

Latest Jurisprudence on art. 17 FIFA RSTP

Roy Vermeer
Vermeer Sports Law
rv@vermeerlaw.nl



REGULATIONS
on the Status and
Transfer of Players

Outline

- European Court of Justice ruling in Diarra - recap
- CAS 2023/A/9954 FC Sheriff v. Edmund Addo & FC Spartak Subotica
- CAS 2024/A/10280 JSC Football Club Rostov v. Mathias Antonsen Normann & Al Raed Sport Club & Fédération Internationale de Football Association
- Amendments to the FIFA RSTP - Interim Regulatory Framework
- FIFA DRC - Massafi Al-Jonob, Iraq vs Musa Esenu, Uganda & Bul Football Club, Uganda

ECJ Diarra

Compensation for breach of contract – art. 17 par. 1 FIFA RSTP

- If player terminates contract without a valid reason, compensation should be calculated taking into account:
 - The law of the country concerned;
 - The specificity of sport;
 - Any other objective criteria:
 - The terms of the player's new employment contract;
 - The terms of the player's old employment contract (i.e. the terminated contract);
 - Non-amortised expenses incurred by the club (transfer fees, agent fees, etc.)
 - Whether breach falls within protected period
- The joint liability of the new club of the player
- Sporting sanctions for the inducement of a breach of contract.
- ITC procedure

ECJ Diarra

ECJ rules that FIFA RSTP infringe freedom of movement rights and violate competition law.

On calculation of compensation for breach of contract

- Law of the country concerned: *hardly ever used* by the FIFA DRC and CAS, therefore no effective compliance with this part.
- Specificity of sport: *too vague and discretionary*, therefore unforeseeable for players.
- Terms of the player's new employment contract: *irrelevant* as it does not relate to the contract that was terminated.
- Non-amortised transfer expenses: *excessive*, as it is not negotiated by the player but by other parties (i.e. two clubs) for their own interest + this criterion is only there to safeguard economic interests of club rather than to ensure the proper organisation of sports competitions.

Only criteria of art. 17 FIFA RSTP not denounced by ECJ

- The terms of the player's old employment contract + timing of termination (and national law)

ECJ Diarra

On joint liability new club (17 par. 2):

- Given that it is 'automatic' there is *per se* no proportionality as it does not take into account the specific circumstances of each case (i.e. no regard to actual conduct of club)
- Reference also to the criticism in relation to art. 17 par. 1 FIFA RSTP

On sporting sanctions new club (17 par. 4):

- Presumption of inducement to breach of contract which the DRC/CAS cannot change on a case-by-case basis not justified
- Sanctions can only be imposed if transparent, objective, non-discriminatory and proportionate
- For proportionality, one always needs to assess all circumstances of a case when determining sanctions.

On ITC:

- Again not proportionate as no case-by-case assessment

CAS 2023/A/9954 FC Sheriff v. Edmund Addo & FC Spartak Subotica

- Player terminates his employment contract without just cause
- CAS awards compensation for breach of contract based on:
 - Average between salary of old and new contract(s!)
 - The non-amortised transfer fee
 - Makes reference that “missed transfer fees” under certain circumstances can be a damage under art. 17 FIFA RSTP.
- No explicit consideration to the EU law and/or Diarra in terms of calculation
- As to the joint liability of the new club:
 - FC Spartak Subotica refers to the opinion of the Advocate General in Diarra
 - Ruling of Diarra is published in between the submissions-phase and the notification of the decision CAS
- CAS rules: EU law not relevant given the ‘nationalities’ of the parties:

“Finally, and for the sake of good order, the Panel notes that even if one assumes, as submitted by Spartak, that the provision regarding the joint and several liability of a new club is most likely in conflict with EU law (quod non), this does not change the Panel’s view for the mere reason that this dispute concerns a player from Ghana and two clubs from Moldova and Serbia, and the submission regarding EU law therefore seems irrelevant.”

CAS 2024/A/10280 JSC Football Club Rostov v. Mathias Antonsen Normann & Al Raed Sport Club & Fédération Internationale de Football Association

- Player terminates his employment contract without just cause
- After the hearing, CAS reopens evidentiary phase and invites parties to provide submissions on Diarra:

Player: *“The decision of the ECJ is of no relevance. That case concerned EU competition law and free movement law as applicable to an EU citizen seeking employment in an EU member state, whereas the present case does not concern an EU citizen or a transfer between EU member states. Further the applicable law in these proceedings is the FIFA RSTP and, subsidiarily, Swiss law. Lastly, whilst the Player is a EEA citizen, decisions of the ECJ are not automatically binding on EEA member states. Even if it was, the judgment could not be applied in a manner that disadvantages such citizen as against a non-EU or non-EEA citizen.”*

CAS 2024/A/10280 JSC Football Club Rostov v. Mathias Antonsen Normann & Al Raed Sport Club & Fédération Internationale de Football Association

- After the hearing, CAS reopens evidentiary phase and invites parties to provide submissions on Diarra:

New Club: *“With regard to joint and several liability, certain aspects of FIFA’s rules are incompatible with Article 45 of the TFEU. The risk of sporting sanction deprives recruitment of practical interest. With regard to the calculation of compensation, there is an incompatibility with Articles 45 and 101 of the TFEU.*

and

“Even though, in these proceedings, neither club is in the EU or EEA and the Player is an EEA citizen it will have an impact in such kind of international relationship”

CAS 2024/A/10280 JSC Football Club Rostov v. Mathias Antonsen Normann & Al Raed Sport Club & Fédération Internationale de Football Association

- CAS awards compensation for breach of contract based on:
 - Average between salary of new and old contract (albeit reduced)
 - The loan fee (albeit reduced)
 - A contingent payment under the loan fee
- Al Raed Sports Club jointly liable for the payment of the amount of compensation for breach of contract
- No explicit consideration to EU law and/or Diarra in terms of calculation and/or the joint liability of the new club, but general consideration that EU law is not relevant given the ‘nationalities’ of the parties:

“(...) Whilst the Panel considered the submissions [on Diarra] carefully it concluded that, as (a) the underlying dispute to which the Diarra Judgment relates is unresolved, and (b) these appeals concern the registration of a Norwegian player and clubs from Russia and the Kingdom of Saudi Arabia, such judgment has no bearing on the outcome of the present appeals.

Amendments to the FIFA RSTP - Interim regulatory framework

Art. 17 FIFA RSTP – current

1. Compensation

*“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.**”*

2. Joint liability:

*“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.**”*

3. Sporting sanctions for inducement – see point 2 above

Amendments to the FIFA RSTP - Interim regulatory framework

Art. 17 FIFA RSTP – current

Interesting points to consider: can the new interim wording reverse non-applicability of elements denounced in Diarra for the calculation of compensation? e.g.:

- Elements that safeguard “economic interests” of clubs
 - Non-amortised transfer fees;
 - Transfer offers / “market value”;
- Value new contract

It is for the Club to quantify, substantiate and prove the damage + to prove any damage under national law.

FIFA Jurisprudence

**FIFA DRC - Massafi
Al-Jonob, Iraq vs
Musa Esenu, Uganda
& Bul Football Club,
Uganda**



Key Facts

- | | |
|--------------|---|
| 11 Jan 2024: | Contract signed between player and Al-Jonob for 4.5 months |
| 15 Jan 2024: | Contract signed between player and FC Bul for 1.5 years |
| 4 Feb 2024: | Al-Jonob notifies the Player of a breach of contract |
| 14 Feb 2024: | Player informs Al-Jonob that he terminated the contract for 'personal reasons'. |

Questions for the FIFA DRC

- Main questions:
 - a) Was the contract terminated with or without just cause?
 - b) If a breach of contract, what are the financial consequences?
 - c) If there are financial consequences, is FC Bul jointly liable?

FIFA DRC

a) Was the contract terminated with or without just cause?

- Art. 18 par. 5 of the FIFA RSTP: a player cannot sign two contracts covering the same period of time.
- Contract already terminated when player signed with FC Bul
- Player clearly terminated the contract without just cause and compensation is due

FIFA DRC

b) If a breach of contract, what are the financial consequences?

Club puts the following damages forward:

- USD 13,500 as the 'rest' value of the contract (i.e. salaries that would have been paid)
- USD 700 as the costs for a flight ticket
- USD 405 as a registration fee
- USD 21,000 for the specificity of sport
- USD 15,000 as the replacement costs of the player
- USD 2,000 for losing the opportunity to utilise the player's image rights

FIFA DRC

b) If a breach of contract, what are the financial consequences?

The Chamber rules:

- USD 13,500 as the rest value of the contract – an appropriate starting point for the calculation (majority)
- USD 700 as the costs for a flight ticket – potentially a damage to be reimbursed but not in this case
- USD 405 as a registration fee – rejected as not proven
- USD 21,000 for the specificity of sport – rejected as no longer an element included in art. 17 FIFA RSTP
- USD 15,000 as the replacement costs of the player – rejected as in this case no logical nexus
- USD 2,000 for losing the opportunity to utilise the player's image rights – rejected as not proven

Compensation: USD 13,500 (by majority)

Sporting sanctions: No sanctions (by majority)

FIFA DRC

c) If there are financial consequences, is FC Bul jointly liable?

Art. 17 par. 2 FIFA RSTP: joint liability only applicable if Al-Jonob can prove that FC Bul induced the player to terminate the contract.

The Chamber ruled that:

- There was no evidence to indicate that FC Bul induced the player to breach his contract with Al-Jonob.
- FC Bul could not have known that the player was registered with Al-Jonob given that the ITC had not yet been confirmed in FIFA TMS.
- **No joint liability**

What's next?

- **Possible consequences of Diarra, the Interim Regulatory Framework and the Esenu case:**
 - More difficult for clubs to calculate and prove damages?
 - Easier for players to calculate the compensation to be paid for the premature termination of the contract? – **yet uncertainty remains under current wording.**
 - Likely much more a case-by-case approach than before – national law and/or replacement costs (salary?) main element for clubs to rely on?
 - Increase of use of compensation clauses in employment contracts?
 - More clubs/agents inducing a premature termination of a contract?
 - Less transfers? **Record transfer windows in 2025**
- FIFA needs to change the FIFA RSTP
- Suspension enforcement disciplinary cases by FIFA?
- FIFA DRC cases?
- Claim of Diarra (and other players) for damages

Thank you!
