



The aftermath of the Diarra precedent: possible solutions outside FIFA Regulations

**Jorge Ibarrola, LL.M. (McGill
& ISDE)**

Swiss qualified Attorney-at-Law

**Certified and sworn Mediator FSA |
CEDR | IEMEDep | FIFA**

Former Counsel to the CAS

INTRODUCTION

CAS 2015/A/4094 Lassana Diarra v. FC Lokomotiv Moscow:

Art. 17(1) RSTP in force in 2016:

- In all cases, the party in breach shall pay compensation
- penalty clause, liquidated damages clause => applies
- Otherwise, due consideration for
 - the **law** of the country concerned,
 - the **specificity of sport**, and
 - any other **objective criteria**, including:
 - the remuneration and other benefits due to the player under the **existing contract and/or the new contract**,
 - the **time remaining** on the existing contract up to a maximum of five years,
 - the **fees and expenses paid** or incurred by the former club (amortised over the term of the contract) and
 - whether the contractual breach falls within a **protected period**
- the **CAS Panel upheld the FIFA DRC decision** => compensation = unamortised transfer fee paid by Lokomotiv to Diarra's previous club.



INTRODUCTION

Diarra case => game changer

What are the **consequences**?

⇒ **FIFA Interim Regulatory Framework** (new art. 17 RSTP) => positive interest

⇒ How useful and relevant is the **CAS jurisprudence** to handle future cases?



DIARRA CASE AND ECJ DECISION

CJEU Decision (case C-650/22):

The RSTP rules regarding the consequence resulting from the termination without just cause by a player are contrary to art. 45 and 101 TFUE based on the following conclusions:

- ⇒ **Presumed joint and several liability of new club**
- ⇒ **imprecise and discretionary criteria for determination of compensation**
 - Sometimes **vague** (“without just cause” and “specificity of sport”)
 - sometimes **disproportionate**
 - sometimes **unrelated** to the contractual relationship between the player and the old club (costs for the acquisition of the player and remuneration under the new contract)
- ⇒ **Automatic sanctions** on new club in case of termination during the protected period
- ⇒ **Non-issuance of ITC** in case of dispute with old club



DIARRA CASE AND ECJ DECISION

CJEU Decision (case C-650/22):

RSTP criteria for the determination of the compensation in case of termination or breach by the player “without just cause”

- ⇒ go beyond what is necessary (proportionate) to achieve the legitimate objectives pursued by the FIFA regulations (contract stability) because
- ⇒ apply to players whose **careers are relatively short**
- ⇒ Take into account of **costs of acquisition** of the player
- ⇒ No account of **national employment law, Swiss law applies only subsidiarily**
- ⇒ **Specificity of sport and breach without just cause** = too vague and discretionary concepts, whose application is **unpredictable** and **difficult to control**
- ⇒ **Disproportionate compensation** (but ok to grant the **residual value** of contract)
- ⇒ **Non-issuance of ITC** => limits the player's freedom of movement
- ⇒ **Joint and several liability** of the new club, subject to sanction = further limitation.
- ⇒ seem to be intended more to **protect the clubs' financial interests (non-solicitation agreement between clubs)**

Therefore, all together, rules of 17 RSTP violate art. 45 and 101(1) TFUE



DIARRA CASE AND CJEU DECISION

CJEU Decision (case C-650/22):

How to cope with this decision?

- ⇒ No refusal of ITC
- ⇒ No presumed joint and several liability nor sanction on new club
- ⇒ Clearer criteria for calculation of compensation for breach of contract
 - Breach without just cause
 - Contractual liquidated damages clause
 - Law => national law and Swiss law => predictable and possible to control
 - Residual value
 - No costs unrelated to the player's employment contract and its breach
 - No costs related to the player's future remuneration



FIFA INTERIM REGULATORY FRAMEWORK

FIFA's Interim Regulatory Framework (Bureau of the FIFA Council 22.12.2024)

- To ensure that football stakeholders benefit from **stability and regulatory certainty**
- **Concepts not affected** by Diarra case :
 - **Contractual stability** => respect of contracts which terminate upon expiry of by mutual agreement
 - **Protected period** => sporting sanctions against the party in breach (club or player)
 - **Liquidated damages clauses** in case of unilateral termination of the contract
 - Need for an **ITC**
- **Concepts to adjust:**
 - **Calculation of compensation** in case of breach by a player
 - **Burden of proof** for joint and several liability of new club
 - Procedure regarding the issuance of the **ITC**
 - Amendments to the **Procedural rules** regarding just cause, burden of proof and evidentiary requests.
 - **Just cause** => no longer reasonable to continue a contractual relationship in good faith (= art. 337(2) CO)

FIFA

Explanatory Notes

Interim Regulatory Framework

- Contractual stability, in particular article 17 of the FIFA Regulations on the Status and Transfer of Players
- Sporting sanctions
- International Transfer Certificates
- Coaches
- Cases pending before the Football Tribunal

NEW FIFA RSTP

Definition of “just cause” to article 14 paragraph 1 RSTP

“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. In general, just cause shall exist in any circumstance in which a party can no longer reasonably and in good faith be expected to continue a contractual relationship.”



NEW FIFA RSTP

New article 17 RSTP 2025 : in case of termination of contract without just cause:

Para 1: “In all cases, the party *that has suffered as a result of a breach of contract by the counterparty shall be entitled to receive compensation*. Subject to the provisions of article 20 and Annexe 4 in relation to training compensation, and *unless otherwise provided* for in the contract, compensation for the breach shall be calculated *taking into account the damage suffered, according to the ‘positive interest’ principle, having regard to the individual facts and circumstances of each case, and with due consideration for the law of the country concerned.*”



NEW FIFA RSTP

New article 17 RSTP 2025 : in case of termination of contract without just cause:

Para. 2: “*Entitlement to compensation cannot be assigned to a third party. A player’s new club shall be held jointly liable to pay compensation if, having regard to the individual facts and circumstances of each case, it can be established that the new club induced the player to breach their contract.*”



FIFA NEW ART. 17 RSTP

New article 17 RSTP 2025 : in case of termination of contract without just cause:

Para. 4: *“A sporting sanction shall be imposed (i) on any club found to be in breach of contract during the protected period or (ii) on a player’s new club if, having regard to the individual facts and circumstances of each case, it can be established that the new club induced the player to breach the contract during the protected period.*”



FIFA OTHER NEW RULES

ITC => Art. 11(3) of Annexe 3 to the RSTP

Para 3: Within 72 hours of the ITC request, the former association **shall deliver** the ITC to the new association.

Para 6: If the former association **fails to respond to the ITC** request within 72 hours, the new association will be able to register the player with the new club and enter the relevant player registration information in TMS. In exceptional circumstances, the player, the former association or the new association may request FIFA's intervention. In all cases, the issuance of an ITC is **without prejudice to any contractual dispute** between the player, their former club and/or their new club.

Collaboration => Art. 13 (6) FIFA Procedural Rules

Parties have the **duty to collaborate** to establish the facts and shall respond in good faith to any evidentiary request from a chamber, the FIFA general secretariat or a party. A party submitting an evidentiary request shall demonstrate that the evidence requested is **likely to exist** and is **relevant**. An **adverse inference** may be drawn from a party's reaction to an evidentiary request

FIFA NEW ART. 17 RSTP

New article 17 FIFA RSTP 2025 : in case of termination of contract without just cause:

- ⇒ **Definition of just cause**
- ⇒ **In all cases => compensation** for the party suffering the breach of contract
- ⇒ **Liquidated damages clause** in case of unilateral termination => applies
- ⇒ Otherwise, damage suffered => **positive interest principle**
 - Having regard to the **individual facts and circumstances** of each case, and
 - with due **consideration for the law of the country** concerned (to be proven by the party relying on national law)
 - **Burden of proving the damage** => on party claiming for compensation
 - Proof of responsibility of new club for **joint liability and sanction**
 - **Mitigation** = possible
 - same applies to **coaches**

CJEU Decision (case C-650/22):

- ⇒ No refusal of ITC ✓
- ⇒ No presumed joint and several liability nor sanction on new club ✓
- ⇒ Clearer criteria for calculation of compensation for breach of contract
 - Breach without just cause ✓
 - Contractual liquidated damages clause ✓
 - Law => national law and Swiss law => predictable and possible to control ✓
 - Residual value ✓
 - No costs unrelated to the player's employment contract and its breach ?
 - No costs related to the player's future remuneration ?

SUSPENSION OF DISCIPLINARY MEASURES

25 November 2024 => Chairman of the FIFA Disciplinary Committee temporarily suspends

- disciplinary measures on **players or coaches** relating to **enforcement of financial decision** based on art. 17 RSTP
- disciplinary measures on **clubs** based on joint and several liability pursuant to art. 17 RSTP

=> Disciplinary measures may be **reinstated** at a later stage



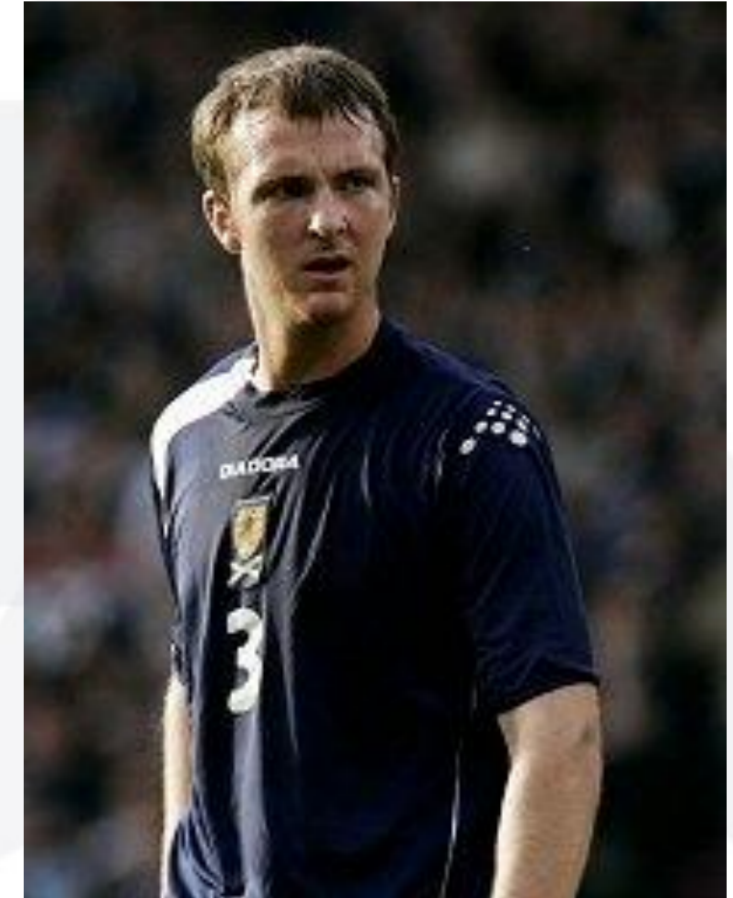
RELEVANCE OF THE CAS JURISPRUDENCE FOR APPLICATION OF ARTICLE 17 RSTP

- ⇒ What is the leading CAS jurisprudence regarding positive interest?
- ⇒ What are the applicable criteria for the calculation of the compensation under art. 17 RSTP ?
- ⇒ Swiss law applies in addition to RSTP => same criteria if art. 17 RSTP ≠ applies?

WEBSTER CASE

Award CAS 2007/A/1298

- **Applicable law** => FIFA regulations + Swiss law; Scottish law only if relevant ✓
- **Residual value of the contract:** remuneration and benefits = player's market value ✓
- **Specificity of the sport:** reasonable balance between
 - ⇒ contractual stability and
 - ⇒ freedom of movement of players ✓
- **Not taken into account:**
 - ⇒ Player's training ✗
 - ⇒ estimated value of the player on the transfer market ✗
 - ⇒ lost profits ✗
 - ⇒ cost of replacing the player ?
 - ⇒ costs of acquisition of player amortised ✗
 - ⇒ Remuneration under new contract ✗



MATUZALEM CASE

Award CAS 2008/A/1519

- **Average remuneration and benefits** under the old and new contracts ✗
- **Value of services:** price agreed by the club to retain the player
 - ⇒ if **transfer** => transfer amount ✗
 - ⇒ if **no transfer** but there is an offer from another club => the offer = important for determining compensation ✗
 - ⇒ **Nor transfer nor offer** =>
 - **signing-on fee** or ✓
 - 1/3 club's offer ✗
- **Positive damage** => Art. 99 CO and 42(2) CO => if the exact amount of damages cannot be established, the judge shall assess them in his **discretion**, having regard to the **ordinary course of events** and the measures taken by the damaged party to limit the damages ✓
- **Specificity of sport** => art. 337c and 337d CO (6-month salary) ✓



MUTU CASE

Award CAS 2008/A/1644

- **Applicable law:** FIFA regulations and choice of English law in employment contract ✓
- **Causal link** between termination and club's damage ✓
- **Calculation of compensation:**
 - ⇒ Residual duration of the contract ✓
 - ⇒ non-amortised value of transfer fee ✗
 - ⇒ non-amortised value of signing fee ✓
 - ⇒ non-amortised value agent's fees ✗
 - ⇒ solidarity contribution (pro rata temporis) ✗
 - ⇒ transfer levy in England (pro rata temporis) ✗
 - ⇒ Chelsea's agents' fees ✗



DE SANCTIS CASE

Award CAS 2010/A/2145-2146-2147

- **Applicable law:** FIFA regulations and Swiss law ✓
- **No average salaries and specificity of sport** ✓
- **Positive interest**
 - ⇒ Specific facts of the case
 - ⇒ Weight of each and all criteria to assess the compensation (not only those of art. 17) ✓
 - ⇒ Onus on parties to prove the calculation of compensation ✓
 - ⇒ The compensation must be **just, fair, transparent and comprehensible** to put the injured participation in the position it would have been if the breach had not occurred ✓
- **Other relevant criteria (not in art. 17)**
 - ⇒ Loss of a **possible transfer** ✗ ? (art. 337(d) CO, loss of a chance
 - ⇒ **Replacement costs** ? (✓)
 - ⇒ Logical **nexus** between the breach and the loss claimed ✓
 - ⇒ Specificity of sport = correcting factor ? (✓ under 337(c) and (d) CO)



DE SANCTIS CASE

Award CAS 2010/A/2145-2146-2147

Para 61:

The Panel also notes the "**positive interest**" principle that was referred to in Matuzalem and equally applied in El-Hadary, as such a panel "will aim at determining an **amount which shall basically put the injured party in the position that the same party would have had if the contract was performed properly**"(para 86 of Matuzalem).

Para 74:

As stated by the panel in Matuzalem (para 114) " ... the judging authority will have a wide **discretionary power** to decide on the appropriate amount, taking into consideration the specific circumstances of the case and the responsibilities of both the parties". The injured party has a well established **duty to mitigate** and the level to which this has been done has to be considered by the judging authority. Each case will turn on its own facts, [...]"

Para 96:

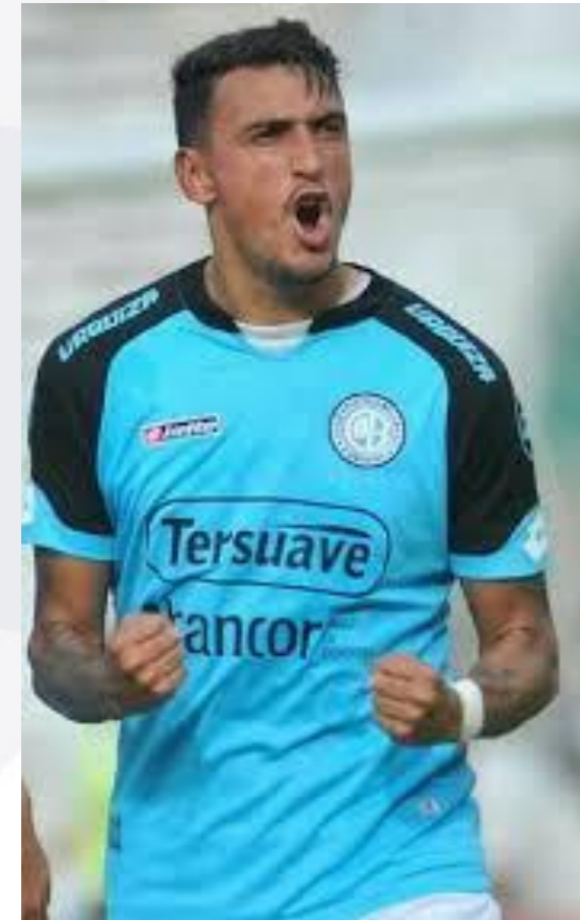
[...] the **specificity of sport** is not an additional head of compensation nor a criteria allowing to decide in equity, but a **correcting factor** which allows the Panel to take into consideration other objective elements which are not envisaged under the other criteria of Art. 17 of the Regulations.



EZEQUIEL CASE

Award CAS 2018/A/5607-5608 CAS 2018/A/5607-5608

- **Applicable law** => FIFA regulations and Swiss law ✓
- **No just cause according to CAS jurisprudence and Swiss law** (threat of terrorist attack – nor force majeure – poor health of mother) ✓
- **Compensation:**
 - ⇒ **Lower Player's remuneration under new employment contract** ≠ taken into account ✓
 - ⇒ Replacement costs => **link between player's termination and new player** ? (✓)
 - ⇒ **Player's agent fees (amortised)** ✗
 - ⇒ **No Average residual value** of old and new contracts (on top of replacement costs) ✓
 - ⇒ **Deduction of Player's salary under the old contract** ?
 - ⇒ **Specificity of sport** => **Art. 99 and 42 CO** => indemnity of 25% of the initial amount of compensation ✓



EZEQUIEL CASE

Award CAS 2018/A/5607-5608 CAS 2018/A/5607-5608

Para. 70:

The concept of “**just cause**” is not defined in the RSTP. [...] It is now well-established by CAS jurisprudence that: “Under Swiss law, such a ‘just cause’ exists **whenever the terminating party can in good faith not be expected to continue the employment relationship** (Article 337 para. 2 CO).”

Para 111

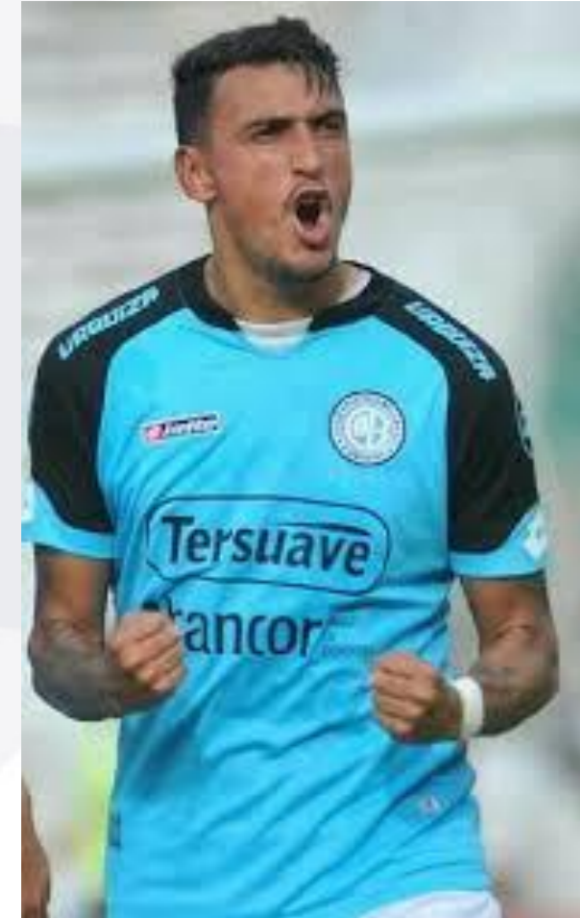
The Panel also observes that there is an established consensus in CAS jurisprudence that the “**positive interest**” principle must apply in calculating compensation for an unjustified, unilateral termination of a contract under Article 17, para. 1 RSTP

Para. 148:

According to CAS jurisprudence, one of the factors to consider when deciding whether the **specificity of sport** requires a **correction in the amount** of compensation awarded is the behavior of the parties, in particular, of the side that failed to respect its contractual obligation

Para. 155

The Panel recognizes that the exact damage caused by the above is hard to establish. Therefore, considering **Articles 99, para. 3 and 42, para. 2 of the Swiss Code of Obligations (“CO”)**, under which a judging authority may estimate the value of damages at its **discretion** in light of the **normal course of events** and the measures taken by the damaged party to **limit the damages**, [...]



GHODDOS CASE

CAS Award CAS 2019/A/6463-6464

- **Compensation**

- ⇒ **Liquidated damages clause** => can be reduced to a proportionate level (art. 163 CO)

- ⇒ **Player's value**

- Transfer fee ✗
 - Deduction of the salaries with future club (terminated) ?



GHODDOS CASE

CAS Award CAS 2019/A/6463-6464

Para. 144:

As repeatedly confirmed in CAS jurisprudence, the list of criteria set out in Article 17.1 RSTP is **illustrative and not exhaustive**. Other objective factors can and should be considered, such as the **loss of a possible transfer fee** and the **replacement costs**, provided that there exists a **logical nexus** between the breach and loss claimed [...]. CAS precedents also indicate that, in the analysis of the relevant criteria, the order by which those criteria are set forth by Article 17.1 RSTP is irrelevant and need not be exactly followed by the judging body

Para. 145

The Panel further observes that, according to CAS jurisprudence, it is for the judging authority to carefully assess, on a **case by case basis**, all the factors and determine how much weight, if any, each of them should carry in calculating compensation under Article 17.1 RSTP



TAKEAWAYS

To abide by the CJEU decision in Diarra Case and

In addition to the FIFA Interim Regulatory Framework,

⇒ **art. 49 FIFA statutes** => in case of appeal to the CAS, FIFA regulations and **Swiss law** apply

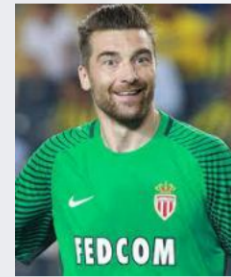
⇒ **the CAS jurisprudence**

- based on Swiss law
- allows the calculation of compensation for breach of contract by players even without art. 17 RSTP

Accordingly

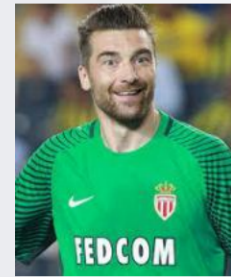
⇒ **Just cause to terminate an employment contract**

- Same in FIFA Interim Regulatory Framework as in art. 337(2) CO



TAKEAWAYS

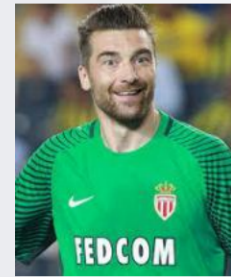
- Criteria of art. 17 RSTP for the calculation of compensation for breach of contract
 - ⇒ **Not exhaustive** (salaries, transfer fee, replacement costs, etc.) and assessed on a **case-by-case basis** based on **causal link** between termination and damage
 - ⇒ **Positive interest** = similar to those provided by **Swiss law**:
 - Assessment of damages based on evidence or art. 99 and 42 CO => **positive interest and discretionary power**
 - The **employer is entitled to compensation** if breach by the Player under art. 337b and 337d CO
 - **Mitigation** => art. 44 and 337c(2) CO
 - **Liquidated damages** admitted by Swiss law (art. 160 CO) and can be reduced if disproportionate (art. 163(3) CO)
 - **Specificity of sport** => application of art. 337c(3) by analogy, at least in favour of the players + 99 & 42 CO
 - ⇒ **Similar** to those of **many national employment laws**



TAKEAWAYS

Criteria of art. 17 RSTP

The **definition of positive interest** does not necessarily need to be more specific in the RSTP as in most of the concepts under the old 17 RSTP will be based on the application of **national law and/or Swiss law** for the calculation of damages for breach of contract by Player



THANK YOU

Questions – Answers

Jorge Ibarrola, LL.M. (McGill & ISDE)

Swiss qualified Attorney-at-Law

Certified and sworn Mediator FSA | CEDR | IEMEDP | FIFA

Former Counsel to the CAS

Maison du Sport International
54, avenue de Rhodanie
1007 Lausanne
Switzerland
www.libra-law.ch

Tel: +41 21 601 81 25
Fax: +41 21 601 81 26
Mob: +41 79 485 38 44
ibarrola@libra-law.ch
Skype: jorgeibarrola