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INTRODUCTION

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

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

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

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

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

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

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

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

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

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

Brussels, 18 October 2011

Michele Colucci

THE 2001 INFORMAL AGREEMENT ON THE INTERNATIONAL TRANSFER SYSTEM

by *Borja García**

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

1. *Introduction*

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

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

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

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

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

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

2. *The Commission challenges FIFA and UEFA*

Since 1979, international transfers in Europe had been regulated by a mixture of UEFA and FIFA rules.³ Following the Bosman case, FIFA decided to withdraw UEFA's competences over transfers, assuming for itself the regulation and implementation of international transfers within Europe in 1995.⁴ For that reason the Commission's investigation of the international transfer system was addressed to FIFA, which was formally responsible for their regulation.

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

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

⁴ UEFA, *Ibidem*.

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

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

3. Towards a compromise solution in the transfer system

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

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

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

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

⁷ European Commission, *Sport and Free Movement, Bosman Case: Background Situation on the European Court's Decision in the Bosman Case, 1996, 4*, European Commission website. http://ec.europa.eu/sport/sport-and/markt/bosman/b_bosman_en.html.

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

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

and, if necessary, impose fines.¹⁰

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

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

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

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

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

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

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

¹³ M. BOSE, 'Players' Rift with Fifa Threatens Transfer Talks'. *The Daily Telegraph*, 28 October 2000, www.telegraph.co.uk/sport/main.jhtml?xml=/sport/2000/10/28/sfnbos28.xml.

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

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

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

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

In 2001 the negotiations towards a final settlement gathered more pace. The Commission proposed a meeting at the highest level between the commissioners responsible for the negotiations and the presidents of FIFA and UEFA.¹⁸ That meeting, held in Brussels on 14 February 2001, paved the way for a final agreement. The two sides realised that there was a common understanding, in principle, on important issues such as transfer windows, minimum and maximum duration of contracts and the principle of compensation for training costs.¹⁹ The Commission let it be known that there were still some issues to be ironed out, but it was firmly committed to and optimistic of finding a final compromise before the end of February 2001.²⁰ Two further meetings between the Commission and FIFA and UEFA were held in February 2001 to clarify the technicalities of the remaining issues.²¹

The agreement was finalised on 5 March 2001 in another meeting between the Commissioners and the presidents of FIFA and UEFA.²² Following the deal, the European Commission closed the investigation into the rules governing international transfers in June 2002.²³

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

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

¹⁷ European Commission, *Ibidem*.

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

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

²⁰ European Commission, *Ibidem*.

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

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

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

²⁴ The FIFA Executive Committee adopted the new international transfer system in July 2001.

**MAINTENANCE OF CONTRACTUAL STABILITY BETWEEN
PROFESSIONAL FOOTBALL PLAYERS AND CLUBS – THE FIFA
REGULATIONS ON THE STATUS AND TRANSFER OF PLAYERS
AND THE RELEVANT CASE LAW OF THE DISPUTE RESOLUTION
CHAMBER**

by *Omar Ongaro**

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

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

1. Introduction

Both, the principle of maintenance of contractual stability between professional football players and clubs as well as the Dispute Resolution Chamber (DRC) were included in the Regulations for the Status and Transfer of Players of FIFA (hereinafter: *the Regulations*) and implemented within FIFA's regulatory framework in September 2001,¹ following the agreement reached in March 2001 between the joint FIFA/UEFA delegation and the European Commission on the principles that should form the basis of the international transfer rules in order to make them compatible with European law. This short essay aims at briefly referring to the various provisions of the Regulations pertaining to the stability of contracts currently in place² and, furthermore, on the basis of some selected litigations, at illustrating the existing case law of the DRC.

1.1 General remarks

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

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

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

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

² Art. 13 to 17 of the 2010 edition of the Regulations.

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

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

1.2 The nature and the activity of the Dispute Resolution Chamber

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

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

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

³ Cf. art. 24 para. 1 in combination with art. 22 lit. a) and b) (stability of contracts between professional players and clubs), lit. d) (training compensation) as well as lit. d) and e) (solidarity mechanism) of the Regulations.

⁴ Cf. art. 24 para. 2 and 3 of the Regulations.

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

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

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

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

⁶ Cf. art. 24 para. 2 of the Regulations.

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

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

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

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

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

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

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

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

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

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

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

¹¹ Cf. art. S14 of the Code of Sports-related Arbitration and Mediation Rules.

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

¹³ Cf. § 12 para. 2 GOG.

¹⁴ Cf. § 15 para. 1 GOG.

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

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

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

If in September 2001 you had asked somebody familiar with the legal framework in place in the “pre-Bosman” era¹⁵ about the contents of the Regulations relating to the maintenance of contractual stability between professional players and clubs, he or she would certainly have answered you that the new concept was a revolution. Yet, if you ask somebody who has not been influenced by the previously existing transfer system and has some knowledge of contractual and/or labour law to comment on the current provisions of the Regulations pertaining to the stability of contracts,¹⁶ that person will immediately recognise that many of the fundamental aspects addressed in the relevant section of the Regulations simply reflect general principles of contractual and labour law.

2.1.1 *Respect of contract*¹⁷

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

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

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

¹⁷ Art. 13 of the Regulations.

Like any other contract concluded for a predetermined period of time,¹⁸ a contract between a professional player¹⁹ and a club may only be terminated upon ordinary expiry of the term of the contract or by mutual agreement. *A contrario*, it is inherent to the wording of the article concerned that at the end of the stipulated contractual duration, or following the termination of the contract by mutual agreement, both parties are no longer bound one to the other and are free to look for new engagements without the need of the approval or any authorisation of the other party.

2.1.2 Terminating a contract with just cause²⁰

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

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

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

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

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

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

²⁰ Art. 14 of the Regulations.

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

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

Bearing in mind the just mentioned considerations, one may conclude that, as a general rule, for a party to have a just cause to early terminate a contract, the other party needs to have seriously neglected its own contractual obligations. As a result, the fact that the party prematurely terminating a contract with just cause will not suffer consequences of any kind obviously does not mean that the counterparty will also remain free from any possible liability. On the contrary, normally and at the request of the party having put an end to the contractual relation with just cause, the counterparty will be required to pay compensation²² and possibly, also sporting sanctions will be imposed on it.²³ In other words, creating or setting a valid reason for the other party to early terminate the contractual relation by seriously neglecting contractual obligations, is, *mutatis mutandis*, regarded as the equivalent to having personally terminated the relevant contract without just cause.

2.1.3 *Terminating a contract without just cause – payment of compensation*²⁴

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

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

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

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

²² Art. 17 para. 1 of the Regulations.

²³ Art. 17 paras. 3 and 4 of the Regulations.

²⁴ Art. 17 para. 1 of the Regulations.

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

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

2.2.1 Sporting sanctions²⁶

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

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

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

²⁶ Art. 17 para. 3 and 4 of the Regulations.

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

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

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

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

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

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

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

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

²⁸ Cf. art. 17 para. 3 of the Regulations.

²⁹ Cf. art. 17 para. 4 of the Regulations.

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

by *Richard Parrish**

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

1. Introduction

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

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¹ Beloff, M., Kerr, T., Demetriou, M., (1999), Sports Law, Oxford: Hart, 9.

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

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

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

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

2. Termination for just cause

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

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

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

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

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

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

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

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

3. Termination on the grounds of sporting just cause

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

4. Restriction on terminating a contract during the season

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

5. The consequences of terminating a contract without just cause

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

⁹ Commentary on the Regulations for the Status and Transfer of Players, 39-40. Accessed at www.fifa.com.

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

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

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

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

6. *Article 17 Key Cases*

6.1 *Webster - CAS Decision Rendered 30th January 2008*

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

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

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

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

¹¹ FIFA DRC 4 April 2007, no.47936, para. 39.

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

¹³ Facts from Webster.

¹⁴ FIFA DRC 4 April 2007, no.47936.

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

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

6.2 Matuzalem – CAS Decision Rendered 30th May 2009

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

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

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

DRC awarded Shakhtar compensation of Euro 6,800,000.¹⁵ In doing so it found that the Euro 25,000,000 clause could not be interpreted as a penal clause applicable in case of breach of contract by the player. The DRC established that the appropriate formulation to be employed in determining the compensation amount was three-fold. First was the residual value of the contract. Second, was the non-amortised value of the initial transfer fee paid by Shakhtar. Third, was the compensation as a result of the poor conduct of the player (justified under the 'specificity of sport' criteria).

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

6.3 El-Hadary – CAS Decision Rendered 1st June 2010

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

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

¹⁵ FIFA DRC Decision, 2nd November 2009, no.117549.

¹⁶ FIFA DRC Decision, 16th April 2009, no.49194.

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

6.4 *de Sanctis – CAS Decision Rendered 28th February 2011*

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

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

¹⁷ CAS *El-Hadary*, paras. 224-227.

¹⁸ CAS *El-Hadary*, para. 247.

¹⁹ FIFA DRC, 10th December 2009, no.129641.

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

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

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

7.1 *The 'law of the country concerned'*

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

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

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

²⁰ Commentary on the Regulations for the Status and Transfer of Players, 47, footnote 74. Accessed at www.fifa.com.

²¹ FIFA Statutes, 2010 Edition.

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

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

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

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

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

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

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

²⁵ CAS *Webster*, para. 20.

²⁶ CAS *Webster*, para. 21.

²⁷ CAS *Webster*, para. 63.

²⁸ CAS *Webster*, para. 63.

SPORT AND CONTRACTUAL STABILITY: THE ITALIAN CASE

by *Michele Colucci**

SUMMARY: 1. Law No. 91 of 1981 on Professionalism in Sport – 2. The status of Italian Athletes – 3. A special employment relationship – 4. The employment relationship in football – 5. Rights and obligations – 6. Termination of the contract – Conclusions

1. Law No. 91 of 1981 on Professionalism in Sport

In Italy the legal basis for labour relations in sport are laid down by Law No. 91 of 23 March 1981, which substantially amended the previous legal framework and provided a special set of regulations suited to the specificity of sport.¹

Pursuant to Article 1 of Law No. 91/81 ‘the practice of a sporting activity, whether individually or as part of a group, as a professional or an amateur, is free’.

Despite such a general provision, a sports activity can be considered as being completely free only when carried out as a formative or recreational activity and thus for leisure.

In fact, at professional level this freedom could be substantially restricted by the de facto monopoly of the sports federations and their rules.²

Article 1 reiterates principles enshrined in the Italian constitution, in particular Articles 2, 3, 4, and 32 concerning personal freedom to carry out sporting activities, which may not be limited by state legislation except for ‘justified’ reasons.

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¹ L. CANTAMESSA, ‘*Il contratto di lavoro sportivo professionistico*’, in L. Cantamessa, Giovanni Maria Riccio, Giovanni Sciancalepore, ‘*Lineamenti di diritto sportivo*’, Giuffrè, Milan, 2010, 171; M. COLUCCI, ‘*Il rapporto di lavoro nel mondo dello sport*’, in M. Colucci, ‘*Lo sport e il diritto*’, Jovene, Napoli, 2004, 17; G. VIDIRI, ‘*Profili societari ed ordinamentali delle recenti modifiche alla legge 23 marzo 1981, No. 91*’, *Riv. dir. sport.*, 1997, 3; F. BIANCHI D’URSO & G. VIDIRI, ‘*La nuova disciplina del lavoro sportivo*’, *Riv. dir. sport.*, 1982, 3.

² M. SIGNORINI, ‘*Le organizzazioni sportive*’, in M. Colucci, ‘*Lo sport e il diritto*’, cit., 10; A. QUARANTA, ‘*Sulla natura giuridica delle federazioni sportive nazionali*’, *Riv. dir. sport.*, 1986, 172; G. PETRUCCI, ‘*Rapporto di lavoro con federazioni sportive: natura pubblica o privata?*’, *Dir. e pratica del lav.*, 1997, 812; C. NOYA, ‘*La nuova disciplina delle società sportive professionistiche*’, *Riv. dir. sport.*, 1997, 629.

The practice of a sporting activity cannot be subject to the registration to the Italian National Olympic Committee (CONI) nor to a sporting federation. However, membership of a sporting organization implies acceptance of its rules, including those establishing the requirements and criteria that distinguish the two categories of athletes (professionals and amateurs).³

Pursuant to Article 2 of Law 91/81 professionals⁴ are the 'athletes, trainers, technical and sports managers, and coaches who carry out a remunerated sporting activity on a continuous basis'.

In order to work professionals need to obtain an authorization from the relevant national sports federation, in accordance with the rules laid down by them and provided for by CONI.⁵

Law No. 91/81 deals with technical staff alongside athletes as was previously the case with the law which places artistic and technical staff under a single legal statute; however, it is possible to distinguish the technical and sports managers (the person who is responsible for setting the rules for the sporting activity in a given sector) from the managers/coaches and trainers (who are usually assistant coaches). Only the latter have the recognized competence to prepare and train the athletes from both a technical and physical point of view.

Article 2 finally set a rigid legal framework which had the negative consequence of siphoning off all the cases of 'de facto professionalism' from Law No. 91/81.

In fact, the categories of sports professionals are listed in such a manner as to exclude any possibility of extending its interpretation or application to other categories. It is, however, true that the *ratio* of the provision was to create a far-reaching regulation,⁶ aiming at giving large autonomy to the sports system and consequently to the organizational structure headed by CONI.

On the basis of the above considerations, the categories listed in Article 2 cannot be considered exhaustive and therefore the only two requirements necessary to qualify as a professional are the following: (a) authorization by the national sports federation; and (b) remuneration.

The same provision does not cover amateur sporting activity since this has different characteristics and objectives: Amateur sport is practiced for free

³ P. AMATO, 'Il vincolo sportivo e le indennità di formazione e di addestramento nel settore calcistico alla luce della sentenza Bernard: il fine che non sempre giustifica i mezzi', in M. Colucci & M. J. Vaccaro, *Vincolo sportivo e indennità di formazione. I regolamenti federali alla luce della sentenza Bernard*, SLPC, Bracciano, 2010, 51.

⁴ L. CANTAMESSA, 'Il contratto di lavoro sportivo professionistico', in L. Cantamessa, Giovanni Maria Riccio, Giovanni Sciancalepore, 'Lineamenti di diritto sportivo', cit., 150; G. GIUGNI, 'La qualificazione di atleta professionista', *Riv. dir. sport.*, 1986, 166.

⁵ G. MARTINELLI, 'Lavoro autonomo e subordinato nell'attività dilettantistica', *Riv. dir. sport.* (1993): 13; A. D'HARMANT FRANÇOIS, 'Il rapporto di lavoro sportivo tra autonomia e subordinazione', *Dir. lav.* 1 (1988): 265; F. REALMONTE, 'L'atleta professionista e l'atleta dilettante', *Riv. dir. sport.* (1997): 371.

⁶ G. AMBROSIO & A. MARANI TORO, 'L'iter Parlamentare della Legge 23 marzo 1981, No. 91, sui rapporti tra società e sportivi professionisti', *Riv. dir. sport.* (1981), 492.

even though amateur sportsmen are allowed to receive a series of gratuities in the form of reimbursements which, however, cannot be considered *strictu sensu* as a salary.

2. *The status of Italian Athletes*

In general terms, the status of an athlete – professional or amateur- is defined by each single federation taking into account that amateur sport is carried out for free even though amateur athletes are allowed to receive a series of gratuities in the form of reimbursement which, however, cannot be considered as a salary.

As far as the type of employment relationship is concerned article 3 of Law No. 91/81 states that the sporting activity carried out by the athlete is considered as work under an employment contract, and therefore it is subordinate in its nature, except in those cases where at least one of the following requirements is met:

- (a) the activity takes place in a single sporting event or a series of sporting events linked over a short period of time;
- (b) the athlete is not bound by contract to attend training or preparation sessions;
- (c) though the services provided by the sportsmen are on a continuous basis, they do not exceed eight hours per week or five days per month or thirty days per year.

According to some authors⁷ the hypothesis under (a) clearly refers to a fixed-term contract while the one under (c) to a vertical part-time contract. On the contrary, the hypothesis under (b) certainly does appear to be a contract of self-employment⁸ because the elements of subordinate status are absent.⁹

The concept of ‘subordinate status’, historically linked to the characteristics of work done within an enterprise, progressively proved inadequate to cover the various forms of work under an employment contract.

Hence the efforts of legal scholars and the courts to supplement and refine it, either linking it with socio-economic criteria (such as the economic weakness of employees or the fact that the means of production and the results of their work do not belong to employees),¹⁰ or referring to some elements from which the presumption of such a relationship may be inferred (such as the employee being tied to the organization of the enterprise, the payment system, the existence of fixed working hours, the incidence of risk).

⁷ M. PERSIANI, ‘*Commento all’art. 3 della Legge 91/1981*’, *Nuove Leggi civ. comm.* (1982): 567.

⁸ According to Art. 2222 of the Italian civil code, this is a contract, under which one party undertakes, for a fee, to perform a task or service without the ties of subordinate status and using predominantly his or her own labour. Self-employment is governed not by the protective norms and principles of labour law but by those covering ordinary contracts of exchange (such as sale, hire, etc.), which presupposes the parity, not the inequality, of the contracting parties.

⁹ V. FRATTAROLO, *L’ordinamento sportivo nella giurisprudenza* (Milano, 1995), *passim*.

¹⁰ T. TREU, *Labour Law in Italy*, The Hague, Kluwer Law International, 1997.

In any case, all these criteria need to be considered within an overall assessment of the employment relationship taking account of the particular features of the activity performed. Absolute criteria to define subordinate status do not exist and has maintained that qualification of the relationship must be decided not by a judgment of identity but by a judgment of approximation, on a case-by-case basis.

Following Law 91/81, a sporting activity is considered a subordinate form of employment and in some cases as self-employment.¹¹ Employment in sport is extremely varied, compared to the typical characteristics of employment provided for by Article 2094 of the Civil Code, which defines an employee as someone who works in a position of subordination and under the direction of another person, under a contract of employment. Besides, the services provided by professional athletes have a nature and characteristics of their own.

3. *A special employment relationship*

A special legal regime applies to sports professionals because of their status and the peculiarities of the field where they play.

In this perspective, the employment relationship in Sport is considered as a “special employment relationship” in the sense that some labour law provisions which apply to all workers with regard to some of their fundamental rights (Law 300/1970, so called “workers statute” and Law 604/ 66 on dismissals and the relevant legislation on fixed term contracts (Legislative Decree 2001/368) do not apply to professional athletes (art. 4 of Law 91/81).

In practice some limitations and restrictions foreseen in order to protect the workers do not apply to Sports Professionals because of the specificities related to their activities. The ban on monitoring with cameras the workers activities, the prohibition of checking the health and medical conditions of the worker in case of illness and injury at workplace, the prohibition to hire workers directly and the right to be re-hired in case of dismissal without just cause do not apply to Sport.

The same is true with regard to fixed term contract whereas the Italian legislation (Decree 2001/368) sets a series of restrictive conditions in order to hire a worker and expressly states that the contract for a fixed term period can be legitimately renewed only once for the same duration and activity.

It is clear that all these conditions do not match with the needs of both players and clubs who need more mobility taking into account with the peculiarities of sports competitions and the very short length of the career of sports professionals.

As a way of derogation from principles of contract law, a written contract establishing an employment relationship is required in the sports sector; otherwise

¹¹ L. CANTAMESSA, ‘Il contratto di lavoro sportivo professionistico’, in *Lineamenti di diritto sportivo*, eds L. Cantamessa, G.M. Riccio & G. Sciancalepore (Milano, Giuffrè, 2008), 147; DURANTI, ‘L’attività sportiva come prestazione di lavoro’, *Riv. it. dir. lav.* 1 (1983), 699.

the contract is null and void.¹² Such a form is necessary in order to prove the existence of the contract itself and to afford a minimum level of protection to the players.¹³

Article 2126 of the Italian Civil Code provides for the ratification of an invalid employment contract (when for example the condition that it should be in writing has not been respected) for the period it was implemented: a professional football player who performs without a written contract certainly has the right to everything to which he is due by contract.

On the basis of the provisions of Article 4, paragraph 1, every athlete's contract must be drawn up 'in accordance with the standard contract drafted by the relevant national sports federation and the representatives of the interested categories'. Every club has the obligation to file the contract with the relevant sports federation for its approval.

This provision is of great significance because it gives the federations or the leagues important powers: they decide on the standard contract in the collective bargaining process and subsequently they should check every single contract.¹⁴

In that regard for some federations/leagues the standard contract is just a framework to be fleshed out with content in the negotiating stage of each individual relationship while for others it must contain the full text of the collective bargaining agreement.

Pursuant to Article 4, paragraph 12, Law No. 91, the athletes shall play for the club, respecting technical instructions and other requirements given to that end. This provision is in conformity with the general rule of Article 1176 of the Italian civil code which obliges the employee to perform his/her services using the care, skill, and prudence demanded by the nature of the job performed.¹⁵

Instructions concerning players' behaviour outside sport *tout court* are legitimate and binding only if they are justified by requirements related to his professional activity. In any case, they cannot be of prejudice to human dignity.

Although Article 8 of Law 300/1970 (the so-called 'workers' statute') prohibits any investigations into workers' private opinions and private lives unless it is necessary in relation to the work they carry out; such investigations are allowed in the sports sector to the point that athletes must accept in writing the insertion of a clause in the contract obliging them to observe the technical instructions and training indications given by the club.

¹² V. FRATTAROLO, *Il rapporto di lavoro sportivo*, Giuffrè, Milan, 2004, 38-61; G. VIDIRI, 'Sulla forma scritta del contratto di lavoro', *Giust. civ.*, I, 1993, 2839.

¹³ M. SANINO & F. VERDE, *Il diritto sportivo*, CEDAM, Padova, 2008, 191.

¹⁴ L. CANTAMESSA, 'Il contratto di lavoro sportivo professionistico', cit., 157; M. COLUCCI, 'Il rapporto di lavoro nel mondo dello sport', cit., 25; M. DE CRISTOFARO, 'Commento all'art. 4, L. 23 marzo 1981, No. 91', *Nuove leggi civ. comm.*, 1982, 574.

¹⁵ M. ROCCELLA, 'Manuale di diritto del lavoro', Giappichelli, Torino, 2010, 279; A. BRECCIA FRATADOCCHI, 'Profili evolutivi e istituzionali del lavoro sportivo', *Dir. lav.*, I, 1989, 71.

4. *The employment relationship in football*

The employment relationship in football between players and clubs is regulated by reference to Law 81/91 as well as by the collective bargaining agreement (hereafter “CBA” recently concluded by Assocalciatori (the Italian trade union association), the Italian League of Serie A, and the Italian Federation on 5 of September 2011.¹⁶

5. *Rights and obligations*

The Collective Bargaining agreement governs the economic and regulatory treatment of the relationships between professional footballers and Clubs. In this context it provides clubs and players with rights and obligations.

Pursuant to art. 10 of the CBA the player shall provide his sports services to the Club and observe the technical instructions as well as disciplinary rule.

He shall be loyal to the club and therefore avoid any behaviour that could be detrimental to the Club’s image.

This means that even rules relating to the footballer’s lifestyle are legitimate and binding, provided, however, that human dignity is respected at all times.

Particularly important is also the provision according to which the player shall have no right to interfere in the Club’s technical, managerial and business decisions.

The violation of one of the above rules could lead to the breach of contract and therefore to its termination with all (sporting and economic consequences).

Depending on the seriousness of the breach a player could be sanctioned with a written warning; fine; reduction of pay; temporary exclusion from training sessions and pre-championship preparation with the first team; termination of the Contract.

Of course, before applying any kind of disciplinary sanction all necessary procedural steps should be undertaken, as for instance the communication in writing of the alleged violation.

Peculiar is the provision concerning the fine. This shall consist of a contractual penalty the amount of which shall not exceed 30% (thirty percent) of one twelfth of the fixed part only of their gross annual remuneration. In the case of the accumulation of several infractions committed during the same month, the fine shall not exceed 60% (sixty percent) of one twelfth of their gross annual remuneration (fixed part).

The amount of the remuneration can be reduced and shall not exceed 50% (fifty percent) of the part of gross annual compensation relating to the period for which the reduction itself is requested.

In case the player has been sanctioned by a national or international Sports Justice body, the Club can propose a reduction of the effective gross remuneration

¹⁶ The collective bargaining agreement is available on www.assocalciatori.it/LinkClick.aspx?fileticket=PwXxRnZrcIQ%3d&tabid=58&language=en-US (19 September 2011).

for the period corresponding to the duration of the disqualification, and for an amount not exceeding 50% (fifty percent) of the remuneration due for the period.

Due account shall be given to: a) the fixed part of the compensation only, a) the nature of the anti-regulatory conduct occurring and punished and of the subjective element that has given rise to the disqualification, c) and the extent of the detriment caused to the Club.

Pursuant to art. 11 para. 10 of the Collective bargaining agreement the player's temporary exclusion from training sessions or from pre-championship training with the first team, may also be ordered provisionally by the Club provided that the latter duly notifies the player with the appropriate sanction.

The club could ask and obtain the termination of the contract in those cases where the player has been condemned in last degrees.

The player, on his side, can oppose the disciplinary sanction and ask either for the reinstatement and/or for the termination of the contract. Before the national arbitration body the player can ask damages and/or the termination of the employment agreement when the Club has violated contractual obligations it is required to fulfil towards him.

In particular, in case the player is not allowed even to train with the first squad or does not have access to the training facilities, after having duly notified the club, can refer the matter to the arbitration body asking the reinstatement or the termination of the employment agreement. In both cases, the footballer also has the right to payment of the damages in the measure of not less than 20% (twenty percent) of the fixed part of his gross annual compensation.¹⁷

Pursuant to art. 13 of the collective bargaining agreement the player has just cause to terminate a contract when the club delays 20 days the payment of the monthly salary to its players. By far this is a provision very much in favour of the players working in Italy since the FIFA Dispute Resolution Chamber, for instance, in the international cases it judges on, recognises the right to ask termination for just cause only when there are 3 salaries due (in some circumstances two).

If the footballer is signed by the Club following temporary transfer of the contract as specified in Act no. 91 of 23 March 1981 and further amendments, the notice referred to in article 13 must also be sent, with the same modalities and terms, to the Club which temporarily transferred the contract. Similar notice must be given to the Club that holds participation rights in the event of a definitive transfer.

6. *Termination of the contract*

A contract between a player and a club can be terminated: a) because the parties

¹⁷ Pursuant to art. 12 para. 4 of the collective agreement, if, after the decision taken by the arbitration body for the reinstatement of the player, the Club does not comply within 5 (five) days of receipt of the decision, the footballer will be entitled to obtain the termination of the Contract as well as compensation for damages which is calculated as the amount of the contractual compensation due up until the end of the sports season.

do not fulfil their contractual obligations as examined above, b) upon its expiration, or c) or by mutual agreement.

Of course, it can also be terminated for *just cause* which occurs when a fact or situation arises such that the employment relationship cannot be continued even temporarily.

The just cause does not necessarily presuppose non-fulfilment of contractual obligations, since it can refer to facts or situations which are external or private although still incompatible with the possibility of continuing the employment relationship; in reality, however, such facts must be regarded as relevant in so far as they affect the probability of proper fulfilment of contractual obligations in the future. Non-fulfilment of the duties inherent in the employment contract must be of exceptional gravity, such that it does not fall within the less serious category of subjectively justifiable reason or disciplinary sanction as opposed to dismissal. If the violation is among those laid down by collective bargaining as cause for disciplinary dismissal, the guarantees covering disciplinary sanctions apply to it.

Except in the event of a *just cause*, resignation carries an obligation to give notice to the employer. Unlike dismissal, resignation does not require any justification or reason.

The definition of just cause and whether just cause exists shall be established in accordance with the merits of each particular case and taking into account the relevant provisions of the CBA.

In fact, behaviour that is in violation of the terms of an employment contract still cannot justify the termination of a contract for just cause. However, should the violation persist for a long time or should many violations be cumulated over a certain period of time, then it is most probable that the breach of contract has reached such a level that the party suffering the breach is entitled to terminate the contract unilaterally.

In the event of just cause being established by the competent body, the party terminating the contract with a valid reason is not liable to pay compensation or to suffer the imposition of sporting sanctions.

On the other hand, the other party to the contract, who is responsible for and at the origin of the termination of the contract, is liable to pay compensation for damages suffered as a consequence of the early termination of the contract.

In particular, in case it is the club to terminate the contract without just cause, the club will pay a compensation equal to the remaining value of the contract.

On the contrary, in case it is the player to terminate the contract he/she will compensate the damages caused to the Club which are nevertheless very difficult to prove.

Even if art. 15 of FIFA regulations foresee the termination of the employment relationship for the so called “sporting just cause” and such a principle is binding on national sports federations, the Italian one has not implemented such a rule.

The Regulations reflect the fact that an established player may have valid

CONTRACTUAL STABILITY AND TRANSFER SYSTEM FROM AN ECONOMIC POINT OF VIEW

by *Marc Valentin Lenz**

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Abstract: Contractual stability is essential in order to benefit from the transfer system through stabilization, the redistribution of wealth from “big” to “small” clubs and secured investments in youth development. Economic realities and tendencies within the European Football Market demonstrate the importance of contractual stability, but further indicate imperfections that threaten its maintenance.

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This paper will contribute with an introduction on the economics of contracts and an insight on transfer systems over time, highlighting various economic implications and tendencies and their effect on contractual stability.

1. Introduction

The legal perspectives expressed so far in this edition discuss the legislative framework and juridical tendencies in securing contractual stability. Further emphasis has been on the interplay between national respectively supranational law and the sporting regulations of football's world governing body FIFA.

As Economics and the legal framework have always been interdependent, the extension of the legal perspective with the economic point of view is a valuable complement. Likewise, too is the establishment of a transfer system as a mechanism by which clubs acquire the services of players. From the first order to register players around 1891, through the "retain-and-transfer" and the "freedom of movement" system to the Bosman ruling: On the one hand, economic principles, argumentations and foresights have been used to restrict individual rights with reference to the specific aims and environments of sports leagues. On the other hand, legal interventions have secured individual's rights. Resulting amendments of legal frameworks had partially tremendous impact on the economics 'of the game'. The trade-off between legal and economic principles in football comes down to the question, whether exceptional rights for sporting environments can be reasonably justified so that the restrictions of essential individual's rights are acceptable.

A related key issue within the football industry is the interdependence between the free movement of workers and contractual stability – both significantly influenced by the transfer system. The starting point for the analysis of contractual stability is therefore the constituted transfer system and the economic actions of clubs and players within the drawn framework.

As the emphasis of this bulletin is on contractual stability, this paper will contribute with an insight on transfer system(s), resulting economic implications and tendencies, and their effect on contractual stability. The main features of the economic contract theory are stated in Chapter 2, all in relation to contractual stability and the football regulatory framework. Key points of the various transfer systems over time are summarised subsequently (within Chapter 3 for the pre-Bosman transfer system and within Chapter 4 for the post-Bosman system),¹ highlighting economic consequences and their impact on contractual stability.

Law". The views expressed in this article are those of the author alone and do not necessarily reflect those of ISDE.

¹ This differentiation accounts for the major influence on contractual stability, firstly, through deregulation of the transfer market on the basis of the Bosman-verdict and secondly, based on further intervention by the European Commission in 2001.

2. Economics of Contractual Stability

Contractual Stability is a principle of major importance for securing sporting and economic interests. Both clubs and players are looking for planning security.

Focusing on the club's economic perspective, players are considered assets and thus, directly reflected in accounts and balance sheets of clubs respectively, their affiliated companies. A lack of contractual stability reduces planning security and influences the clubs' finances significantly: Firstly, the squad defines the foundation of sporting and commercial success. Secondly, taking the external ownership structures of clubs into account, investors build expectations and react consistently on the stock market.² The withdrawal of majority shareholders – i.e. due to reduced profit expectations – can lead to a chain reaction as new stakeholders reduce their expectations and takeover bids accordingly.³ Players consequently do have a strong signalling function for the sporting success that leads to major importance of contractual stability if only from a pure economic point of view.

From the player's perspective, the specificities of a career in sports – i.e. the short career period and the high risks associated with their activities – necessitate contractual planning security and outweigh the constrained freedom of movement.

2.1 Contracts from an Economic Perspective

The conclusion of a contract ensures the provision of the player's services exclusively for one club during the stipulated duration.⁴ Contracts define the framework by creating guidelines, reducing uncertainty or transforming uncertainty in risks.⁵ The contract theory focuses on contractual arrangements in the presence of information asymmetries, which are pervasive in economic relationships.

Economic models can be distinguished on various grounds, *inter alia* depending on private information and the resulting distribution of power, the strategic approach of the parties on the market as well as the design of contracts, such as completely specified or incompletely specified contracts.

2.1.1 Information Asymmetry

Players and clubs are “monopolist” over their private information, which can be

² Additional example: Borussia Dortmund. Successful games raised the expectations and attracted investors during the season 2008/09. However, the team missed the qualification for the UEFA Europa League on the last match day. Their share price dropped by 20 percent on the following Monday within the first few minutes of trade.

³ Additional example: AS Rom. Decrease of share price in April 2011 of up to 38% following the announcement of a takeover for a share price of Euro 0.6781. In effect, this meant a 42% deduction on the share price.

⁴ J. McCUTCHERON, *Negative Enforcement of Employment Contracts in the Sports Industry*, *JLS*, vol. 17, 1997, 67.

⁵ D. DEQUECH, *The New Institutional Economics and the Theory of Behaviour Under Uncertainty*, *JEB*, vol. 59, 2006, 120.

manipulated in order to achieve the individual's interests.⁶ The acquisition of information *ex-ante*, signalling and screening are methods to reduce the information deficit. Clubs reduce their risk *ex-ante* by acquiring information about the player's sporting performance – i.e. via scouting measures – as well as financial conditions of a transfer. Players in turn improve their situation of imperfect information through consultation of their agent and network. They are further willing to take the risk of imperfect information if the hard facts of the contract are satisfying. Nevertheless, the decision on signing a contract is still influenced by the remaining information asymmetry.

2.1.2 *Completely Specified Contracts*^{7,8}

A contract is called “complete” if it defines the parties' obligations and specifies further the legal consequences and prospective payments under each conceivable contingent. Unforeseen changes of the contractual environment are anticipated and result in the activation of the ad hoc provision in the contract.⁹ It binds the parties until the end of their contractual relationship which excludes the possibility of renegotiations. The drawn assumptions of this concept are strong. It implicitly assumes that the costs of including a specific clause for an unlikely contingency are outweighed by the benefits.

2.1.3 *Incompletely Specified Contracts*¹⁰

Contracts typically abstract from all contingencies and consider the most relevant traceable variables, likewise in sporting contracts. This is, *inter alia*, the case as contracts are complex and the transaction costs high which implies that it is neither realistic nor economically justifiable to cover every contingency in a contract. In case an unforeseen contingency occurs, parties have the possibility to renegotiate. The option to renegotiate is, in economic terms, an *ex-ante* constraint to the parties and might therefore result in an efficiency loss.

2.1.4 *Efficiency of Contracts*¹¹

Completely specified contracts are “pareto-efficient”,¹² if no change can be made

⁶ In reference: The “homo oeconomicus” concept: which describes humans as rational and narrowly self-interested, who further maximize personal utility, react to changing economic environments and have established preferences.

⁷ B. SALANIÉ, *The Economics of Contracts*, Cambridge, MIT Press, 2005, 161ff.

⁸ S. SHAVELL, *Damage Measures for Breach of Contract*, *Bell JE*, 1980, 466ff.

⁹ B. Salanié, *The Economics of Contracts*, Cambridge, MIT Press, 2005, 193ff.

¹⁰ S. SHAVELL, *Damage Measures for Breach of Contract*, *Bell JE*, 1980, 466ff.

¹¹ S. SHAVELL, *Damage Measures for Breach of Contract*, *Bell JE*, 1980, 467ff.

¹² Pareto-efficiency: Given an initial allocation of goods among a set of individuals, a change to a different allocation that makes one of the people more satisfied with his or her allocation without

which makes one contractual party better off without making any other worse. If no party is interested in beneficial changes, it is in their interest to be bound by the precise contractual terms. In this case, parties are willing to force compliance with the contract terms and conditions by setting damages for failure at a sufficiently high level. Nevertheless, as drafting of pareto-efficient completely specified contracts would be unfeasibly complex and costly considering contract negotiation and information costs, contracts are typically incomplete. As a result, these contracts are (most times) pareto-inefficient as an unexpected contingency can lead to a worse allocation for at least one party in comparison to the preceding allocation. This provides incentives to the parties to breach a contract. Contract law is therefore, considered to close gaps of incomplete contracts as contractual parties behave in a way “that approximates what they would have agreed on in a fully specified contract”. This is central in order to build a framework for contractual stability and efficiency, based on the support of voluntary and informed trading.

2.2 Commitment and Risk Allocation¹³

A further key element of contractual stability within the dynamic perspective is the parties' commitment. The ability to commit depends on the institutional setup, the value placed on credibility, the reputation of the parties as well as the relevant penalties to discourage a unilateral breach. Four types of commitment are distinguished (and relevant to understand prior to considering the different transfer systems described later):

- *No commitment*: Contract holds for the current period. Parties can resign a contract at the end of the contractual period.
- *Limited commitment*: Intermediate case between “no commitment” and “long-term commitment.”
- *Long-term commitment*: The entire duration of the contract is covered and an option to renegotiate multilaterally included.
- *Full commitment*: Contract covers the whole duration and cannot be breached or renegotiated.

A lack of commitment can be the result of various circumstances surrounding professional football. A significant factor that drives commitment over time is the allocation of risks and information asymmetries. Players and clubs cannot foresee the productivity of players.¹⁴ External factors, such as the media, reputation and career concerns, can influence the productivity in addition to sporting aspects, such as training, success and injuries. Additionally, the player's career duration tends to be short in comparison with other labour groups. These factors

making another person less satisfied is called a “pareto-improvement”. An allocation is defined as “pareto-efficient” when no further “pareto-improvements” can be made.

¹³ B. SALANIÉ, *The Economics of Contracts*, Cambridge, MIT Press, 2005, 161ff.

¹⁴ H. DIETL, E. FRANCK & M. LANG, *Why Football Players May Benefit From the Shadow of the Transfer System*, *Eur J Law Econ*, vol. 26, 2008, 131.

create strong incentives for players to maximize their short period of earning which can result in renegotiations or a breach of contract.

2.3 Renegotiations

Risk-averse players sign long-term contracts with a high share of fixed payments as risk insurance, covering the uncertainty of future earnings. The uncertainty of player's performance is often addressed in the employment contract via variable bonus payments. Nevertheless, in case the player's productivity turns out higher than expected, the player can seek renegotiations with his current club. *Vice versa*, the club can seek renegotiations in case the productivity is lower. Either way, the disadvantaged party tries to match wage level and productivity of the player. In general, risk-neutral clubs can diversify their risk of productivity variations based on their portfolio of players as well as a diversified ownership-structure.

Interestingly, the fact that the transfer system works in the context of renegotiations, risk and wages function as a "surrogate which makes insurance contracts complete", as Dietl, Franck and Lang (2008) express it. If players were granted the bargaining power to renegotiate their salaries permanently up to the amount reflecting their marginal productivity, clubs would have to cover the risk. Therefore, the transfer system creates an environment in which the player pays for his risk insurance' with a reduced freedom of movement and the obligation to stay at the club, even if the salary does not match the player's marginal productivity.

2.4 Breach of Contract and Damage Measures

A breach of contract occurs when one party fails to perform one or more of its defined obligations pursuant to the contract. While a breach of a condition might result in disciplinary sanctions, a fundamental breach – defined as repudiatory breach in which one party completely fails to perform – threatens contractual stability. Such a breach leads to the complete dissolution of the relationship between the parties, and of the contract itself.

As a result of this, internal rules governing the registration respectively eligibility of players and the transfer mechanisms have been designed to draw the framework within professional football, *inter alia*, in order to ensure contractual stability.

2.4.1 Damage Measures

Damage measures can be considered as a second substitute for completely specified contracts.¹⁵ As already explained in relation to the role of contractual law as a substitute, parties adjust their behaviour in a manner similar to the concrete actions they would have specified under a complete contract. Economic and academic

¹⁵ S. SHAVELL, *Damage Measures for Breach of Contract*, *Bell JE*, 1980, 468ff.

discussions address the topic on how breaches of contractual promises are best compensated. Commonly used measures are the expectation measure (hereinafter as “positive interest”), the reliance measure¹⁶ and the restitution measure.¹⁷

The principle of “positive interest” – by definition, to put the suffering party in as good a position as it would have been if the contract had been properly performed – is a fundamental principle in contract law, and of major importance in the sports law word. With respect to football, FIFA Regulations create the legislative framework, and the FIFA Dispute Resolution Chamber (DRC) and the Court of Arbitration for Sport (CAS) ensure the implementation of these regulations judicially. Article 14 and 15 of the FIFA Regulations on the Status and Transfer of Players (RSTP) provide a legal basis for unilateral termination of a contract based on just cause respectively sporting just cause.¹⁸ In contrast, Article 17 FIFA RSTP does not provide a legal basis for a breach but stipulates the damage measure to be imposed with respect to the obligation to compensate. Thus, this article regarding consequences of a unilateral termination of contract without just cause maintains a key function for the establishment of contractual stability:

- *Art. 17 para. 1 FIFA RSTP*: The article has two key elements: Firstly, the assurance of compensation and secondly, the declaration regarding the calculation of compensation.

As the party in breach is obliged to compensate the other party, the promisor is, in principal, free to breach the contract. However, CAS jurisdiction clearly states “Article 17 of the FIFA Regulations does not provide the legal basis for a party to freely terminate an existing contract at any time, prematurely, without just cause. Rather, the provision clarifies compensation will be due”.¹⁹ Article 17 para. 1 of the FIFA RSTP and the respective jurisdiction determine further the factors for calculation of compensation, the used method of expectation damages and consequently the allocation of risks. The purpose of the compensation is to set the non-breaching party in the situation that it would have been in if the contract had been properly performed. The prospective defaulting party does not wish, under this condition, to breach the contract and pay compensation unless it gains more from the breach than the suffering party loses. Crucially, neither the regulation nor jurisdiction facilitates a prediction of the amount of compensation that will be payable in case of a unilateral termination without just cause. This uncertainty is an

¹⁶ Reliance measure: The defaulting party compensates the other party for his reliance expenditures and returns to the other party payments that he made; thus except for foregone opportunities, the victim of breach is put in the position he was in before he made a contract (cf. S. SHAVELL, *Damage Measures for Breach of Contract*, *Bell JE*, 1980, 471).

¹⁷ Restitution measure: The defaulting party returns only the payments made to him (cf. S. SHAVELL, *Damage Measures for Breach of Contract*, *Bell JE*, 1980, 471).

¹⁸ Whether or not any reason for a unilateral termination of contract can be considered as “just cause” is a pure legal question (which will be decided on a case by case basis) and will therefore not be further addressed within this paper.

¹⁹ CAS 2008/A/1519-1520.

intentional measure imposed by regulators and was correctly re-established by CAS jurisdiction in several judgements after the Webster-Case,²⁰ such as the Matuzalem,²¹ the El-Hadary²² and the De Sanctis²³ case. It firstly provides for all possible circumstances to adequately compensate the quantified and established losses suffered. It secondly withdraws the possibility of foreseeing whether a breach would be (financially) efficient or not. Even if the intending party has better alternatives – i.e. the player with an employment offer from another club – the financial gain and its distribution resulting from a breach are not predictable. As the amount of financial compensation is not foreseeable in advance, the risk of breaching a contract is *ex-ante* not quantifiable. Article 17 para. 1 FIFA RSTP therefore reduces the incentives for breaching a contract unilaterally.

- *Art. 17 para. 2 FIFA RSTP*: The joint and several liability of the new club regardless of any involvement or inducement also transfers significant risk to the club.
- *Art. 17 para. 3/4 FIFA RSTP*: Expanding the financial implications of a breach by imposing sporting sanctions for players and clubs is a highly valuable tool in maintaining contractual stability as it negates the main aim of the breach at least temporarily: that is, the player’s services. The club can additionally face serious consequences that would limit its future transfer and business opportunities. Without a doubt, sporting sanctions for players and clubs increase the risk of breaching a contract significantly.
- *Art. 17 para. 5 FIFA RSTP*: As a matter of completeness, this provision extends the threat of sanctions for inducing a breach of contract to further stakeholders who are subject to the FIFA Regulations.

2.4.2 Buyout-Clause

Taking the incompleteness of contracts into account, external factors can lead to a point in which it is in the joint benefit of the contractual parties that one breaches the contract. Contractual parties can therefore consider mutual advantageous situations *ex-ante*, resulting in the inclusion of a buyout-clause in the contract. This option is acknowledged by Article 17 FIFA RSTP by the conclusion of the terminology, “unless otherwise provided”, and provides the legal basis to terminate the contract unilaterally at any moment and without a valid reason by simply paying the stipulated compensation. Furthermore, in such a situation a sporting sanction will not be imposed.

The effects of buyout-clauses are contradictory: As an advantage, the stipulated amount that has to be paid in case of unilateral termination by the player

²⁰ CAS 2007/A/1298-1300.

²¹ CAS 2008/A/1519-1520.

²² CAS 2009/A/1880-1881.

²³ CAS 2010/A/2145-2147.

clarifies the situation and reduces information asymmetry. The parties can foresee whether a breach is efficient or not. Economically speaking, a breach would occur if performance under the current contract would prevent resources from their most valuable use.²⁴ Taking the economic relation between the marginal productivity and salary into account, this means in effect that the player will only breach the contract in case he/she has incentives – i.e. can earn a higher salary – under the new contract. The breach in this case is in mutual interest as long as the stipulated amount is advantageous for the club. Stipulating the amount demands intensive negotiation as the margin is limited: On the one hand, the amount has to be advantageous for the club. On the other hand, the amount has to be approved by the player and meet juridical criteria. Players obviously will aim for a low buyout clause in order to maximize their freedom of movement. Judicial requirements stipulate further that the amount must roughly approximate the anticipated damages. Under consideration of the aforementioned, a variable buyout-clause should be included which adjusts the amount of compensation in relation to indicated objective criteria. Nevertheless, it might be in the interest of the club to stipulate a minimum amount nevertheless.

The downside of a buyout-clause is that it facilitates a breach rather than the performance of a contract. The inclusion of the clause minimizes the uncertainty or risk associated with a breach from an economic perspective – focusing on the trade by itself – as the efficiency of a prospective breach is calculable *ex-ante*. It further has to be stated that the negotiation of a buyout-clause leads to advanced transaction costs.

3. *Status Quo Ante: Contractual Stability within the Transfer Systems over time*

Contractual stability and transfer systems are closely related. Transfer systems constitute a particular form of labour market restrictions which results in various consequences on wages, contract lengths, profits and player development. These factors influence the commitment of contractual parties and maintain a crucial impact on contractual stability.

This chapter provides a brief overview of the development and alteration of transfer systems, respectively the institutional amendments in labour market restrictions, and their impact on the economics of football and contractual stability.²⁵

3.1 *First Steps of a Transfer System: Players' Registration (1885)*

²⁴ S. SHAVELL, *Damage Measures for Breach of Contract*, Bell JE, 1980, 466.

²⁵ The transfer system of the English Football Association (FA) will be in focus, as various transfer systems in association football originated in guidance with the concept of the English FA. Although the chronology and details of the transfer market reforms varied between countries and FAs within the years, key features have been equal and long term trends evident worldwide.

3.1.1 Brief description

The English FA and the English FL imposed the requirement to register players in 1885. This fundamental principle can be considered as the first stage of an organised transfer system within European Football.

- *Registration*: Players had to be registered with the English FA and the English FL in order to be employed and fielded by member clubs.
- *Availability*: Players could only play for the club they were registered for.

Member clubs were forced to register players annually on a one-year contract in order to employ and field the players. As players were free to register with another club the next season or – under the approval of the club and the governing bodies – even during an ongoing season, the free movement of players was not significantly restricted.

3.1.2 Impact on the Economics of Football

Under consideration of the (elementary) institutional characteristics of the players' labour market – particularly the players' status as free agents and no wage restrictions – the bargaining power was with prospective new clubs.²⁶ Incentives of the current club to invest in the player's human capital were reduced as a return on investment could not – neither in sporting nor in financial terms – be guaranteed.

The individual player wage was between the player's current Marginal Revenue Product (MRP)²⁷ and the highest MRP he could attain by transferring to another club.²⁸ In case the player did not transfer, his wage remained constant. However, taking the player's free agent position and the negotiation option into account, it was likely to cause a transfer to the club with which his MRP was the highest.

3.1.3 Impact on Contractual Stability

The development of the required annual registration and restriction to play for one team converted the player's services into a tradable commodity. However, the

²⁶ E. FEESS & G. MUEHLHEUSSER, *The Impact of Transfer Fees on Professional Sports: An Analysis of the New Transfer System for European Football*, *Scand. J. of Economics*, vol. 105, 2003, 146f.

²⁷ Marginal revenue product (MRP): Amount a player adds to the club's profit in case he is/would be signed.

²⁸ Following two basic economic perspectives are underlying: Firstly, profit maximising clubs offer wages up to the amount a player would add to club's revenues: his MRP. Signing a player for a wage lower than the player's MRP will increase the club's profit in comparison to the situation of non-signing, vice versa. Secondly, teams that are maximising utility – defined as playing success, attendance and profit – may sign players for wages higher than player's MRP, even though this approach is not profitable. Additional aspects – such as the characteristics of the transfer system influence the action of stakeholders (cf. S. DOBSON & J. GODDARD, *The Economics of Football*, Cambridge, Cambridge University Press, 2001, 210ff).

courts to mitigate said termination clauses.

8.2 *Additional options to maintain contractual stability*

Consideration may also be given to the inclusion of a *choice of law clause* in favour of the law of the country in which the Member is domiciled, if the relevant domestic law supports the application of the above recommendations. There is, however, no guarantee that the domestic law will be applied to an “Article 17 dispute”, given the comments of the CAS Panel in the *Webster* case, that due to the international nature of any such dispute, the governing law of the contract at the centre of the dispute may not be the governing law of the dispute itself.

Another option that clubs may consider is the inclusion of a *loyalty bonus system* in the Contract with the player. If the player is willing to stay a certain number of years with the club, he could receive a significant bonus payment. This may attract players to respect their contracts with the club instead of terminating them unilaterally.

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