. Subsequently, the partners have 9 months to reach a mutual agreement, during which the Commission cannot continue its own legislative proposal. Under article 155(1) TFEU, even when there is no legislative initiative by the Commission, the social partners are free to autonomously (after a consultation by the Commission or on their own initiative) conclude agreements.

Once the social partners have jointly adopted a text, the Treaty provides two routes for the implementation of the agreement, namely the 'voluntary route' and the implementation route through a Council decision.

Firstly, implementation of an agreement can take place according to national procedures and practices, based on the different structures of industrial relations within the respective Member States. In this so-called 'voluntary route', the responsibility to implement lies with the national members of the European social partner organisations.¹⁰ The latter play a prominent role in overseeing the implementation of voluntary agreements, which are not generally binding, do not form an integral part of EU-law and, consequently, have no direct legal effect. In its first Communication concerning the application of the Agreement on social policy, the Commission confirmed that the terms of these agreements merely bind the members of the social partner organisations and will affect solely them and only in accordance with the practices and procedures specific to them in their respective Member States.¹¹ Pursuant to the Declaration, annexed to article 155(2) TFEU, 'this arrangement implies no obligation on the Member States to apply the agreements directly or to work out rules for their transposition, nor any obligation to amend national legislation in force to facilitate their implementation'.¹² It should be noted, however, that the voluntary route does not *exclude* agreement from

¹⁰ S. Smismans, *l.c.*, 343.

¹¹ Commission of the European Union, Communication concerning the application of the Agreement on social policy presented by the Commission to the Council and the European Parliament, COM (93) 600 final, (December 1993), point 37.

¹² Declaration annexed to TFEU art. 155(2), 2008 O.J. C.

being applied or transposed through national legislation.¹³

As a second choice for the implementation of their mutually agreed texts, pursuant to article 155(2) TFEU, the social partners can submit a joint proposal to the Commission requesting to submit their agreement to the Council of the European Union.¹⁴ While the European Parliament has no role in this second implementation route,¹⁵ the Council decides on the implementation of the collective agreement by qualified majority¹⁶ or, for agreements relating to any of the fields mentioned in Article 153(2) TFEU, by unanimous votes.¹⁷ The Council cannot make amendments and it only retains the political choice to adopt the agreement or not.¹⁸ In the latter case, the Commission may still decide to produce a normal legislative proposal,¹⁹ according to the appropriate legislative procedure stipulated in article 153(2) TFEU.

Although – in theory – implementation through a Council Decision may also result in a Regulation, this route will in practice result in a Directive, which the Member States subsequently have to convert into their respective national legislations.²⁰ European social dialogue thus has the capacity to be an autonomous source of European social policy legislation. Pursuant to article 155(2), however, implementation through a Council decision is only possible for agreements falling under one of the fields listed in article 153 TFEU.²¹

¹³ See: Commission of the European Union, Commission Staff working Paper of 2 July 2008: Report on the implementation of the European social partners' Framework Agreement on Telework SEC (2008) 217.

¹⁴ In its Employment, Social Policy, Health and Consumer Affairs configuration, which brings together ministers responsible for employment, social affairs, health and consumer policy from all EU member states.

¹⁵ This essentially means a deviation from the normal legislative procedure as listed in TFEU art. 294. According to TFEU art. 155(2), the European Parliament shall be *informed*.

¹ TFEU art. 16 (3) states: 'the Council shall act by a qualified majority except where the Treaties provide otherwise'.

² TFEU, art. 155(2)

³ Commission of the European Union, Communication concerning the application of the Agreement on social policy presented by the Commission to the Council and the European Parliament, COM (93) 600 final, (December 1993), point 41.

⁴ *Id.*, point 42.

⁵ TFEU, art. 288

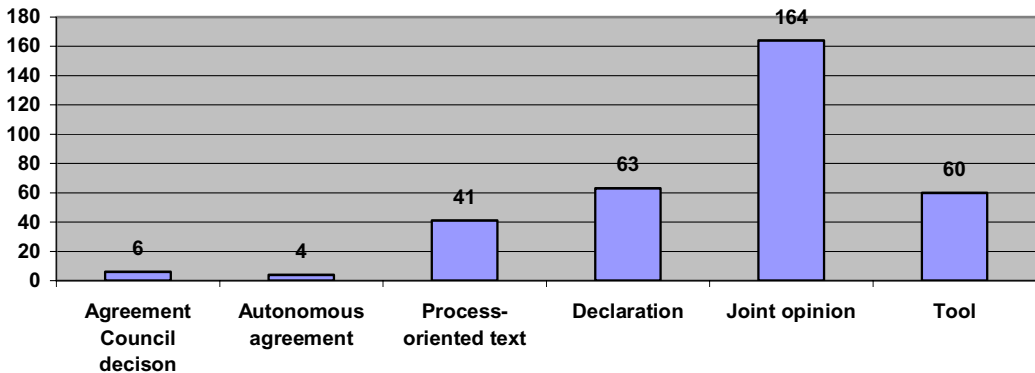
⁶ These fields are (a) improvement in particular of the working environment to protect workers' health and safety; (b) working conditions; (c) social security and social protection of workers; (d) protection of workers where their employment contract is terminated; (e) the information and consultation of workers; (f) representation and collective defence of the interests of workers and employers, including codetermination, subject to paragraph 5 153 TFEU; (g) conditions of employment for third-country nationals legally residing in Union territory; (h) the integration of persons excluded from the labour market, without prejudice to Article 166; (i) equality between men and women with regard to labour market opportunities and treatment at work; (j) the combating of social exclusion; (k) the modernisation of social protection systems without prejudice to point (c).

2.2 European sectoral social dialogue in practice

Sectoral social dialogue committees are composed by 40 representatives from both sides of industry, represented in equal manner.²² They are chaired by a representative from one side of industry or, at their own joint request, by a Commission representative.²³ In consultation with the Commission, each Committee establishes its own rules of procedure,²⁴ and holds at least one plenary session a year.²⁵

Currently, there are over 40 sectoral social dialogue committees, which cover more than 145 million workers in the EU. They have issued around 500 texts of varying legal status.²⁶ Most adopted text are not implemented via one of the mentioned routes. They are of a ‘soft’ nature and aim to raise awareness, disseminate good practice, or help to build consensus and confidence (see figure 1).²⁷

Figure 1: Joint outcomes of the European sectoral social dialogue committees (1998- February 2010)



Source: Commission of the European Union, Commission staff working document on the functioning and potential of European sectoral social dialogue, SEC (2010) 964 final, annex 4.

²² Commission of the European Union, Commission Decision of 20 May 1998 on the establishment of Sectoral Dialogue Committees promoting the dialogue between the social partners at European level, COM (1998) 500 final, art. 3.

²³ *Id.*, art. 5(2)

²⁴ *Id.*, art. 5(1)

²⁵ *Id.*, art. 3

²⁶ Commission of the European Union, Commission staff working document on the functioning and potential of European sectoral social dialogue SEC (2010) 964 final.

²⁷ *Ibid.*, 9.

Currently, a whole range of texts exists alongside voluntary (autonomous) agreements and agreements implemented through a Council decision.²⁸ As can be read from Figure 1, most outcomes of the sectoral social dialogue committees pertain process-oriented texts, declarations, joint opinions and tools. According to Pochet, these outcomes mirror a lack of pressure from the Commission and the Member States for the development of an ambitious European social policy and the lack of interest in the social dialogue on employers' side.²⁹ The peak in joint opinions, which are mostly aimed at influencing EU policy and by no means force obligations on the partners' national affiliations, shows that the sectoral social dialogue is mainly used as a tool for influencing the European multi-level system of policymaking. In this regard, the influence of these committees is not limited to EU social policy, but extends over a range of European policies.³⁰

3. *European social dialogue in professional football*

In 2001, an agreement on the new FIFA rules on international transfers of football players was reached between FIFA and UEFA, on the one side, and the EU Commissioners in charge of competition, sport and social affairs, on the other side.³¹ These new regulations replaced the old transfer rules which had to be abolished as a consequence of the Bosman ruling by the CJEU.³² The European Commission invited FIFA and UEFA to encourage clubs to start or pursue social dialogue with the representative bodies of football players, recognising that social dialogue could have been an effective method to find common solutions on employment matters between clubs and players. Ever since, the Commission has been supporting projects for the consolidation of social dialogue in sport in general and in football in particular. Amongst others, these projects were aimed at identifying the relevant social partners in the sector at both the EU and the national level.

In its 2007 White Paper on Sport³³ the Commission addressed the main challenges in the field of sport and recalled its respect for the autonomy of sports associations, which, however, needs to be 'respectful of good governance

²⁸ Commission of the European Union, Communication from the Commission: Partnership for change in an enlarged Europe -Enhancing the contribution of European social dialogue COM (2004) 557 final. This Communication aimed to stress that the added value of texts not only depends on whether they are legally binding or not, but also on the operational follow-up and effective implementation of the outcome.

²⁹ P. Pochet, *European Social Dialogue between Hard and Soft Law*. Conference paper presented at the EUSA Tenth Biennial International Conference, Montreal, 17–19 May 2007, 17 (see: www.unc.edu/euce/eusa2007/papers/pochet-p-08f.pdf).

³⁰ *Ibid.*, 15; R. De Boer, H. Benedictus and M. van der Meer, 'Broadening without Intensification: The Added Value of the European Social and Sectoral Dialogue', *European Journal of Industrial Relations*, vol. 11, 2005, 66.

³¹ Letter from Mario Monti to Joseph S. Blatter, D/000258, 5 March 2001.

³² CJEU, *Union Royale Belge Sociétés de Football Association and others v. Bosman and others*, Case C-415/93, [1995] E.C.R. I-04921.

³³ Commission of the European Union, White Paper on Sport, COM (2007) 391 Final, July 2007, 13.

principles'.³⁴ In this light, the White Paper strongly encouraged the use of social dialogue in the sports sector, because '[it] can contribute to addressing common concerns of employers and athletes, including agreements on employment relations and working conditions in the sector in accordance with EC Treaty provisions'.³⁵ The Commission acknowledged the difficulty to predetermine the form of a social dialogue in the sport sector and, thus, it declared to be ready to 'examine any request to set up a sectoral social dialogue committee in a pragmatic manner'.³⁶

The Commission's encouragement of social dialogue in football has had a substantial impact on the emergence of suitable social partners. On 10 December 2007, a request was submitted to the Commission for the establishment of a sectoral social dialogue committee in the professional football sector by FIFPro and EPFL. In March 2008, the Commission confirmed the representativeness of FIFPro and EPFL and, subsequently, ECA. Given the specificity of sport governance, the social partners invited UEFA to chair their dialogue. The aim of the committee is to improve employment relations for all players and reduce disputes through dialogue.³⁷

This section aims to make both a legal and political analysis of the SDCPF. First, the social partners in the committee are mapped. Then, the legal implications of the agreement on Minimum Requirements for Standard Players' Contracts are discussed and a general legal analysis of the committee's legal limits and opportunities is conducted. The subsequent sub-section presents a political assessment of the limits and opportunities of the SDCPF by exploring the added value of European social dialogue in professional football for the involved parties. Finally, the role of the Commission in the steering of the committee is highlighted.

3.1 *The social partners*

The SDCPF was established in July 2008, following the signing of the Rules of Procedure by the participating parties.³⁸ As mentioned, UEFA chairs the committee. The employers' side is composed of representatives from EPFL and ECA. Founded only in 2008 and simultaneously recognised by UEFA,³⁹ ECA is an independent autonomous body directly representing the European football clubs. The 207 represented clubs are drawn from every one of the 54 national associations that are UEFA members. ECA was founded as a result of the dissolution of the G-14, the association of 18 of the leading professional football clubs in Europe, constituted in

³⁴ *Ibid.*, section 4.

³⁵ *Ibid.*, section 5.3.

³⁶ Commission of the European Union, Commission staff working document on the functioning and potential of European sectoral social dialogue, SEC (2010) 964 final, section 5.3.

³⁷ Commission Press Release, IP/08/1064 (Jul. 1, 2008), Footballers and employers launch new EU forum for social dialogue (see: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1064>).

³⁸ European Commission, Rules of procedure for the European sectoral social dialogue committee in the professional football sector, July 2008, art. 3.

³⁹ UEFA and ECA, *Memorandum of Understanding Between the UEFA and the ECA*, Nyon, UEFA, January 2008.

2000 but originating from an informal network founded in 1997.⁴⁰ As part of a settlement between football's governing bodies and the G-14 concerning the payment of compensation to the national football clubs when their players are called up for their national teams, and after UEFA's reform of the Champions League, the G-14 was dissolved and in its place ECA was established and subsequently officially sanctioned by FIFA and UEFA.⁴¹ In addition, UEFA agreed to grant four ECA-representatives a seat in its Professional Football Strategy Council, a body with consultative status.

Professional football leagues usually negotiate with their respective national Football Associations on matters such as management of league championships and the selling of broadcasting rights. In recent years, they have become active at the European level as well. In 2005, EPFL was created in order to be the voice of professional football leagues in Europe on all matters of common interest, to consider social dialogue issues at a European level and act as a social partner.

On the workers' side, FIFPro provides representatives to the SDCPF meetings. Founded in 1965 to pursue and defend the rights of professional football players, FIFPro is a worldwide federation of national associations, which currently has 55 members. FIFPro Division Europe currently has 29 member associations and was founded in July 2007 in order to be eligible for participation in EU level social dialogue.

3.2 The agreement on minimum requirements for standard players' contracts

The absence of high-standard minimum requirements for football players' contracts has in certain cases led to wrongs in the relation between clubs and players. For instance, FIFPro has reported about the many abuses in Eastern Europe regarding players' contracts such as the absence of any guarantee in case of illness and/or injuries, penalties from 10% to 100% of salary, and bonuses unilaterally determined by the club management.⁴² Already in 2006, FIFPro, EPFL and UEFA agreed upon Minimum Requirements for Standard Players' Contracts (MRSPC) in order to tackle these issues.

When the SDCPF was established, MRSPC were thus a logical choice for a starting point for negotiations. As the MRSPC were mostly already agreed upon, the negotiations focused on their implementation. FIFPro wanted to make sure that the eventual EU-level agreement would have a significant legal effect at

⁴⁰ B. García '*The European Union and the Governance of Football: A Game of Levels and Agendas*'. PhD diss., Loughborough University, 2008, 40.

⁴¹ This conflict reached a climax with the so-called Charleroi/Oulmers case concerning the payment of compensation to the national football clubs when their players are called up for their national team (CJEU, *Sporting du Pays de Charleroi, G-14 Groupment des Clubs de Football Européens v Fédération Internationale de Football Association (FIFA)*, Case C-243/06, [2006]). The G-14 decided to join this case citing a lack of clubs' representation in the governance of professional football rules. Eventually, the parties to the dispute however decided to settle the case out of the Court.

⁴² FIFPro press release, 'You can always change a bizarre standard contract', 9 September 2011.

the national level, especially in those countries where standard contractual requirements for players are most pertinent. ECA and EPFL were however very reluctant to enter into an agreement that could have legal repercussions for their members. These issues eventually resulted in a severe impasse in February 2011.

In August 2011, following several attempts by the Commission to reconcile differences, the parties eventually reached an agreement on the implementation of the MRSPC. This agreement then had to be approved or ratified by the relevant internal bodies of the signatory parties, a process that, again, would hold a few difficulties. Certain stronger leagues did not want to ratify a binding agreement and, eventually, those countries where the standard of contractual protection is above the standards provided in the agreement -16 in total- were excluded from the agreement by means of a side-letter agreement.⁴³ Since this proved to be the final obstacle, the agreement was finally signed during an official ceremony on 19 April 2012.

Since the agreement is implemented through the so-called ‘voluntary route’, implementation at the national level is necessary in order for it to have any direct legal effect. Therefore, a European Professional Football Social Dialogue Taskforce has been set up, bringing together experts from FIFPro, ECA, EPFL, FIFA and UEFA. The Taskforce coordinates the promotion and implementation of the agreement on a country-by-country basis and uses best endeavours to convince the relevant national parties to buy in to the agreement.

3.3 *Legal analysis*

Two pertinent legal questions emerge from the above. First, what are the limits and opportunities of the SDCPF given the EU legal framework? Second, and relating to the first question, what are the legal implications of the MRSPC agreement for the relevant parties?

With regard to the first question, it must be stressed that the legal context of the social dialogue in professional football *a priori* poses a few obstacles. Firstly, agreements made within the contexts of the SDCPF are not excluded from EU law and, therefore, the parties must be wary when drawing up agreements that fall within the scope of free movement and competition law.⁴⁴ Secondly, as FIFA is not a party in the SDCPF but UEFA nevertheless has to comply with FIFA’s rules and regulations,⁴⁵ a wider bargaining agreement in European football is (currently) not an option. Thirdly, the legal effects of an agreement implemented through a Council decision would be limited to the 28 EU Member states. As a consequence, it would

⁴³ ECA, EPFL, FIFPro, and UEFA, *Side-letter agreement regarding the minimum requirements for standard player contracts in the professional football sector in the European Union, and I the rest of the UEFA territory*, Unpublished, 2012.

⁴⁴ M. Olfers, *Sport en Mededingingsrecht [Sport and Competition Law]*, Amsterdam, Kluwer juridisch, 2008, 372.

⁴⁵ FIFA Statutes, art. 20(3)a.

not cover the national contexts of a large part of the 54 national UEFA member federations. Moreover, it is unlikely that UEFA would ever support the implementation of an agreement through a Council decision since it is not a strong advocate of increased regulatory EU activity in football. SDCPF agreements will therefore be implemented through the voluntary route, which brings with it serious issues regarding enforceability.

This brings us to the second question, regarding the legal implications of the MRSPC agreement. Although this agreement, which covers not only the 28 EU Member States but the whole UEFA territory, provides an important first step towards the improvement of labour conditions for professional football players, it will not have immediate far-reaching consequences. First of all, 16 countries where the standard of contractual protection is above the standards provided in the agreement were excluded from the agreement by means of a side-letter agreement.⁴⁶ Moreover, the minimum requirements on which the partners agreed are very basic and, in fact, in most Western European countries, high-standard minimum requirements are already in place.⁴⁷

With regard to the agreements' enforceability, it should be stressed that European collective agreements are of a special nature because the signatory parties are European-level organisations, which consist of national affiliates and these national affiliates in turn have individual members. There are thus three groups that are potentially affected by the MRSPC agreement, namely the signatory parties, the national affiliates of these parties, and football players and clubs.

Firstly, the agreement, which can be regarded as a contract, creates legal obligations for the parties that have signed it, namely UEFA, EPFL, ECA, and FIFPro. In this light, article 155(2) TFEU, which stipulates that 'European Collective Bargaining Agreements *shall be implemented*' (emphasis added), suggests that the Treaty makers wanted legal rights and obligations to be created between signatory parties.⁴⁸ The international character of the agreement can be derived from the fact that the parties to the agreement are residing in Switzerland (UEFA and ECA) and The Netherlands (FIFPro) and will also perform their obligations there. Thus, private international law is applicable to the legal relationship between the signatory parties.⁴⁹

Nevertheless, the consequences on the signatory parties themselves are minimal since article 18 of the agreement simply states that '[i]n the context of

⁴⁶ *Id.*

⁴⁷ ECA, EPFL, FIFPro and UEFA, *Analysis of Questionnaires on Standard Player Contracts Results of all 4 stakeholders*, Version 21.10.2009, unpublished.

⁴⁸ Commission of the European Union, Commission Staff working Paper of 2 July 2008: Report on the implementation of the European social partners' Framework Agreement on Telework SEC (2008) 217. Article 3(1) ILO Recommendation ILO Recommendation no. 91 furthermore states: '*Collective agreements should bind the signatory parties thereto and those on whose behalf the agreement is concluded [...]'*'.

⁴⁹ Council Report on the Convention on the law applicable to contractual obligations by M. Giuliano and P. Lagarde, OJ C 282/1, 31-10-1980, 10.

article 155 TFEU, this Agreement commits the Parties to use *best endeavours* to ensure the implementation at national level where possible, using the most appropriate legal instruments as determined by the relevant parties at national level in the European union and the rest of the Territory' (emphasis added). The agreement thus constitutes an obligation of means.

Secondly, the agreement potentially affects the national affiliations of the Signatories. In fact, the wording 'shall be implemented' in article 155(2) TFEU can be seen as directed towards the national affiliates as it is ultimately up to them to implement the Agreement.⁵⁰ However, according to Franssen, national affiliates cannot be obliged to implement what has been agreed upon at the EU level since this would be contrary to general principles of international labour law, in particular article 8 of ILO-convention no. 154 concerning the promotion of collective bargaining. Pursuant to this article, measures taken by governments with a view to promoting collective bargaining shall not be so conceived or applied as to hamper the freedom of collective bargaining. Public authorities only have a duty to take measures to facilitate collective bargaining⁵¹ and they should refrain from any interference which would restrict the right to bargain freely or impede the lawful exercise thereof.⁵² Therefore, article 155(2) TFEU can never be so interpreted as to suggest that the Treaty obliges the national affiliates of the social partners to implement European collective agreements. Finally, as they are characterised by a low degree of centralisation, ECA, EPFL and FIFPro lack an enforcement mandate over their national affiliates and can thus not oblige them to implement the MRSPC.

Thirdly, and finally, the agreement has a potential impact on football players and clubs. In case the national affiliates would implement the MRSPC, for instance in a national bargaining agreement, the legal effects for clubs and footballers would simply derive from the relevant national laws and collective bargaining agreements. The TFEU, however, does not give a legal basis for the presumption that European collective agreements have a direct legal effect on individuals.⁵³ Consequently, the agreement will only have a legal impact on footballers and clubs if it is implemented at the national level.

3.4 *Political analysis*

3.4.1 *The added value of European social dialogue for the parties*

This section discusses the added value of the European social dialogue in professional football for the involved parties and their national affiliates, since it can be regarded as a crucial independent variable for the success of the SDCPF. According to De

⁵⁰ E. Franssen, *Legal Aspects of the European Social Dialogue*, Antwerp, Intersentia, 2002, 129.

⁵¹ Article 4 of ILO Convention no. 98 concerning the application of the principles of the right to organize and to collectively.

⁵² Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 1985, para. 583.

⁵³ E. Franssen, *l.c.*, 139.

Boer *et al.*, collective bargaining agreements are only possible when they contain an added value for both sides of industry.⁵⁴ If one or more of the involved parties fails to identify clear benefits associated with a European social dialogue, negotiations are bound fail. Moreover, if more favourable results with regard to European policy can be achieved through other channels of the European multilevel decision-making, social partners will not be committed to the European social dialogue.⁵⁵

Like most European sectoral social partner organisations, EPFL, ECA and FIFPro are characterised by a low degree of centralisation, meaning that they in principle have limited capacity to influence their national affiliates. Involving national sectoral social partners in EU social dialogue is however crucial to assure an effective follow-up at the national level. Moreover, national organisations that are not involved in the work of the committees at European level may not want to implement provisions which they do not endorse and to which they did not contribute.⁵⁶ A strong mandate to negotiate at the European level is thus of vital importance and this will only be possible if national affiliates see a clear added value for European social dialogue.

UEFA

In the past, top professional clubs and national football leagues have criticised UEFA's position in the governance of European football by questioning its legitimacy to govern European football unilaterally.⁵⁷ In order to safeguard its autonomy as much as possible, UEFA has turned to two main strategies. Firstly, by integrating clubs, leagues and players into its internal structures, yet at the same time withholding them genuine decision-making power, UEFA has been able to control governance developments in European football.⁵⁸ Simply put: UEFA remains in close contact with its increasingly powerful stakeholders and therefore weakens their incentives to seek external solutions. Secondly, UEFA has been seeking recognition by the EU institutions in order to obtain legitimacy.⁵⁹

The added value of the SDCPF must be seen in this regard. Participating in the SDCPF gives UEFA a certain amount of recognition and legitimacy and thus political empowerment. In addition, as García notes, UEFA has realised that it is beneficial to have a constructive relationship with the EU as it has an influence on the goodwill of the Commission with regard to the application of EU law to football.⁶⁰

⁵⁴ R. De Boer *et al.*, *l.c.*, 55.

⁵⁵ *Ibid.*, 55-56.

⁵⁶ Commission of the European Union, Commission staff working document on the functioning and potential of European sectoral social dialogue SEC (2010) 964 final, 17.

⁵⁷ M. Holt, *UEFA, Governance and the Control of Club Competition in European Football*, London, Football Governance Research Centre, Birbeck University of London, 2006.

⁵⁸ *Ibid.*

⁵⁹ B. García, 'UEFA and the European Union: From Confrontation to Cooperation', *Journal of Contemporary European Research*, vol. 3, 2007, 202-223.

⁶⁰ *Ibid.*

That said, there are reasons to expect that UEFA is only a mild supporter of the SDCPF. Firstly, it stimulates policy-making in football outside of its own structures and has consequently empowered its internal stakeholders. In order to keep control of governance developments, UEFA has ensured that the rules of procedure of the SDCPF stipulate that every item that will be discussed in the SDCPF first must be approved by UEFA's Professional Football Strategy Council. Secondly, given its strong lobbying power, UEFA does not need the SDCPF in order to influence EU multilevel decision-making.⁶¹

FIFPro

Football players are found at the very end of the chain of command of the traditional governing model of football. This implies that players are directly subordinate to clubs, their employers, and that they are not directly in contact with the entities above clubs in the chain such as leagues, national federations, UEFA and FIFA. The latter two organisations, however, devise and issue rules that have an enormous impact on players' activities. Founded to pursue and defend the rights of professional football players, FIFPro remained of relatively marginal importance as for decades, it was unable to exert a substantial influence on FIFA and UEFA. After the CJEU ruling in the *Bosman* case and following the renegotiation of the transfer system, FIFPro managed to become an important actor in the governance of European football.⁶² While FIFPro failed to have a substantial impact on the new transfer system, among others because of divergent views among its members,⁶³ its participation in the SDCPF strengthened its representativeness, contributed to its legitimacy and, thus, enhanced its position in the governance of European football, making it a stronger stakeholder organisation. Most importantly, however, the SDCPF enables FIFPro to put more pressure on UEFA to change its policy into a more 'workers oriented' direction.⁶⁴

Although FIFPro has become an important organisation in football governance, several issues curtail its actual powers. First and foremost, unilateral action on behalf of football players is more difficult because there is a small category of players who are powerful because of their talent and less dependent upon collective action and representation. Some claim that FIFPro therefore is "more an amalgam of individuals than a cooperative".⁶⁵ Finally, there is a lack of unanimity among national players' associations on the subject of football's regulatory provisions relating to employment.⁶⁶ As a result, FIFPro rarely speaks with a strong voice.

⁶¹ M. Holt, *l.c.*; B. García, *l.c.*

⁶² B. Dabscheck, 'International Unionism's Competitive Edge: FIFPro and the European Treaty', *Industrial Relations*, vol. 58, 2003, 97-102.; M. Holt, *l.c.*, 74.

⁶³ *Ibid.*; J. Irving, 'Red Card: The Battle over European Football's Transfer System', *University of Miami Law Review*, vol. 56, 2002, 713.

⁶⁴ B. Dabscheck, *l.c.*

⁶⁵ Former Head of Government, in discussion with the author, 11 July 2013.

⁶⁶ B. Dabscheck, *l.c.*, 97-102; M. Holt, *l.c.*, 73.

ECA

With the growing commercial nature of professional football, clubs began contesting the monopolistic power of football's governing bodies. In this light, the G-14 was founded as a pressure group against UEFA and FIFA and it used the EU institutions as mediators in its conflict with them.⁶⁷ This group even threatened to leave FIFA and UEFA's structures to form its own 'super league' in 1998. UEFA thus realised the hard way that clubs, in contrast to players, have the option of 'exit' from its structures, and can use this as a threat to obtain concessions.⁶⁸ According to Hirschmann, exit is a viable solution as long as there are outside options available. European elite clubs can rely on their reputation and the quality of their players to attract a large audience in their own competition. Other clubs do not have the necessary means and are more 'loyal' to UEFA, mostly due to the historic appearance of UEFA's competitions⁶⁹ and the lack of a viable exit solution.

Although ECA can, in principle, use the SDCPF in order to pressure UEFA, the added value of the committee is limited to the fact that it contributes to having a good relation with the EU, which is important given the EU's internal market powers. The capacity of Europe's elite clubs to wring concessions from UEFA on threat of exit changed the governance landscape of European football and ECA has thus obtained important, far-reaching concessions from UEFA in matters in which there was unanimity among its most powerful members, without having to rely on the SDCPF. For instance, clubs take a majority of the seats in UEFA's Club Competitions Committee, which among others draws up recommendations and exchanges views regarding possible modifications to the existing UEFA club competitions and to the regulations governing these competitions. Furthermore, the recently renewed memorandum of understanding between ECA and UEFA includes arrangements on an increase of the agreed amount to be distributed to clubs for giving their players away to national teams; an insurance covering the risk of injury while on international team duty; and the international match calendar.⁷⁰

It is thus clear that the SDCPF, which enables FIFPro to push UEFA more in a workers oriented direction, does not have a high priority for ECA.

EPFL

EPFL indirectly represents the European football clubs that play in the top national

⁶⁷ B. García 'The European Union and the Governance of Football: A Game of Levels and Agendas'. PhD diss., Loughborough University, 2008, 40.

⁶⁸ A. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organisations, and States*, Cambridge, MA, Harvard University Press, 1970.

⁶⁹ A. King, 'The New Symbols of European Football'. *International Review for the Sociology of Sport*, vol. 39, 2004.

⁷⁰ UEFA and ECA, *Memorandum of Understanding Between the UEFA and the ECA*, UEFA, January 2008.

European leagues. Both ECA and EPFL thus (indirectly) represent clubs, but these representative organisations put different emphases in their representation. While EPFL is concerned with everything that surrounds the organisations of (domestic) competition, ECA is more interested in football regulations. Compared to ECA, social dialogue is more important for EPFL since it contributes to its *raison d'être*. EPFL is also a vital partner in European social dialogue, since leagues are involved in national bargaining agreements in football, representing the employer's side of industry.

Whereas European social dialogue is thus important for EPFL, the added value for its members is sometimes rather unclear. Certain stronger European leagues are very reluctant to give away their bargaining powers to EPFL,⁷¹ which is in fact a familiar issue in EU level social dialogue.⁷² Consequently, EPFL has not been able to bargain at the EU level with a strong mandate from its member base.⁷³

3.4.3 *The steering role of the European Commission*

The Commission, capitalising on the importance UEFA and the other partners in the committee attach to having a good relationship with the EU,⁷⁴ has played a pivotal role in the SDCPF. Under article 154(1) TFEU the Commission can take 'any relevant measure to facilitate social dialogue by ensuring balancing support for the parties'. By providing important resources, bringing actors together, supporting projects and studies, reconciling differences and exercising a light form of pressure, it was able to steer the involved parties towards an agreement on MRSPC.⁷⁵ Given the general lack of (voluntary) agreements in other sectoral social dialogue committees, this is quite remarkable.

4. *Conclusion*

This chapter shed light on the limits and opportunities of the SDCPF as a vehicle for fostering cooperative industrial relations within the professional football sector. Presenting a dual analysis, it explored these both from a legal and a political point of view.

It was shown that the legal context of the SDCPF poses several limitation. Firstly, as FIFA is not a party in the SDCPF but UEFA nevertheless has to comply with FIFA's rules and regulations, a wider bargaining agreement in European football is (currently) not an option. Secondly, regarding the implementation of agreements,

⁷¹ Stakeholder Official, in discussion with the author, August 2012.

⁷² De Boer *et al.*, *l.c.*; Commission of the European Union, Commission staff working document on the functioning and potential of European sectoral social dialogue, SEC (2010) 964 final.

⁷³ Stakeholder Official, in discussion with the author, August 2012.

⁷⁴ A. Geeraert, 'A Principal-Agent perspective on good governance in international sports. The European Union as ex-post control'. PhD diss., KU Leuven, 2013.

⁷⁵ A. Geeraert 'New EU governance modes in professional sport: enhancing throughput legitimacy'. *Journal of Contemporary European Research*, vol. 10 (3), 2014.

a Council decision would only make the agreement enforceable in the EU territory, which does not cover all 54 national UEFA member federations.

Regarding the MRSPC agreement, it was shown that this agreement, which was implemented via the voluntary route, does not have immediate far-reaching (legal) consequences. First of all, 16 countries where the standard of contractual protection is above the standards provided in the agreement were excluded from the agreement by means of a side-letter agreement. Secondly, the minimum requirements on which the partners agreed are very basic. Thirdly, the legal implications for the signatory parties, their national affiliates, and clubs and football players are minimal. The actual impact of the agreement will thus depend on how the activities of the European Professional Football Social Dialogue Taskforce will crystallise further.

The political analysis in this chapter uncovered that FIFPro is the only actor in the SDCPF for which European social dialogue has a clear and indisputable added value. Despite this, a voluntary agreement was concluded between the parties, while sectoral social dialogue committees generally fail to produce these. This can be explained by the added value of the committee for UEFA, ECA and EPFL in terms of its contribution to having a good relation with the EU, which helps fostering sympathetic regulatory treatment. Indeed, a lack of progress within the SDCPF, which could eventually result in the refusal from the Commission to renew the SDCPF budget and, consequently, the death of the committee, may harm this good relationship significantly.

As long as they do not have far-reaching consequences for the signatories and their constituents, new agreements may be produced by the committee. Progress towards wider bargaining agreements will only be taken one (tiny) step at a time. The Commission can facilitate this progress, but its steering efforts would benefit from stronger political support. In this case, the Commission would have a stronger mandate and in-compliant behaviour by (one of) the parties would potentially have bigger consequences for their regulatory treatment by the relevant EU institutions.⁷⁶

⁷⁶ A. Geeraert and E. Drieskens, *'The EU controls FIFA and UEFA: A Principal-Agent perspective'*, forthcoming.

EMPLOYMENT RELATIONSHIP IN FOOTBALL: A COMPARATIVE ANALYSIS

by *Michele Colucci* and *Frank Hendricks*

SUMMARY: 1. The (sometimes difficult) reception of football employment in labour law – 2. Addressing the specific sport or football issues in labour law – 3. Specific sports acts or football acts – 4. Collective bargaining – 5. Transfer rules – 6. Dispute settlement

The survey of the employment relationship regulations of professional football activities in different legal systems, delivers a variety of views and insights. We have divided them into various headings hereafter, taking the peculiarities of each country into account.

1. The (sometimes difficult) reception of football employment in labour law

A first major issue is how to address football employment from a legislative point of view. Many legal systems depart from the idea that general employment law governs the football employment relationship. The integration of football employment into the broader concepts and mechanisms of employment law aims for a better legal protection of both football players and their employers. This is the case in **The Netherlands** where specific sports activities fit well within the ordinary labour law rules.

In Argentina players are workers and have mandatory protection based on general employment laws first, and then, on special regulations for professional players' activity.

Even in countries where the government usually abstains from regulating sport, such as the **United Kingdom**, employment law covers football employment. For example, in the case *Walker v Crystal Palace Football Club* [1910], the Court of Appeal applied a new 'control test' as a common law means of distinguishing an employee subject to the control of the employer from a self-employed contractor who is not. The Court ruled that the employee status of professional footballers comes from their obligation to abide by the club's rules and practices, training regime and general instructions.

In Germany contractually stipulated obligations as to the time and place of a training session or sporting competition, especially the participation in a league-competition, or duties pertaining to conduct on and off the pitch (e.g. attendance at club's or sponsor's appointments/events) qualify professional football players as employees.

However, for some other countries the application of ordinary employment law to football employment is either excluded or limited and conditioned.

For example, in the **Czech Republic** system professional players fall outside the scope of labour law. Players have to sign into a civil law contract and have recognized a self-employed legal status. Therefore, they deal with tax and social security contributions by themselves. It is reported that this implies, in practice, a player-club relationship that is unbalanced in favor of the employer. In the Czech Republic, players are seen as the weaker party since they are not duly protected.

The Czech stakeholders are negotiating the national implementation of the "Autonomous Agreement regarding the Minimum Requirements for Standard Player Contracts", as negotiated between UEFA, ECA, FIFPro and EPFL at European level. The Football Association of the Czech Republic together with the Czech Association of Football Players and the League Football Association have been working on changes to the Czech (football) legislation in order to meet the requirements of professional player contracts. The implementation of the Autonomous Agreement is expected to lead to one of the most important changes in the sporting activity of professional players within the past ten years.

In **Slovakia** the labour code defines dependent work. Such a notion covers the professional athletes' employment relationship. Notwithstanding this general principle, in practice labour law does not apply to footballers.

In fact, atypical contracts based on the Civil Code or the Commercial Code govern the players' agreements. This is due to the rigid nature of the Slovakian Labour Code and the failure of the Slovak Republic to enact specific laws on the employment status of players, taking into account the specificities of the sports sector. As a consequence, once again, football players as self-employed persons have to deal with tax and social security systems.

A similar issue arises in **Croatia** where the Croatian Football Federation defines the terms of the self-employed status of professional players. Like in the Czech Republic, footballers are excluded from protection under national labour law and need to pay by tax and social security contributions themselves. This has been highlighted as a problem, considering that clubs fall short of complying with their contractual obligations, such as remuneration, towards the players. Nowadays more than 60 professional players are reported to have debts towards the national tax authorities and bank accounts and property have been blocked.

Therefore, the noticeable trend is for changing the legal status of professional players into an employment contract recognised under regular labour law. A working group of the Croatian Ministry of Science, Education and Sport is dealing with a new Sports Act bill of law. As for the Czech Republic, the

“Autonomous Agreement regarding the Minimum Requirements for Standard Player’s Contract” should integrate the legal status of professional football players into a labour law.

When you move to the Far East, **Japan** raises a similar issue. There are no special laws, such as labour law regulations, for professional footballers. In fact, even in a situation where the legislator has covered sports through the enactment of Japan’s Basic Act on Sport in 2011, there are no regulations therein that address the legal status of professional sports people. Footballers are thus generally not workers under Japanese labour law. In general, whether a professional football player might qualify as an employee depends on the interpretation of every single rule of law applicable to that case.

In **Turkey**, the Labour Code clearly excludes athletes from its scope. Therefore, the Civil Code, the Code of Obligations and the sports federation’s regulations govern the football players’ employment relationship.

In **Russia**, the State plays a significant regulatory role together with sports associations. In particular, the Russian Federal Law 13-FZ of 28 February 2008 has added an entire section to the Russian Labour Code RF (2001) regulating the employment of professional sportsmen and women.

2. *Addressing the specific sport or football issues in labour law*

In **Italy**, ordinary law takes into account the specificity of sport, so derogating from labour legislation, which applies to employees’ relationships. In particular, it waives the application of the relevant legislation on the protection of the freedom and dignity of workers and of trade union freedom and union activity in the workplace. Moreover the rules regarding the public employment service and those on fixed term contracts do not apply to professional sport players.

In **Portugal**, the football players are subject to the same general rights and obligations as any other employee. However, there are certain laws which exclusively address the football players’ status because they have peculiar working times and conditions. Moreover, unlike all other employees, they can be transferred to another employer [club] in exchange for a fee. Unique to these laws is also the fact that players and clubs have their own dispute resolution bodies and systems, although they are also entitled to their constitutional rights to seek redress before the ordinary courts.

In **Swiss** law, there are no special statutory sources to regulate employment relationships with football players and other athletes. The Swiss labour law rules cover the athletes’ employment agreements. This legal system is more liberal and relatively less protective for workers. Nevertheless, Swiss law provides a sophisticated social security system to which all professional athletes can contribute and benefit from.

The **French** *Code du Sport* provides a certain number of basic provisions on the employment relationship.

However, the status of professional footballers is also covered by collective bargaining agreements. In particular, the Professional Football Charter, together with the French national collective agreement on Sport, is the main collective bargaining agreement in football. As a consequence, professional footballers have a hybrid status subject to the Code de Travail and certain provisions which are very specific to their profession.

The **Spanish** legal system defines the athletes as being “special employees” who professionally practice a sporting activity under the direction of their employers (clubs, sport associations, etc.) and the specificity of their employment relationship is regulated by the Royal Decree 1006/1985.

Equally in **Mexico**, players fall into a category of special employment in the labour law. The labour code has a chapter on “Professional Athletes”, which nevertheless must comply with the general principles of the labour law.

3. *Specific sports acts or football acts*

A number of countries have adopted acts focused on sports professionals or, more specifically, on football. Due to the needs of the sector, specific rules and regulations have been adopted to address either the sports professional issues in general or the football situation in particular.

Noteworthy is the so-called Pelé Law (1998) of **Brazil**. The Pelé Law (Law n° 9.615/98, amended by the Law n° 12.395/11) applies exclusively to football, which is the only professional sport in Brazil.

For **Portugal**, we should mention the “Law on Professional Sports Employment Contracts”, which establishes the legal framework governing the employment contracts of professional sports people as well as training contracts for the education and training of young sportsmen (amateurs and/or minors). It also establishes the maximum and minimum terms of contracts, the rights and obligations of the contracting parties, includes disciplinary issues, and makes provision regarding loans and transfers, termination of contracts and compensation criteria. There is also a Law of Physical Activity and Sport, which contains provisions for the resolution of sporting matters in the strict sense, meaning that they are based on technical or disciplinary rules of the game.

In **Belgium**, there is something similar. There is the Act of 24 February 1978 concerning employment contracts for sports professionals (the Sports Professionals Act). Sports professionals are defined as those persons who undertake to prepare themselves for, or take part in, a competition or sports spectator event under the authority of another person in return for remuneration exceeding a certain level or threshold. The Sports Professionals Act applies to professional football players whose annual gross remuneration is higher than a certain threshold, as determined by Royal Decree on a yearly basis. It should be noted that, the so-called *Dahmane* case has triggered quite some debate in the football world and the public media. It concerns a case of the Labour Court of Antwerp, who decided on

6 May 2004 that the special rules in the Sports Professionals Act on dismissal for sports professionals are discriminatory and not in conformity with the Belgian Constitution and, therefore, cannot be applied.

4. *Collective bargaining*

Collective bargaining, and the use of collective agreements are widely used in various countries in the field of sport. Many countries have a practice of collective bargaining which has led to the adoption of specific football related collective agreements.

In **Argentina** and in **Italy** the football player-club relationship is mainly governed by the rules set out in agreements signed by the leagues on one side, and the football players' trade union association on the other.

Both clubs and players have specific rights and obligations detailed in the CBA.

In particular, the Italian players have their fundamental rights as workers finally recognized (right to play, work and train, and social security) while clubs can rely on more guarantees concerning the players' services.

In **France**, the Professional Football Charter is the result of a collective bargaining process between the club employers and their employees in the field of sport. It covers youth coaches, apprentice players and professional players. It has been negotiated in the presence of the French Football Federation and the Professional Football League. It governs all the conditions of employment, vocational training, and fixes all employment benefits. It contains many provisions on pay, health and safety, accreditation of training centres, the different statuses of players (apprentice, trainee, elite, professional, foreign), the approval of contracts, transfers, trade union rights, etc.

The role of collective bargaining has also been made clear in the **Danish** contribution. Until July 1999, legal matters between professional football players and the clubs were regulated by the standard contract drawn up by the Danish football association. All contracts had to be approved by the football association in order to become valid and enter into force. However, the respective players and clubs associations signed two (collective) agreements regulating the relationship between the signatories, whilst also providing for the minimum content of the players' working conditions and pay. With reference to these two agreements, the players and clubs associations elaborated a new standard contract pursuant to their applicable (collective) agreements.

Also in **Belgium**, there is a practice of concluding collective agreements on football employment. The collective agreement of 2 July 2013 governs the contract of professional football players and their clubs to the extent that the Sports Professionals Act regulates them. This 'football collective agreement' is active for a limited duration of time and expires after 30 June 2015. Since the football agreement was conceived by a Joint Committee which has a national competence in the sports

sector, it is applicable across the whole country.

Also for **Spain**, there was a recent collective agreement for professional football activities, which was signed between the National Professional Football League and the Spanish Footballers Association on 25 July 2014. There is also an older collective agreement for professional football activities in the National Second “B” Category.

Portugal equally engages in a system of collective bargaining in football. There is a collective agreement between the “Liga” and the “Professional Football Players Union” which governs the specificities of Portuguese professional football employment. It also applies to sports employment relations between professional coaches and clubs, which are members of the Liga.

The **Netherlands** too has a tradition of collective bargaining in football. The collective agreement is concluded between the two players unions in the country and the organization for employers in Dutch professional Football. This organization for professional clubs is not the same as the combination of the two professional leagues but is a separate entity. The collective agreement gives substantial protection to football contracts for players. For example, in case of illness and injury, 100% of the salary during the full term of the contract is guaranteed.

5. *Transfer rules*

In this comparative analysis, we do not have the ambition to summarize all technical details that the various country overviews have mentioned with regard to transfer issues in professional football. However, realizing that football transfers involve a lot of discussion, also at a fundamental legal level, we select a few striking issues in some legal systems.

In the **German** analysis, reference is made to the impact of fundamental constitutional values in football transfers. More specifically, the constitutional freedom to choose and exercise a profession is referred to. This is seen in the German system as a subjective right which protects the free development of a person’s personality in the area of work as well as the possibility to create and preserve one’s livelihood from one’s own labour. Through open norms in civil law, these constitutional principles impact private law relationships. On this basis, it is concluded that football transfer rules that limit professional freedom must serve a legitimate purpose and have to be suitable and adequate. With regard to training compensation, the German Federal Court ruled that the payment of a lump-sum amounting to 25.000 Deutsche Mark as training compensation for a contract-amateur in football is inappropriately high and constitutes an infringement of the freedom to choose and exercise a profession as laid down in the German constitution.

Noteworthy is that, in **Spain**, the issue of training compensation does not arise from the FIFA Regulations but from a Royal Decree (1006/1985) which stipulates that when a player has terminated his contract and signs a new one, the new club shall pay a training compensation. The system is quite original. The club

from which the player is going to leave can indicate the amount of the compensation to the player's new club, but if no agreement on this compensation is reached, the old club still has to offer a new contract to the player of one year with an increase of 7%, based on the amount of training compensation that was sought.

The **Mexican** case is interesting too. Transfer of players is addressed in federal labour law: if a club receives any amount of money from another club for the transfer of a player, the player has the right to benefit from that payment. In some cases the player may receive more than 50 percent of the amount paid for him.

6. *Dispute settlement*

With regard to dispute settlement, in many legal systems the ordinary courts deal (or can deal) with football employment disputes. In some cases, reference is made to arbitration. However, in some countries, arbitration is not allowed in employment disputes. This is the case of **Spain** where there is no possibility to provide a contractual reference for submitting a dispute to an arbitration panel since arbitration for employment-related issues is strictly forbidden.

In **Italy**, players and clubs may refer their disputes to an arbitration body. For **Denmark**, it is reported that case law from the ordinary courts concerning employment relationships is rare, because in practice parties opt for arbitration.

Arbitration is the normal way of dispute settlement in **The Netherlands** too. The Arbitration Committee of the football association is the competent body for professional football. It is a one-instance arbitration body whose members are nominated by players' and club organizations. There is no real option to lodge a complaint with the ordinary courts although recently one player succeeded in bypassing this system. The number of disputes taken to arbitration is quite low and can be related to the well-functioning dialogue at national level. Moreover the arbitration award can be obtained rather fast and is well motivated.

Some legal systems have provided for conciliation procedures instead of arbitration, combined with access to ordinary courts.

For example, in **France**, disputes concerning collective agreements require a preliminary hearing. A legal commission has the task of reconciling the positions of the parties in the event of non-compliance with the obligations contained in contracts between club and player. This procedure is mandatory in football. The French *Cour de Cassation* has considered that this preliminary prerequisite was a guarantee for the employee. Once this preliminary procedure has been implemented, the dispute may be settled before the labour courts.

In **German** football there is no arbitration for employment disputes.

Ordinary state labour courts are competent for disputes arising from contracts between clubs and players.

Prior to submitting a labour issue to the ordinary labour courts, the German players' license regulations, however, provide for a *conciliation committee* with

the football league.

In Russia, special arbitration courts have been created and mediation procedures introduced. Normally the disputes relating to administrative matters or employment relations come under the jurisdiction of the regular courts, while disputes relating to business relations subject to civil law may be dealt with by the arbitration courts.

In the context of alternative dispute settlement through arbitration, taking into account the fact that some countries prohibit arbitration for reasons of worker protection, it is worth mentioning the developments reported in **Portugal**. With the establishment of the Portuguese Court of Arbitration for Sport (Tribunal Arbitral do Desporto) in 2013, a jurisdictional body intended to act independently of (public law) administrative bodies and private sports bodies, was created. It received jurisdiction to decide sports-related litigation in Portugal, namely disputes arising out of the sport legal system and disputes related to the practice of sport. Arbitration in this tribunal may be either compulsory or voluntary depending on the nature of the dispute. However, since its creation, the tribunal has yet to decide on a dispute and as things stand, it can neither operate nor function as a decision making body following a decision of the Portuguese Constitutional Court in November 2013 which declared that the TAD is incompatible with the Constitution.

* * *

It is not a surprise that a large degree of variety of legal systems governing the employment relationship in football does exist in the reported countries.

With some exceptions, football employment is quite well integrated into the national labour law system in most countries. The integration of football issues in labour law remains, however, difficult in other countries. Surely the main parties of the 'football contract' are clubs and players. However, other substantial stakeholders do exist in the football world: sports associations, such as the national football bodies and FIFA.

Notwithstanding the efforts deployed in many countries, it remains a legal challenge to reconcile the specific rules proper of the sports sector with the ordinary labour law provisions, both dealing with the working conditions of footballers.

There are issues of compatibility and primacy of law between sports and ordinary rules. The debate on those issues trigger a discussion regarding how much autonomy and specificity must be granted to football.

The employment of a professional football player is, in many cases, not comparable with an ordinary employment situation on the labour market.

Some countries have already acknowledged this specific situation by enacting autonomous rules in their national legislation.

However, a sustainable and credible legal framework for professional football can only exist when it is compatible with the fundamental principles of labour law.

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THE EUROPEAN SPORTS LAW AND POLICY BULLETIN, ISSUE 1-2014

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