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TRANSFERS OF FOOTBALL PLAYERS
A practical approach to implementing FIFA rules

Michele Colucci **and** *Ornella Desirée Bellia* **(eds.)**

PART I

INTERNATIONAL TRANSFERS OF PLAYERS

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INTRODUCTION

Football is a global marketplace where talented players move frequently from one club to another.

Since footballers' contracts are now more lavish than ever, the interests at stake are also huge. As a consequence, footballers, clubs, and intermediaries, are often involved in extended, exhausting negotiations to close employment and transfer agreements, which have multifaceted contents, encompassing sport activity and image marketing.

In such a context, it becomes obvious that the stakeholders' lawyers bear the responsibility to carefully and diligently conceive, negotiate, and draft the relevant contracts' clauses.

They do so within the legal framework designed by FIFA over the years and shaped mostly by the evolution of the CAS and FIFA jurisprudence. So, it is unsurprising that the transfer regulatory framework has been amended several times.

The last reform has recently been endorsed by the FIFA Football Stakeholders Committee which debated and agreed some measures in the spirit of positive dialogue between parties with mutual interests in the effective functioning of the transfer rules.

Taking into account the legal and economic context of the transfer system, the ongoing reform process, and the consolidated digest of FIFA and CAS jurisprudence, this book has the realistic ambition to provide football stakeholders and lawyers with an updated and comprehensive overview of all the sensitive questions, which seriously matter for the transfer of players, such as:

What are the indispensable facts and legal acts that clubs and players should consider in order to complete a mutually profitable and successful transfer agreement?

What are the main provisions that clubs, players, and intermediaries should focus on while concluding a contract?

Furthermore, what are the federations' responsibilities, duties and operative measures?

How do the regulatory provisions governing football transfer and employment agreements work in practice?

The Authors of this publication are practitioners and scholars who answer those and other questions, exploiting their proven, professional experience as in-house lawyers or legal counsels to clubs, Football Associations, and players.

They provide a comprehensive overview of all matters related to the transfer of players.

This book is updated with the latest amendments to the *FIFA Regulations on the Status and Transfer of Players* published in March 2020.

It is divided into two parts: the first one has an international scope and puts emphasis on the main contractual clauses drafted in the context of a transfer in light of the relevant FIFA regulations and international case law.

Highlighted topics include training compensation, third party ownership, transfer of minors, intermediaries and international tax issues.

The second part concentrates on national transfers. Following the same outline, the Authors analyse the relevant domestic regulatory frameworks by underlining and explaining in detail the peculiarities of each system from a practical viewpoint.

On the basis of such analysis the editors draw the main conclusions in order to identify and validate the best practices and to hopefully contribute to upgrading the legal framework of the football transfer system.

The editors wish to sincerely thank James Mungavin for his linguistic revision and valuable comments, Durante Rapacciuolo for his precious suggestions, and Antonella Frattini for her patience and her meticulous work in editing the book.

Last but not least, a word of thanks to all the Authors who – despite their busy agendas – found the time and the necessary concentration to write the chapters which have made this book unique.

Ornella Desirée Bellia and *Michele Colucci*

Zurich – Brussels, 13 April 2020

PART I

INTERNATIONAL TRANSFERS OF PLAYERS

FIFA REGULATIONS ON THE STATUS AND TRANSFER OF PLAYERS – THE LATEST DEVELOPMENTS

by *Omar Ongaro*[*]

I. Introduction

In order to give a comprehensive overview of the issues affecting the transfer of players, this chapter complements the analysis made in the other parts of this book by focusing on the latest amendments to the FIFA Regulations on the Status and Transfer of Players ("FIFA RSTP"). The rationale behind those amendements as well as the reasoning of the FIFA deciding bodies when applying the main FIFA provisions is explained. Moreover, in line with the practical approach of this publication, concrete examples of cases and circustamnces that clubs and players (and their legal representatives) should take into account on the occasion of a transfer are given.

At the time of writing this essay, the work of the Task Force Transfer System ('Task Force'), which was institutionalised by FIFA's Football Stakeholders Committee ("FSC")[1] and mandated to carry out a detailed review of the transfer system at working level, is still ongoing. It has presented a first series of findings to the FSC on the occasion of its meeting held in London on 24 September 2018. A second "Reform Package" was proposed to the same Committee for endorsement on 25 September 2019.

The last paragraph of this chapter will address the relevant resolutions and provide some background information concerning the various principles that were endorsed for the future reform of the transfer system.

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[*] Vice Chairman of the FIFA Dispute Resolution Chamber. The opinion of the author expressed in this article does not necessarily correspond to the official position of the Fédération Internationale de Football Association (FIFA) and its competent decision-making bodies. All indications contain in the following text are of a general nature and serve a purely informative purpose only. Consequently, they are without prejudice whatsoever. A previous, original and shorter version of this article appears in M. Bernasconi/A. Rigozzi (eds.), International Sports Arbitration, 7th CAS & SAV/FSA Lausanne Conference 2018, Weblaw, Berne 2019. E-mail: omar.ongaro@fifa.org.

[1] Cf. art. 44 of the FIFA Statutes.

Like the aforementioned Committee, the Task Force comprises representatives of all the stakeholders, i.e. the Confederations, member associations, leagues, clubs and players. The purpose of the Task Force is to investigate and explore the various issues of the current transfer system ('broad issues') and to provide advice, proposals and recommendations to the FSC based on its findings.

While it may not have been expressly stated as being the case, broadly speaking and based on the manner in which the current system has been set up, the main and original objectives of the transfer system framework, as set out, in particular, in the FIFA RSTP, may be summarised as follows:[2]

– Protection of contractual stability between clubs and professional players;
– Encouragement of training of young players;
– Solidarity between the elite and grass-roots;
– Protection of minors; and
– Ensuring the regularity and integrity of sporting competitions, in particular, by preventing teams from altering their competitive strength during an ongoing competition.

These objectives and principles of the transfer rules remain sound. Consequently, any possible future new, revised or amended system will have to duly consider them, while asking the question if they are being achieved. If necessary, appropriate measures to realign the rules to meet the stated aims will need to be taken.

Moreover, other challenges and "threats" are currently pressuring football:

– A, at least perceived, lack of transparency on the transfer market, which has a direct impact on the enforcement of the training compensation and solidarity mechanisms;[3]
– The persisting malpractice of overdue payables towards players but also clubs;
– The increasing financial gap between 'rich' clubs/leagues and others, resulting in the concentration of power and influence in the transfer market within those with the greatest resources; and
– A, at least perceived, decrease in competitive balance.

A possible reform of the transfer system will have to address these issues too. However, it remains to be seen if potential new, revised or amended rules regulating the transfer market will, alone, be able to provoke the desired results. At least with respect to the increasing financial gap and the decrease in competitive balance, additional, broader matters, such as distribution, sponsorship and competition formats will probably also have to be taken into account. Indeed, studies show that top clubs are now earning more than 50% of their revenues

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[2] For a comprehensive overview of the main provisions of the FIFA RSTP, cf. O. Ongaro, "*Maintenance oc 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*", in *Contractual Stability in Football,* M. Colucci ed., SLPC, 2011, 27-67.

[3] Cf. Report to the European Commission, "An update on change drivers and economic and legal implications of transfers of players", March 2018, 8, available at https://ec.europa.eu/sport/sites/sport/files/report-transfer-of-players-2018-en.pdf.

from sponsorship,[4] meaning that even if distribution and the transfer system are regulated properly and effectively, the issues might not be solved.

Last but not least, the pertinent and required rules need to fairly balance the interests of players, clubs, leagues, federations and, also, of those who follow the game with a passion.

Parties' rights, such as freedom of movement, must be respected. Legitimate interests, such as incentives for clubs to train young players, must be protected. And certain rights/interests will inevitably be divergent. In any case, the pertinent rules will have to ensure that any restriction to freedom of action or competition arising from them is justified. Each proposed reform will have to be designed to be inherent and proportionate to achieving the stated legitimate objectives. This will ensure that the proposed reforms are, by design, aligned with fundamental legal principles.

No doubt, not an easy exercise. However, it makes sense that in the given circumstances FIFA has a duty to reform the transfer rules to address the current challenges facing football. The next months will show what measures will be adopted, how existing rules will possibly be changed or amended or potential new rules introduced. It is most likely that it will represent the most significant reform to the transfer system since its inception in the current form back in 2001.

In the meantime, however, and before venturing a gaze at the future, let us cast a backward glance at the latest developments that affected the transfer rules, and in particular the RSTP, in the past four years. Certainly not a revolution, more an evolution. Yet, still important steps aiming at ameliorating the existing system, and rendering it more efficient.

II. The FIFA RSTP amendements over the past few years

Before analysing in detail the most recent changes to the FIFA RSTP it appears worth recalling that, albeit not shaking them to the very foundations, various and regular revisions were made to the RSTP since September 2001, when the current framework of the transfer system came into force. Indeed, new editions of the RSTP were regularly released over the years[5] and the current version is in place since 1 June 2019.[6] The main impulse for changes and amendments was given by experience "on the grounds" (i.e. development in and observation of the market), jurisprudence of the different decision-making bodies, initiatives/proposals of the various stakeholders and/or consultation/engagement with the stakeholders concerned.

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[4] Cf. for example, UEFA Club Licensing Benchmarking Report: Financial Year 2016, 77; UEFA Club Licensing Benchmarking Report: Financial Year 2017, published in 2019, 66 and 67; Deloitte Football Money League 2018, 2, available at www2.deloitte.com/us/en/pages/consumer-business/articles/deloitte-football-money-league.html.

[5] First on 1 July 2005, and then in 2008, 2009, 2010, 2012, 2014, 2015, 2016, and 2018.

[5] Cf. FIFA Circular no. 1679 dated 1 July 2019.

Some of the milestones that deserve particular mention comprise:

– *Overdue payables*;[7]
– *Protection of minors*: implementation of the subcommittee of the Players' Status Committee;[8]
– *Transfer Matching System (TMS)*;[9]
– *Ban on third-party ownership of players' economic rights (TPO)*;[10]
– *Female players*: international transfers of professional female players processed in TMS since 1 January 2018;[11]
– *Contractual relationship between players and clubs and execution of monetary decisions*.

1. Overdue payables

Players, due to unpaid remuneration, clubs, due to unpaid transfer and training compensation as well as solidarity contributions, and other stakeholders such as coaches are more and more frustrated of clubs not respecting their financial obligations. The discontent of players having to wait for their salaries and clubs having to run after outstanding compensation is more than understandable. Moreover, the voice of clubs complaining about other clubs obtaining an unjustified competitive advantage by promising and committing to pay money they actually do not have becomes constantly louder. Finally, not least the deciding authorities are also pointing at the persisting malpractice of overdue payables. Indeed, the vast majority of (contractual) disputes brought before the various decision-making bodies continues to concern outstanding or late payments.[12]

In view of the above, it will not come as a surprise that many of the most recent amendments to the RSTP relate to overdue payables. A first important step was taken with the coming into force of art. 12bis of the RSTP on 1 March 2015.[13] Subsequently, further measures were adopted and implemented. The guiding

[7] Cf. art. 12bis of the RSTP and FIFA Circular no. 1468 dated 23 January 2015.
[8] Cf. FIFA Circulars no. 1190 dated 20 May 2009 and 1206 dated 13 October 2009.
[9] Cf. FIFA Circular no. 1233 dated 12 July 2010. The TMS started its operations based on Annexe 3 of the RSTP on 1 October 2010, after a one-year transition period, and having served the procedure regarding the protection of minors already as of October 2009.
[10] Cf. FIFA Circular no. 1464 dated 22 December 2014 and FIFA Circular no. 1679 dated 1 July 2019 concerning the latest version (2019) of FIFA RSTP.
[11] Cf. FIFA Circular no. 1601 dated 31 October 2017.
[12] Cf. for example, DRC decision of 25 October 2018, ref. no. 10180947-E; DRC decision of 14 September 2018, ref. no. 09181685-E; DRC decision of 17 May 2018, ref. no. 05181023-FR; DRC decision of 1 February 2019, ref. no. 02191515-E; DRC decision of 4 October 2018, ref. no. 10180174-E; DRC decision of 4 October 2018, ref. no. 10182112-E; DRC decision of 14 September 2018, ref. no. 09180063-E; DRC decision of 10 August 2018, ref. no. 08181749-E; DRC decision of 7 June 2018, ref. no. 06180751-E; available at www.fifa.com/about-fifa/official-documents/governance/dispute-resolution-chamber.html; and Single Judge decision of19 September 2018, ref. no. 09180583-E; Single Judge decision of 5 June 2018, ref. no. 06181392-E; available at www.fifa.com/about-fifa/official-documents/governance/player-status-committee.html respectively.
[13] Cf. FIFA Circular no. 1468 dated 23 January 2015.

theme clearly is – clubs pay, please. It remains to be seen how the different amendments and procedures will impact parties behaviour, and how effectively dilatory tactics will be addressed and tackled. Much will probably depend (also) on the stance of the deciding bodies. The efficiency of the different provisions requires a firm and convinced application by all of them, at FIFA level, but also by the Court of Arbitration for Sport ("CAS").

2. The Protection of minors and the five-year rule

By means of its circular number 1542,[14] FIFA informed its member associations of certain amendments to the provisions of the RSTP governing the protection of minors,[15] which were to come into force on 1 June 2016.

As to the substance, the amended provisions – paras. 3 and 4 of art. 19 of the RSTP – did nothing more than codifying already existing practice and jurisprudence of the Subcommittee of the Players' Status Committee. The latter is the competent body to decide on applications for approval of any international transfer of a minor player or first registration of a foreign minor player.[16] In fact, the so-called *"five-year rule"* had already been consistently applied by the aforementioned deciding authority for several years, and it had also found its way into the TMS. Any association that wished already then to submit an application to the Subcommittee via TMS,[17] would find a respective application (tab) of its own in the *"minors section"* of the system, referring to the existing additional possibility to potentially be authorised to register a foreign minor player.

The *"five-year rule"* establishes that a foreign minor player who has lived continuously for at least the last five years in the country in which he wishes to be registered for the first time, should be treated as a "national" from a sporting point of view and as regards the provisions on the protection of minors. Consequently, he/she shall not be considered a foreign minor player anymore, and he/she shall not be subject to the conditions of art. 19 paras. 1 and 2 of the RSTP. Nevertheless, it is up to the Subcommittee to assess the specific situation of a minor player and to authorise or not the minor player's registration, if an association is calling for the application of the pertinent rule.[18]

The *"five-year rule"* only concerns the first registration of a foreign minor player, i.e. players who have never previously been registered at an association with a club, and it came to add to the three exceptions contained in art. 19 para. 2 of the RSTP.

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[14] In addition, the same circular letter referred to several changes to Annexe 1 of the RSTP, which governs the release of players to association teams. They aimed at having a more uniform approach with respect to possible breaches of FIFA regulations, assigning the respective competence, in principle, to the FIFA judicial bodies also in that area. Furthermore, a purely linguistic simplification was adopted in Annexe 1, art. 5 of the RSTP.

[14] Cf. art. 19 of the RSTP.

[16] Cf. art. 19 para. 4 and Annexe 2, art. 3 of the RSTP.

[17] Cf. art. 19 para. 5 in conjunction with Annexe 2, art. 5 of the RSTP.

[18] Cf. art. 19 para. 4 of the RSTP.

Besides the above-mentioned formal amendments to the RSTP, and following the same approach adopted previously with respect to the *"five-year rule"*, it was decided to create two supplementary applications of their own in the TMS, based on existing jurisprudence of the Subcommittee, without amending the text of the regulations.

The pertinent jurisprudence is the result of/reaction to common and current realities, one of them a very sad one, which the deciding authorities of FIFA are more and more confronted with in relation to the protection of minors.

Same as for the one of its predecessor, the Players' Status Committee and its Single Judge, the jurisprudence of the Subcommittee relating to the protection of minors is characterised by a strict and firm application of the pertinent provisions. CAS confirmed this course of action applied by FIFA on several occasions.[19] In particular, CAS has repeatedly underlined the importance and the proportionality of art. 19 of the RSTP, thereby fully and consistently confirming the respective conclusions and decisions of FIFA's decision-making bodies. By doing so, CAS has confirmed that the strict approach adopted by FIFA is the appropriate and justified one and does not contravene any principles of law, the public order or any fundamental rights.

To this day, the competent deciding bodies of FIFA have granted exceptions outside of those contained in art. 19 of the RSTP only on limited occasions, with extreme reservation and solely for very specific groups of players.

In particular, the Subcommittee has occasionally accepted applications, under very strict conditions, where:

1) the minor player moved to another country without his/her parents due to humanitarian reasons and could not be expected to return to his/her country of origin given that his/her life or freedom would be threatened on account of race, religion, nationality, belonging to a particular social group or belief in a particular political opinion (so-called unaccompanied refugee player); or
2) the minor player's academic and/or school education was clearly the primary reason for the international move without his/her parents and the maximum duration of the minor player's registration for the club concerned did not exceed one year, provided that the minor player immediately returned home after the end of the relevant educational programme or turned 18 before the end of said programme (so-called exchange student player).

In each of these very specific situations, the Subcommittee emphasised the fact that the minor player's international move was not linked to football at all.

The competent FIFA bodies, i.e. the Players' Status Committee and ultimately the FIFA Council, did not yet feel comfortable to include these two exceptions in the RSTP, and preferred to continue closely monitoring the relevant development and respective jurisprudence. However, it was decided to at least have these two additional possibility to potentially be authorised to register a foreign

[19] Cf. CAS 2005/A/955 & 956, CAS 2008/A/1485, CAS 2011/A/2354, CAS 2011/A2494, CAS 2012/A2787, CAS 2014/A/3611 and CAS 2015/A/4312.

minor player reflected in the TMS.[20] Depending on the evolution, both of them are likely to find their way into the RSTP in due course. Indeed, the moment for them to be included in the RSTP has in the meantime come. By means of its circular no. 1709 dated 13 February 2020 FIFA informed its member associations, pertinent stakeholders and the public of the relevant amendments, which were approved by the FIFA Council on 24 October 2019, and which came into force on 1 March 2020. In order to reflect the established practice described above, the two unwritten exceptions to the general prohibition on the international transfer of minors have been incorporated in the RSTP.[21]

As regards unaccompanied refugee players, a point worth particular mention is that the new provision requires for the minor player to have been (at least) temporarily permitted to reside in the country of arrival. Furthermore, the player's custodian in the country of arrival must consent to the minor's registration with the new club.

As regards exchange student players, it is worth noting that, according to the wording of the aforementioned circular, despite not explicitly mentioned in the provision at stake, throughout the duration of the academic or school programme, it will be required for the minor player to be supervised by host parents, who shall provide accommodation. Moreover, both the minor player's own parents as well as the host parents must consent to the registration with the new club.

Concluding, it has to be stressed that an exhaustive scope relating to the provisions on the protection of minors and, most importantly, the possible exceptions has now been set, by means of the explicit exceptions as per art. 19 para. 2 of the RSTP, the so-called *"five-year rule"* (cf. art. 19 paras. 3 and 4 of the RSTP) and the jurisprudence on unaccompanied refugee players and exchange student players, which since 1 March 2020 has found its way into the RSTP and is now also part of the explicit exceptions enumerated in art. 19 para. 2 of the RSTP.

The practical application of the relevant provisions of the RSTP on the protection of minors by the relevant deciding body on a case-by-case basis and within the aforementioned exhaustive scope, combined with the administrative procedure in place for the submission of minor applications, allows FIFA to prevent the discrimination and unfair treatment of (foreign) minor players, while pursuing the legitimate and undoubtedly important objective to protect the youngest participants in the game.

In order to facilitate the task of any club considering the possibility to register a minor player, and with the aim of enhancing transparency and increasing legal security, the FIFA administration has created the "Minor player application guide". The document is publicly available on FIFA's official webpage.[22] It outlines the pertinent documents to be included with any minor player application depending

[20] The supplements were introduced on 1 June 2016.

[21] Cf. art. 19 para. 2 lit. d) and e) of the RSTP.

[22] FIFA.com: https://resources.fifa.com/mm/document/affederation/footballgovernance/02/86/35/28/protectionofminors%E2%80%93%E2%80%9Cminorplayerapplicationguide%E2%80%9D_neutral.pdf.

on the various individual circumstances surrounding the international move of a minor player within the above-described exhaustive scope.

Finally, and for the sake of completeness, reference shall be made to three further amendments to the provisions on the protection of minors, which came into force on 1 March 2020 and were communicated by means of the FIFA circular no. 1709 dated 13 February 2020.

Firstly, it was specified that the assessment of whether a club provides a player with adequate football education and/or training in line with the highest national standards will be made on the basis of the training categories applied to the training compensation scheme.[23]

Secondly, the existing age threshold of at least 10 years old as from when approval of the sub-committee must be obtain was included in the rules.[24] At the same time, the RSTP now explicitly stipulate that for minor players under the respective age threshold it is the responsibility of the association that intends to register the player to verify end ensure that the circumstances of the player fall, beyond all doubt, under one of the exceptions provided for in art. 19 para. 2 of the RSTP or the five-year rule (i.e. art. 19 para. 3 and 4 of the RSTP).[25] In essence, this corresponds to the codification of the terms of the FIFA circular no. 1468 dated 23 January 2015.[26]

Thirdly, the RSTP now incorporate the principles of the so-called "limited minor exception" (LME) that can be granted to an association, as well as the corresponding responsibilities of the association.[27] By means of this instrument, under special circumstances and at their request, an association may be relieved, under specific terms and conditions, which will be specified in the respective decision of the Subcommittee, and solely for amateur minor players who are to be registered with purely amateur clubs, from the obligation to make an application for approval to the Subcommittee prior to the registration of a minor player. If the LME is granted, it will be the association's responsibility to verify and ensure that the circumstances of the player fall, beyond all doubt, under one of the exceptions provided for in art. 19 para. 2 of the RSTP or the five-year rule (i.e. art. 19 para. 3 and 4 of the RSTP). In essence, this corresponds to the codification of the terms of the FIFA circulars no. 1209 dated 30 October 2009 and no. 1576 dated 10 March 2017.

3. Communication with the parties via e-mail

Finally communication within the scope of the investigation of disputes pending before the various decision-making bodies of FIFA, in particular the Players' Status

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[23] Cf. art. 19 para. 2 lit. b) i) of the RSTP.
[24] Cf. art. 19 para. 4 lit. a) of the RSTP.
[25] Cf. art. 19 para. 4 lit. b) of the RSTP.
[26] Cf. considerations on page 2 under article 9 para. 4.
[27] Cf. art. 19 para. 4 lit. c) of the RSTP.

Committee and the Dispute Resolution Chamber (DRC), can be carried out via e-mail.[28] Despite being a purely formal novelty only, this step was highly welcomed by all interested parties.

The relevant change required amendments to several of the provisions of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber ('the Procedural Rules'),[29] as well as to some articles of the RSTP.[30] They were communicated by means of FIFA circular no. 1603 dated 24 November 2017 and came into force on 1 January 2018. No need to say that the newly applied form of communication facilitates and expedites proceedings.

At the same time, it is important to underline that the change had no impact at all on how the various claims are handled in accordance with the Procedural Rules and any other applicable formal requirement. Equally, one should note that claims for training compensation and the solidarity contribution continue to be managed via TMS.[31]

Without intending to address in detail all of the formal adaptations concerned, some of them appear to be worth particular mention.

– The creation of a dedicated e-mail address at FIFA level, to which all submissions transmitted by e-mail shall be addressed: psdfifa@fifa.org.
  In this respect, one should note that any communication has to be submitted as a PDF file containing the date and a valid and binding signature, otherwise it will not have any legal effect.[32] In other words, it is not possible to present a petition or any other official communication by means of a simple e-mail.
– Communications from FIFA are sent to the parties in the proceedings by using either the e-mail address provided by the parties or as provided in the TMS. The e-mail address provided in TMS by associations and clubs is considered as a valid and binding means of communication.[33]
  The importance for clubs and associations to keep the relevant data in TMS up to date cannot be sufficiently highlighted.[34]
– A more coherent and "lifelike" approach was implemented with respect to time limits. Following the example of probably the majority of today's procedural rules, the respect of a set deadline is, as a general rule, measured against the time of the location of the party required to act.[35]

[28] Submission of a petition by regular mail or courier continues to be permissible (cf. art. 9bis para. 1 of the Procedural Rules).Cf. art. 19 par. 2 lit. b) i) of the RSTP.
[29] Cf. art. 9 para. 1, art. 16 paras. 2, 3 and 8, art. 19 para. 2 and art. 21, as well as the new art. 9bis of the Procedural Rules.
[30] Cf. Annexe 3, art. 4 and art. 5 of the RSTP.
[31] Cf. Annexe 6 of the RSTP.
[32] Cf. art. 9bis para. 2 of the Procedural Rules.
[33] Cf. art. 9bis para. 3 of the Procedural Rules.
[34] Cf. Annexe 3, art. 4 para. 1 and also Annexe 3, art. 5.1 para. 2 of the RSTP.
[35] Cf. art. 16 para. 2 and 8 of the Procedural Rules.

4. The non-application of training compensation to women's football

Another amendment that came into force on 1 January 2018 concerns the application – or better, the non-application – of the training compensation mechanism to women's football.[36]

In order to put an end to a long-standing discussion and for the purpose of legal security and enhanced transparency, art. 20 of the RSTP, which provides for the general principles of the training compensation mechanism, was extended by one sentence. It now explicitly specifies that "[T]*he principles of training compensation shall not apply to women's football*".

As already emphasised in the pertinent circular no. 1603, the amendment at stake does not constitute a material change but does simply codify the always-intended meaning of the relevant article. Indeed, in its constant jurisprudence, the DRC had repeatedly found that the principles of training compensation as per art. 20 and Annexe 4 of the RSTP could not be applied to women's football.[37] The members of the said deciding body explained that the formula created for the men's game would act as a deterrent to the movement of female players. In turn, this would constitute a potential obstacle to the development of the women's game. Consequently, the amendment in fact brings the wording of the article in line with the consistent jurisprudence of the DRC.

The "Global Transfer Market Report 2018 – Women's Football" issued by FIFA TMS[38] (which followed the first ever report on the international transfer activity of female professional football players published in October 2018),[39] that is based on data collected through FIFA's international transfer matching system ('ITMS'), shows that only a very small minority of all international transfers of female players occurs against payment. Furthermore, it also emphasises that, currently, the amounts paid for the transfers of professional female players are far below those paid in the men's game. In 2018, total spending for all international transfers of female players together amounts to USD 564'354, which is just slightly less than the amount of training compensation for one male player that has been trained 10 years by a club as of the season of his 12th birthday, and signs his first professional contract with a Category I club affiliated to an association within UEFA. Finally, one will also note the relatively low number of international movements (696) during the monitored period of 12 months.

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[36] Cf. FIFA Circular no. 1603 dated 24 November 2017.

[37] Different conclusion in CAS 2016/A/4598 WFC Spartak Subotica v. FC Barcelona. However, the award is far from being a "turning point" regarding the application of the training compensation principles to female players, as it was mainly based on the lack of evidence presented by the parties and the misjudgement of the respondent not to present a position regarding the possibility to reduce the amount of training compensation eventually due. The amendment to art 20 of the RSTP was not least prompted by the aforementioned award.

[38] Available at www.fifatms.com/wp-content/uploads/dlm_uploads/2019/01/fifa_tms_gtm_women_A4_online_f01.pdf.

[39] FIFATMS.com: www.fifatms.com/wp-content/uploads/dlm_uploads/2018/09/Women-transfers-in-ITMS_September-2018-1.pdf.

All of this is to corroborate the findings of the DRC that the development of young female players might possibly be jeopardised if one was to apply the training compensation principles of the RSTP to the international movement of women's player. Even further developed and professionalised clubs would probably become reluctant to offer a young player from a less evolved environment the opportunity to unfold her talent, were they to pay training compensation as per the current principles of the RSTP.

Having said that, the development and evolution of female football progresses steadily, and building the women's game and bringing it into the mainstream is one of the key messages contained in "FIFA 2.0: The vision for the future".[40] Therefore, it remains an undisputable necessity to create specific, suitable and appropriate mechanisms that will incentivise club's (financial) efforts and investment in the training and development of young female players. For this reason, the FIFA administration is working on a targeted concept to be applied to the women's game in consultation with the stakeholders as well as relevant experts in professional and women's football. The overall objective is clear: promote and enhance the development of women's (professional) football.

Finally, it appears appropriate to mention that no similar amendment was included in the provision concerning the solidarity mechanism.[41] *A contrario*, this is to confirm that the principles of the solidarity mechanism do apply also to women's football, and this for just cause. The solidarity contribution is a percentage of any compensation paid to a player's former club, in case of the professional moving during the course of a contract.[42] Such percentage is to be deducted from the total amount of the agreed compensation and distributed by the new club to the club(s) involved in the player's training and education over the years. Consequently, the solidarity contribution does not alter the amount that a new club will have to pay in order to acquire the services of a player (such amount was negotiated and agreed upon with the former club), but only the way the relevant transfer compensation needs to be distributed. It will therefore not act as a deterrent to the movement of a (female) player and does not constitute a potential obstacle to the development of the women's game either.

5. FIFA 2.0: The vision for the future. Most recent amendments as per 1 June 2018

Constructive engagement with stakeholders is one of the key messages contained in "FIFA 2.0: The vision for the future", which was released by the FIFA President, Gianni Infantino, in October 2016. For example, it states that "*developing football and widening its impact will require collaboration among FIFA and its many stakeholders, including players, leagues, clubs, international*

[40] Cf. FIFA.com: https://resources.fifa.com/mm/document/affederation/generic/02/84/35/01/fifa_2.0_vision_e_neutral.pdf; 36.
[41] Cf. art. 21 of the RSTP.
[42] Cf. Annexe 5, art. 1 of the RSTP.

organisations ...".[43] Furthermore, it explains that "[c]*ommitting to and continually strengthening* [the] *collaborative and inclusive approach is imperative to charting the sustainable and successful future of football*".[44]

A clear and important efflux of this intention is the creation of the FSC,[45] whose role is to advise and assist the FIFA Council on important football matters involving all stakeholders. One key area that was identified for the FSC to evaluate as one of the most important aspects for the future of football is the transfer system. It is deemed that in-depth discussions with relevant stakeholders (i.e. clubs, leagues, players, member associations and confederations) are required.[46]

On the occasion of its first meeting held on 23 March 2017 the FSC confirmed its intention to deal with the possible reform of the transfer system as one of its priorities. In this respect, it was decided to treat the matter in two separate phases.

Initially, the so-called "narrow" issues of the transfer system, i.e. overdue payables and abuse of players, should be addressed. Once agreement would be found on these aspects, the so-called "broad" issues of the transfer system could be tackled.

The amendments to the RSTP that came into force on 1 June 2018[47] are the result of the work done under the auspices of the FSC relating to the "narrow" issues. Considering the persisting malpractice concerning overdue payables, which was emphasised earlier in this article, it will not come as a surprise that most of the changes to the different articles of the RSTP aim at addressing that particular aspect of the system. One amendment concerns a very specific kind of abusive conduct of a party. Finally, an important novelty was implemented with the objective to render the process pertaining to the enforcement of monetary decisions more efficient and faster. Each of the amendments will be analysed below in this essay.

The respective modifications became possible after an agreement was reached in the various points between the stakeholders, namely the European Club Association (ECA), FIFPro (the World's Players' Union) and the World Leagues Forum (WLF) in October 2017. As part of the entire process, FIFPro withdrew its complaint before the European Commission that it had lodged in order to challenge several elements of the currently existing transfer system. These developments and events were the precursor for the possible broader revision of the transfer system.

During its second meeting, held in October 2017, the FSC, acknowledging the aforementioned achievements, decided to implement and institutionalise the Task Force, which would operate under its auspices and tackle the "broad" issues of the transfer system. The role of the Task Force would be to investigate/explore

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[43] Cf. FIFA 2.0: The vision for the future, 20.
[44] Cf. FIFA 2.0: The vision for the future, 66.
[45] Cf. art. 44 of the FIFA Statutes.
[46] Cf. FIFA 2.0: The vision for the future, 67.
[47] Cf. FIFA Circular no. 1625 dated 26 April 2018.

these issues and to provide advice, proposals and recommendations to the FSC based on its findings.

As mentioned in the introduction to this essay, the operation of the Task Force is ongoing. However, it presented its work, i.e. the in-depth analysis of different elements of the transfer system it had carried out until then as well as the respective study and discussions, its findings and certain first proposals and recommendations, to the FSC on the occasion of its meeting held on 24 September 2018. A second package of measures with further suggestions and recommendations was presented to the same Committee on 25 September 2019. Considering that the first and second "Reform Package" endorsed by the FSC, and subsequently also by the FIFA Council, "only" (this is, however, already an important and significant step) lays out the fundamental principles of certain envisaged amendments, which will eventually have to be converted into a set of concrete regulations, it appears to be premature to speak about possible specific changes to the system, which might be implemented. Even more, it is not possible at this stage to address potential amendments to the RSTP, which still need to be drafted and discussed with and amongst the stakeholders, before obtaining support from the Players' Status Committee and ultimately be formally adopted by the FIFA Council.

Therefore, let us now turn our attention to the different recent amendments to the RSTP that came into force on 1 June 2018. As you will note, some of them represent the codification of existing jurisprudence, while some others are indeed significant additions. As already mentioned, the last paragraph of this article will nevertheless have a closer look at the principles endorsed in the aforementioned first and second "Reform Package".

a. Amendments concerning the provisions on maintenance of contractual stability between professional players and clubs that came into force on 1 June 2018

a1. Amendment to art. 14 of the RSTP and new art. 14bis of the RSTP: just cause

As a matter of fact, it is simply impossible to capture all of the potential constellations that could possibly be considered to be a just cause for the premature and unilateral termination of a contract concluded between a professional player and a club.[48] The issue becomes even more complicated when one has to take into account the specific circumstances of a concrete situation, as is the undisputable duty of any deciding authority called to decide on an employment-related dispute between a professional player and a club. Therefore, the RSTP rightly continue not to provide for a list of "just causes". Hence, the DRC will continue to assess an unilateral

[48] Cf. art. 14 of the RSTP.

termination of a contract, while considering the specificity of each individual affair, based on the well-known criteria:[49]

– only a breach, which is of a certain severity, qualifies as a just cause.
– In principle, the breach is considered to be of a certain severity when there are objective criteria, which do not reasonably permit to expect a continuation of the employment relationship between the parties such as serious breach of confidence.[50]
– Furthermore, the termination of a contract should always be the *ultima ratio* action only.[51]

Translated, for example, to the situation of a professional player not being paid his remuneration in accordance with the contract signed with his club, the following conditions should be met:

Firstly, the outstanding amount cannot be negligible or totally subordinated, and secondly, as a general rule, the player must have put the club in default,[52] i.e. the club was informed of the disrespect of contractual obligations and was made aware that the player is not willing to accept such behaviour in the future.[53] One will recognise the influence of these principles in the new art. 14bis of the RSTP, which is being analysed below.

Notwithstanding the above, the recent amendments[54] to the RSTP bring about two important specifications in relation to what has to be considered a just cause.

i. Abusive conduct of a party ex art. 14 para. 2

The first one makes explicit reference to the abusive conduct of a party "*aiming at forcing the counterparty to terminate or change the terms of the contract*".[55] Such behaviour, if established, will entitle the counterparty to terminate the contract with just cause. Actually, this is not necessarily a novelty, since decisions on this basis can already be found when going through the pertinent jurisprudence.[56] However, the fact that this aspect is now expressly included in the RSTP shows the importance given to such behaviour, which shall not be accepted.

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[49] Cf. for example, CAS 2008/A/1517 with reference to CAS 2006/A/1180; CAS 2009/A/1932.
[50] Cf. for example, DRC decision of 25 October 2018, ref. no. 10180471-E; DRC decision of 24 August 2018, ref. no. 08180794-E; available at www.fifa.com/about-fifa/official-documents/governance/dispute-resolution-chamber.html.
[51] Cf. decisions mentioned under footnote no. 44.
[52] See, however, CAS 2017/A/5242 Esteghlal Football Club v. Pero Pejic: if the termination without prior warning derives from a respective clause in the contract, it is valid.
[53] Cf. for example, CAS 2006/A/1180.
[54] Cf. FIFA Circular no. 1625 dated 26 April 2018.
[55] Cf. para. 2 to art. 14 of the RSTP.
[56] Cf. for example, CAS 2015/A/4286 Sebino Plaku v Wroclawski Klub Sportowy Slask Wroclaw S.A; CAS 2014/A/3642 Erik Salkic v. Football Union of Russia (FUR) & Professional Football Club Arsenal; CAS 2013/A/3398 FC Petrolul Ploiesti v. Aleksandar Stojmirovic.

The terms of the new paragraph are naturally kept neutral and respect the overarching principle of reciprocity, which characterises the provisions relating to the maintenance of contractual stability in the RSTP. Equally, it appears that the deciding authorities will have a quite broad scope of discretion when applying the provision concerned. In particular, the pertinent jurisprudence will have to provide guidance and establish criteria with respect to what shall be considered "abusive" conduct.

As to the scope of the new para. 2 to art. 14 of the RSTP, one will note that it does not address all kind of "abusive conduct", but only relevant behaviour with a very specific objective. In fact, the abusive conduct of a party must be targeted on forcing the counterparty – club or player respectively – to either terminate the contractual relationship or to change the terms of the contract.

A. The conduct of a club: examples

When raising the issue, the primarily envisaged scenario clearly concerned the circumstances where a club decides to separate the player from the team, send him to train alone, possibly at abstruse hours and without appropriate coaching staff accompanying him. If the motivation for such measures is to force the player to either accept the early termination of his contract without any service in return, or to accept an extension of his contract, mainly to avoid him becoming a "free agent" and the club losing the prospect of a transfer fee in case of a move of the player to a new club, then the club's behaviour shall not be accepted. This explains why, initially, when describing the "narrow" issues, reference was made to the abuse of players.

In this context, and according to available case law,[57] key factors, which are being considered when having to assess whether the separation of a player from the first team would constitute a breach of contract by the club include:

– Why was the player sent to the reserve team?
– What was the timing of the measure? Was it a period with (official) matches being played?
– Was the player still being paid his full salary and remuneration?
– Was it a permanent or temporary measure?
– Were there adequate training facilities for the player with the reserve team?
– Was there an express right in the contract for the club to drop the player to the reserve team?
– Was the player training alone or with a team?

From the mentioned jurisprudence it can further be learnt that a club – the employer – is obliged to protect the player's – the employee's – personality. The right of certain categories of employees, including football players, to be

[57] Cf. for example, CAS 2015/A/4286 Sebino Plaku v Wroclawski Klub Sportowy Slask Wroclaw S.A; CAS 2014/A/3642 Erik Salkic v. Football Union of Russia (FUR) & Professional Football Club Arsenal; CAS 2013/A/3398 FC Petrolul Ploiesti v. Aleksandar Stojmirovic.

employed, in particular for employees whose inoccupation can prejudice the future career development, was deduced from such principle. Therefore, the club has to provide his players with the activity they have been employed for and for which they are qualified, and it is not authorised to employ them at a different or less interesting position than the one they have been engaged for. If the club violates this obligation, the player has the right to immediately terminate the agreement.

It is acknowledged that, in principle, individual training is not good for players. Yet, if, for example, a player, needs to recover from an injury, is required to catch up on his level of fitness, has been absent from the team (with the consent of the club) for a longer period of time for other reasons (e.g. national team duties or personal reasons), etc., a temporary relocation to the second team might be justified.[58] One should not forget, however, "*that football is a team sport and that the majority of training would need to be as part of a team or squad and with a football*".[59]

It remains to be seen whether the new provision included in the RSTP will have an impact on parties' behaviour and related jurisprudence, and if so, to what extent and in what direction. In this respect, it should be noted that the, at times probably not easy, burden to proof the abusive conduct of the club lies with the player.

At the time of writing, the DRC has not yet passed any decision based on the new para. 2 of art. 14 of the RSTP.

B. The conduct of a player: examples

Potentially, however, also a player's conduct may be qualified as abusive in the sense of the new provision. One could think, for example, of the situation where a player wishing to leave his club prematurely in order to join a new club is unable to obtain the agreement of his current club. In order to force the latter to agree to the transfer, the player starts refusing to train or to participate in matches, bringing forward all kind of excuses. Clearly, under such circumstances the club may have a just cause to terminate the contract. After all, the player appears to be disrespecting his contractual obligations. Yet, this is exactly what the player wants. Indeed, compensation might become payable to the club, but it will lose the player and his sporting qualities and merits, which it aimed at retaining.

Admittedly, the aforementioned scenario will most likely only apply to a selected group of top players. It shows, however, a dilemma which a club might have to face, and which, by the way, also the new art. 14 para. 2 of the RSTP will not solve.

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[58] Cf. CAS 2015/A/4286 Sebino Plaku v Wroclawski Klub Sportowy Slask Wroclaw S.A.
[59] Cf. CAS 2011/A/2428.

ii. Outstanding salaries as a just cause

The second specification with respect to what has to be considered a just cause[60] finds its motivation in what undisputedly is the source of the (vast) majority of disputes between professional players and clubs brought before the DRC: unpaid or overdue salaries.[61] Equally, the most frequent reason for a premature unilateral termination of a contract by a player is the fact that he is not being paid (on time) by his club. These are the situations addressed by the new provision.

Art. 14bis of the RSTP comes as a kind of *lex specialis* to the principle that a contract can be terminated with just cause. In contrast to the above-discussed new para. 2 to art. 14 of the RSTP, where, as mentioned, a quite broad scope of discretion is left to the deciding bodies, this new article is very specific and contains several concrete details that the competent bodies will have to consider when passing their decision in case of a dispute. Enhancing legal security for players not being paid (on time) by their clubs and better describe their rights is certainly one of the main objectives of the article at stake. At the same time, it will hopefully straighten the often-heard misinterpretation deriving from a statement in the FIFA Commentary on the RSTP (which, by the way, is outdated with respect to many aspects) that three months of outstanding salary automatically constitute a just cause for the player to terminate his contract,[62] or that less outstanding salaries automatically exclude the just cause.

In this respect, it must be pointed out that the Commentary itself speaks of an example based on simplified decisions of the DRC. Moreover, it is an established fact that the DRC assesses the existence of a just cause for a player or a club to terminate their contract on the basis of the above-mentioned criteria[63] and always while taking into consideration the overall and specific concrete circumstances of the matter brought to its attention. This applies also in case of the termination of a contract by a player for outstanding salaries. It is therefore misleading and inaccurate to state that a three-month delay in the payment of the agreed salary constituted automatically a just cause for a player to terminate his contract.

Consequently, it is also misleading and inaccurate to maintain that the new art. 14bis of the RSTP will tighten existing jurisprudence. What the new article does is to make clear that, in future, in case of a club unlawfully failing to pay a player at least two monthly salaries on time, the player will automatically be deemed to have just cause to terminate his contract, subject to the respect of certain formal conditions. In other words, and in relation to the general definition

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[60] Cf. art. 14bis of the RSTP.

[61] Cf. for example, DRC decision of 25 October 2018, ref. no. 10180947-E; DRC decision of 14 September 2018, ref. no. 09181685-E; DRC decision of 17 May 2018, ref. no. 05181023-FR; DRC decision of 1 February 2019, ref. no. 02191515-E; available at www.fifa.com/about-fifa/official-documents/governance/dispute-resolution-chamber.html.

[62] Cf. FIFA Commentary on the RSTP, 39.

[63] Cf. above, point 5.1. a), 10.

of what constitutes a just cause,[64] the provision establishes a regulatory assumption that illegitimate non-payment of two monthly salaries is a contractual breach of sufficient severity to justify its immediate unilateral termination.

One will note that the article refers to unpaid and outstanding salaries only. Other possible parts of a player's remuneration, e.g. sign-on fees or participation bonuses, are not captured. However, this does not at all mean that delayed payment of other forms of remuneration cannot constitute a just cause for a player to terminate his contract prematurely. In case a player invokes other outstanding remuneration as a just cause to terminate his contract, this might still be considered to be the case. Yet, the pertinent circumstances will have to be measured against the general definition of what constitutes a just cause in accordance with the terms of art. 14 of the RSTP and the respective general criteria already mentioned. In accordance with the established approach of the DRC, particular attention will then be given to elements such as the importance of the outstanding amount (is it not negligible or totally subordinated),[65] the extent of the delay or the general stance of the parties in the specific situation,[66] etc.

The 15 days's default

From a formal point of view, the new article requires from the player that he has put the club in default in writing, granting a deadline of at least 15 days for the club to fully comply with its financial obligations. This condition is in line with the established jurisprudence of the DRC and CAS, and aims at increasing clarity and legal security, in particular, in relation to the respective and appropriate time frame.

What happens in case a player has two outstanding salaries, but only grants the club a deadline of, for example, 10 days to fully comply with its financial obligations, and then decides to unilaterally terminate the contract following the club's ongoing failure to pay the relevant amount? Will this not constitute a just cause? Indeed, the formal requirements of the new art. 14bis of the RSTP have not been respected. This will preclude the deciding authority from concluding that the player had a just cause to prematurely terminate the contract with just cause on the basis of the aforementioned provision. However, nothing impedes the player from justifying his unilateral termination of the contract based on the general definition of a just cause as per art. 14 para. 1 of the RSTP. It might be more difficult to persuade the deciding authority than by successfully invoking the new art. 14bis of the RSTP, but the possibility to explain that the breach by the club (non-payment of two salaries) was of a certain severity since there were objective

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[64] Cf. point II., 5., a, a 1) above.

[65] Cf. for example, DRC decision of 10 August 2018, ref. no. 08181796-FR; DRC decision of 6 December 2018, ref. no. 12181902-E; available at www.fifa.com/about-fifa/official-documents/governance/dispute-resolution-chamber.html.

[66] Cf. for example, DRC decision of 14 September 2018, ref. no. 09180376-E; DRC decision of 14 September 2018, ref. no. 09180035-E; available at www.fifa.com/about-fifa/official-documents/governance/dispute-resolution-chamber.html.

criteria, which did not reasonably permit to expect a continuation of the employment relationship between the parties, and that therefore, he had no other option but to terminate the contract, remains available.[67]

Despite definitely increasing legal security, art. 14bis does not allow for a "*black or white*" assessment of the relevant circumstances. Indeed, the failure of the club to pay at least two monthly salaries on their due dates must be "unlawful".[68] This means that the club still has the possibility to overcome the regulatory assumption by providing convincing evidence supporting a valid reason justifying the non-payment.

The new article also addresses contractual constructions, under which the player's salary is not paid on a monthly basis.[69] In such cases, the pro-rata value corresponding to two months shall be considered. Is the outstanding amount of salary equal to at least two months, the player will also be deemed to have just cause to terminate his contract. By means of this addition, attempts of circumvention shall be tackled.

The reference to collective bargaining agreements

Finally, the preference of different conditions contained in a collective bargaining agreement validly negotiated by employers' and employees' representatives at domestic level in accordance with national law is explicitly established.[70] This is a clear evidence and efflux of the active involvement of the "social partner" – representatives of the players, clubs and leagues – in the "legislatory" process and their faith and trust in the social dialogue.

At the time of writing, the DRC has passed three decisions based on this new provision.[71] None of them has been published yet, because either the grounds were not requested,[72] or they were not yet notified to the parties. In all three instances, the competent deciding body concluded that at least two monthly salaries were outstanding and that the player had put the club in default granting a deadline of at least 15 days for the club to fully comply with its financial obligations. Consequently, it was found that the player had just cause to prematurely terminate his contract based on art. 14bis of the RSTP.

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[67] Cf. for example CAS 2015/A/4046 Lizio & Bolivar vs Al Arabi; CAS 2017/A/5242 Esteghlal Football Club v. Pero Pejic: if the termination without prior warning derives from a respective clause in the contract, it is valid; CAS 2018/A/5955 Spas Delev v. PFC Beroe-Stara Zagora EAD & FIFA and CAS 2018/A/5981 Pogoñ Szczecin Spó³ka Akcyjna v. FC Beroe-Stara Zagora EAD & FIFA: the duty to issue a reminder or a warning (default notice), respectively, is not absolute and there are circumstances where no reminder and no warning were deemed necessary.

[68] Cf. art. 14bis para. 1 of the RSTP.

[69] Cf. art. 14bis para. 2 of the RSTP.

[70] Cf. art. 14bis para. 3 of the RSTP.

[71] DRC of 6 December 2018 Player P / Club N.Z.; DRC of 7 March 2019 Player M / Club S.G.; DRC of 11 April 2019 Player R / Club Y.A.

[72] Cf. art. 15 para. 1 of the Procedural Rules.

a2. Compensation due to a player in case of unilateral termination of a contract

Prior to entering into the analysis of the amended art. 17 para. 1 of the RSTP, a reminder of an important principle appears to be appropriate. The aforementioned provision bears the title "Consequences of terminating a contract without just cause". Nevertheless, it is recognised and well-established practice and jurisprudence of both the DRC and CAS to apply the same consequences not only to the party that actually terminated the contract without just cause, but also to the party that committed a serious contractual breach resulting in the counterparty having a just cause to terminate the contract.[73] The most common and illustrious example in this regard is the player terminating his contract with just cause, because of outstanding payments by the club.

Turning our attention now to what has changed in art. 17 para. 1 of the RSTP, to begin with it is essential to recall that, as a first principle, the aforementioned provision allows clubs and players to stipulate in their contract the amount due as compensation in case of unilateral breach of contract without just cause by the counterparty or the way such compensation shall be calculated (liquidated damages clauses). In this respect, particular attention should be given to the fact that, in case of a dispute, this kind of clauses may be declared invalid by the deciding authority (e.g. questions of reciprocity, proportionality and unbalanced terms),[74] or the established amount reduced if considered disproportionate. If there is such a valid contractual agreement, it has to be respected. Calculation based on the objective criteria provided for in the RSTP shall only be applied if no such contractual stipulation exists.[75]

The latest amendment to art. 17 para. 1 of the RSTP,[76] that creates a *lex specialis* only for the specific circumstance of having to calculate the compensation due to a player, does not affect the above-described principles. Indeed, the introduction to the new part of the provision clearly states that compensation due to a player shall be calculated in accordance with the new terms, *"bearing in mind the aforementioned principles"*, i.e. those mentioned above and contained in the first sub-paragraph of art. 17 para. 1 of the RSTP.

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[73] Cf. CAS 2012/A/3033; CAS 2012/A/2910; CAS 2012/A/2775 and CAS 2011/A/2202.

[74] Cf. for example, CAS 2016/A/4875 *Liaoning FC vs Erik Cosmin Bicfalvi*; CAS 2016/A/4605 *Al-Arabi Sports Club Co. for Football v. Matthew Spiranovic*; CAS 2014/A/3656 *Olympiakos Volou FC v. Carlos Augusto Bertoldi & FIFA*; CAS 2015/A/4124 *Neftci PFK vs Emile Mpenza*; but with different opinions also CAS 2015/A/4067 *Valeri Bozhinov v. Sporting de Portugal* & 4068 *Sporting de Portugal v. Valeri Bozhinov & Levski Sofia*; and CAS 2015/A/4262 *Pape Malickou Diakhate & Gestion Service Ltd. v. Granada CF, Bursaspor Kulübü*, *Kayseri Erciyesspor & FIFA* and CAS 2015/A/4264 *Granada CF v. Pape Malickou Diakhate, Bursaspor Kulübü, Kayseri Erciyesspor & FIFA*.

[75] Cf. art. 17 para. 1, first sub-paragraph, of the RSTP.

[76] Cf. art. 17 para. 1, second sub-paragraph, including i. and ii., of the RSTP.

Finally, one needs to consider that, same as for the new art. 14bis of the RSTP, when it comes to calculating the amount of compensation due to a player, the preference of different conditions contained in a collective bargaining agreement validly negotiated by employers' and employees' representatives at domestic level in accordance with national law is explicitly established.[77]

In summary, the following can be retained:

1) The parties – club and player – can agree in advance on the amount of compensation due in case of unilateral breach of contract without just cause by the counterparty (or on the way such compensation shall be calculated) and include such clause in their contract (liquidated damages clause);
2) If no such contractual agreement exists, or in case the relevant clause is considered to be invalid, compensation will be calculated on the basis of the criteria included in art. 17 para. 1 of the RSTP. In case of the player being entitled to the compensation, the *lex specialis* with the relevant specifications as per art. 17 para. 1, second sub-para. i. and ii. of the RSTP will be applied.
3) In the latter case, if at national level the employers' and employees' representatives have validly negotiated a collective bargaining agreement in accordance with national law and its terms deviate from the principles stipulated in art. 17 para. 1, second sub-para. i. and ii. of the RSTP, then the terms of the collective agreement shall prevail when calculating the compensation due to the player.

The purpose of the relevant amendment is, once again, to increase legal security. While, on the one hand, it codifies existing jurisprudence of the DRC, on the other hand it also introduces a real and important novelty – "additional compensation" due to a player under certain conditions. The new provision secures the player an additional compensation of at least three monthly salaries on the mitigated residual value of his previous contract.

When calculating the compensation due to a player in case of unilateral termination of his contract without just cause by the club (or which just cause by the player), two different situations need to be distinguished.

i. The player has not found new employment

In case of a player who was not able to find new employment following the unjustified early termination of his previous contract,[78] the player shall be entitled, as a general rule, to compensation equal to the residual value of the contract that was prematurely terminated. This is nothing more than a confirmation of the long-standing and established jurisprudence of the DRC.[79]

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[77] Cf. art. 17 para. 1, second sub-paragraph, iii. of the RSTP.

[78] Cf. art. 17 para. 1, second sub-paragraph, i. of the RSTP.

[79] Cf. for example, DRC decision of 24 August 2018, ref. no. 08180110-E; DRC decision of 11 April 2019, ref. no. 04192638-E; DRC decision of 6 December 2018, ref. no. 12180908-ES; available at www.fifa.com/about-fifa/official-documents/governance/dispute-resolution-chamber.html.

The decisive moment in time is the day when the competent deciding authority passes its decision.

ii. The player has found new employment

The second situation addressed by the amended provision looks at a player who succeeds in finding new employment following the unjustified early termination of his previous contract.[80]

In this case, the decisive moment in time is again the day when the competent deciding authority passes its decision.

Mitigated and Additional Compensation

In its first part of the amended paragraph, the long-standing and established jurisprudence of the DRC is confirmed.[81] The compensation due to the player is calculated on the basis of the residual value of the contract that was terminated early, from which the value of any new contract for the period corresponding to the time remaining on the prematurely terminated contract is deducted ("Mitigated Compensation").

The real novelty follows. The "Mitigated Compensation" will be increased by at least three monthly salaries ("Additional Compensation"). Yet, and as a further evidence that most of the pertinent amendments were guided by the firm will of effectively combat the persisting malpractice of overdue payables, the "Additional Compensation" will only be granted if the early termination of the contract was due to overdue payables. In other words, a player suffering from a termination of his contract by the club without just cause, or terminating his contract with just cause, for any other reason, will not benefit from this supplementary recompense.

In this respect, it appears appropriate to clarify that the term "overdue payables" does not refer to the same term technically used in a very specific context in relation to art. 12bis of the RSTP. In fact, the latter article explicitly states that its terms are without prejudice to the application of further measures in accordance with art. 17 of the RSTP in the event of unilateral termination of the contractual relationship.[82]

In other words, proceedings under art. 12bis of the RSTP are completely separate from possible procedures in accordance with art. 17 of the RSTP. If a player decides to claim his outstanding salaries, but does not intend to terminate prematurely his contractual relation with his club for such reason (yet), he will

[80] Cf. art. 17 para. 1, second sub-paragraph, ii. of the RSTP.
[81] Cf. for example, DRC decision of 17 May 2018, ref. no. 05180308-E; DRC decision of 10 August 2018, ref. no. 08181396-FR; DRC decision of 11 April 2019, ref. no. 04192622-E; available at www.fifa.com/about-fifa/official-documents/governance/dispute-resolution-chamber.html.
[82] Cf. art. 12bis para. 9 of the RSTP.

invoke art. 12bis of the RSTP, which will trigger the commencement of the relevant fast-track procedure. Once a player decides to put unilaterally an end to his contract invoking just cause and claiming outstanding amounts, plus possibly compensation, art. 12bis of the RSTP will not need to be considered anymore. Instead, the pertinent proceedings will be started taking into account to terms of art. 17 of the RSTP, including the recently amended para. 1.

At the time of writing, the DRC has already passed a couple of decisions based on this new provision. However, again, none of them has been published yet, because either the grounds were not requested , or they were not yet notified to the parties. On four occasions the DRC awarded the automatic additional compensation of three monthly salaries, since the player had terminated his contract prematurely with just cause due to overdue payables.[83] In a further decision passed on 11 April 2019,[84] the DRC faced a situation where the player's contract provided different salaries. Therefore, it was unclear which amount should be used to calculate the additional compensation. The deciding authority established that it was the salary at the time of the termination of the contract. It was on this basis that the player was granted the three automatic additional monthly salaries.

Egregious circumstances justifying an increase of the additional compensation

In case of *egregious* circumstances, the competent deciding authority may decide to increase the "Additional Compensation" up to a maximum of six monthly salaries. This is a new term that founds its way into the RSTP. Obviously, it will be the responsibility of the various decision-making bodies to concretise what exactly should be subsumed under such concept and considered to be "egregious circumstances". Looking up the term in different dictionaries, you can find explanations such as "*extremely bad in a way that is very noticeable*",[85] "*outstandingly bad; shocking*",[86] or "*in a legal context, the term egregious refers to actions or behaviors that are staggeringly bad, or obviously wrong, beyond any reasonable degree*".[87] It remains to be seen if, confronted with this kind of definitions, the DRC and/or CAS will demand higher standards of wrongdoing from a club than for example in cases where "aggravating circumstances" are the benchmark.[88]

Since, as explained above, the act of not paying due remuneration (overdue payables) needs to be the very reason for the unjustified early termination of the contractual relationship in order for the "Additional Compensation" to become

[83] DRC of 4 October 2018 Player D / Club A; DRC of 6 December 2018 Player L / Club P; DRC of 1 February 2019 Player S / Club A.M.; DRC of 11 April 2019 Player P / Club A, as well as Player C / Club M.U.

[84] Player T / Club K, not published.

[85] Cambridge online dictionary: https://dictionary.cambridge.org/dictionary/english/egregious.

[86] Oxford online dictionary: https://en.oxforddictionaries.com/definition/egregious.

[87] Legal dictionary online: https://legaldictionary.net/egregious/.

[88] Cf. art. 12bis para. 6 and 17 para. 3 of the RSTP.

due to the player, the egregious circumstances will in any case have to be related to other, additional misbehaviour by the club. Relevant circumstances to be taken into account could potentially be, for example:

Besides not being paid in accordance with his contract, the player is
– forced to train alone;
– evicted from the training facilities and/or his accommodation;
– deprived of his passport, which is being withheld by the club;
– refused his exit permit.

Equally, a record of illegal misbehaviour or contractual violations may also lead a deciding body to consider a club's stance to meet the condition of egregious circumstances.

In a decision passed on 15 November 2018,[89] the DRC considered the fact that the club kept the player's passport as an egregious circumstance and increased the additional compensation to the maximum, i.e. six monthly salaries. In another recent decision, the DRC awarded the maximum "Additional Compensation" of six monthly salaries to a player, considering an egregious circumstance the fact that a club, which had been imposed a registration ban, promised the player that he would be registered. The club failed to comply with its commitment during two complete registration periods.

In its last sentence, the provision at stake finally specifies that the overall compensation is in any case limited by the rest value of the prematurely terminated contract.[90]

a3. Prohibition of grace periods ex art. 18 para. 6 RSTP

The last amendment to the RSTP that came into force on 1 June 2018 relating to the substance of the contractual relation between a player and a club concerns the so-called contractual "grace periods".[91] The aim of the provision is to avoid

[89] Player S.P. / Club A.A.S.

[90] Cf. art. 17 para. 1, second sub-paragraph, ii. in fine of the RSTP – Example:
Player X signs a 12-month contract with club A. The agreed monthly salary amounts to 10'000. The player prematurely terminates the contract with just cause after 6 months for overdue payables. The player is able to find new employment with club B during 5 of the relevant 6 months, with a monthly salary of 5'000. The "Mitigated Compensation" would be 35'000 (residual value old contract, 60'000, minus remuneration received under new contract, 25'000). Theoretically the guaranteed "Additional Compensation" would be 30'000 (three monthly salaries), which would lead to a total compensation of 65'000. Since the overall compensation may never exceed the rest value of the prematurely terminated contract, the player will, however, only be entitled to 60'000 in compensation.

[91] Cf. art. 18 para. 6 of the RSTP: " Contractual clauses granting the club additional time to pay to the professional amounts that have fallen due under the terms of the contract (so-called "grace periods") shall not be recognised. Grace periods contained in collective bargaining agreements validly negotiated by employers' and employees' representatives at domestic level in accordance with national law shall, however, be legally binding and recognised. Contracts existing at the time of this provision coming into force shall not be affected by this prohibition".

that a club is granted, from the outset, additional time to pay the player amounts that have fallen due in accordance with the actual payment schedule of their employment contract. Such contractual clauses shall not be recognised. However, and similarly to the situation of a contract signed by a player under the age of 18 with a clause providing for a duration of more than three years,[92] the remaining parts of the contract shall not be affected.

Once again, this is a clear message: timely compliance with financial obligations by all clubs is a priority. A club's behaviour aiming at delaying payments due to a player shall be tackled efficiently.

When referring to *"[c]ontractual clauses"* the provision means clauses contained in the pertinent employment contract signed between the player and his club. Yet, the new rule does not limit the possibility of the parties to agree on a new date for a specific payment, after the later has become due. In order words, a club and a player remain at liberty to sign a (settlement) agreement regarding the postponed payment of a certain sum, after it not being paid by the respective due date.

What about contractual clauses stipulating that the monthly salary due to a player shall not become due at the end of the month – as is common practice – but at a later stage, for example, on the 20th of the following month? Is this to be considered a grace period in the sense of the new para. 6 of art. 18 of the RSTP?

Such qualification does not appear to be appropriate. Indeed, and as mentioned above, the new paragraph aims at prohibiting contractual clauses which grant a club additional time to comply with its financial obligations towards the player beyond the originally set due date. Establishing a different due date than the end of the month for the payment of a player's salary does, on principle, not grant the club an additional time frame after the due date, but simply specifies the latter differently from the common practice. Having said that, one needs, however, to be vigilant in order to avoid abuse. In fact, besides possibly violating principles of national legislation,[93] setting the due date for the payment of (monthly) remuneration due to a player excessively late, may certainly be considered as a circumvention of art. 18 para. 6 of the RSTP.

It goes without saying that the interdiction of grace periods will not have any retroactive effect, i.e. if such a clause was inserted in an employment contract signed prior to 1 June 2018, its validity will not be affected by the prohibition.

Finally yet importantly, one needs to emphasise that grace periods will continue to be legally binding and recognised, if they were stipulated in a collective bargaining agreement validly negotiated by employers' and employees' representatives at domestic level in accordance with national law. It is the third time that the preference of terms that were collectively bargained is explicitly retained. Obviously, and this applies to all of the relevant constellations,[94]

[92] Cf. art. 18 para. 2, in fine, of the RSTP.

[93] Cf. for Swiss law, art. 323 para. 1 of the Swiss Code of Obligations.

[94] Cf. also art. 14bis para. 3 and art. 17 para. 1, second sub-paragraph, iii of the RSTP.

the pertinent collective bargaining agreement must be an inherent part of the employment contract signed between the player and his club.

At the time of writing, the DRC has not yet passed any decision dealing with the new para. 6 of art. 18 of the RSTP.

a4. Effect at national level

A last aspect that needs to be addressed in relation to the afore-described amendments and novelties that came into force on 1 June 2018 is the question of their effect at national level.

Of all the articles at stake, art. 18 of the RSTP is the only provision of Chapter IV. of the RSTP, which governs the contractual stability between professional players and clubs, contained in the list of provisions that are binding at national level and must be included in the associations' regulations at domestic level.[95] Consequently, no scope of discretion is granted to the member associations when it comes to the implementation of the new para. 6 to art. 18 of the RSTP.

All other articles, i.e. 14, 14bis and 17 para. 1 of the RSTP, are not binding at national level. However, the RSTP oblige the member associations to include in their national regulations appropriate means to protect contractual stability, while referring to certain principles in particular.[96] As a result, the principles of all of the aforementioned provisions need to be duly considered by the various member associations in their national regulations, which, despite a certain degree of discretion in their implementation, will secure an appropriate reflexion of the pertinent fundamentals also at domestic level.

b. Execution of monetary decisions ex art. 24bis

It is nice to have a decision or an award in your favour in your pocket. However, it is also important to have efficient and appropriate means at disposal for a fast and smooth enforcement of such judgement. Besides the existing enforcement process via the FIFA Disciplinary Committee,[97] another procedural mechanism was included in art. 24bis of the RSTP to tackle potentially dilatory tactics of parties condemned to pay a certain amount of money to another party. Once again, the aim to speed up the entire dispute resolution procedure is easily recognisable.

The new provision grants FIFA's decision-making bodies, i.e. the Players' Status Committee and its Single Judges as well as the DRC and the DRC judges, as the case may be, powers to decide on the consequences for any club or player if they fail to comply with a monetary decision issued by the said decision-making bodies.

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[95] Cf. art. 1 para. 3 a) of the RSTP.
[96] Cf. art. 1 para. 3 b) of the RSTP.
[97] Cf. art. 15 of the FIFA Disciplinary Code.

Its main objective is to ensure that the decisions are complied with swiftly and without unnecessary delays. It is not new for the aforementioned deciding authorities to have respective powers. Indeed, they regularly impose sanctions on clubs within the scope of proceedings pertaining to overdue payables,[98] or sporting sanctions on clubs and players in relation to unjustified unilateral termination of a contract, or inducement to such action.[99] A statutory norm corroborates the relevant competence.[100] The nature of the latter sanctions, however, importantly differs from the powers under the new art. 24bis of the RSTP, as will be shown in detail below in the paragraph dedicated to appeals at CAS (cf. point 5., b., ii. below).

The new provision may recall a very ancient circular letter of FIFA,[101] which has in the meantime become obsolete. Besides showing that the phenomenon of overdue payables and the non-respect of decisions is anything but new, certain similarities to the current setup are undeniable:

– The circular letter established that in case of non-respect of financial obligations following the intervention of FIFA and the setting of a specific deadline of 30 days (probably on the basis of a respective decision confirming the legitimacy of the claim), an interest rate of at least 10% p/a should be applied; this has nothing to do with the new art. 24bis of the RSTP, but it is very similar to the existing current practice of the FIFA deciding bodies, which regularly apply an interest rate of 5% in case of non-respect of a monetary decision;
– In case of persistent non-respect of the financial obligations/decision, a last grace period of 15 days should be granted, following which a transfer ban (thus, not only a ban from registering new players but also on release players – an important difference to art. 24bis of the RSTP) would be imposed, as long as the due amounts are not paid;
– Finally, if two months following FIFA's first intervention the amount is still outstanding, the matter should be referred to the FIFA Disciplinary Committee.

On the other hand, contrary to art. 24bis of the RSTP that refers to clubs and players not complying with a monetary decision, the aforementioned circular letter was directed exclusively at clubs. Equally, art. 24bis of the RSTP does not provide for the granting of a grace period. Furthermore, from the terms of the circular letter it was not clear who would be deciding on the different steps. Would it be the Players' Status Committee or the FIFA administration? In case the competence would be with the Committee, would it pass a unique decision comprising all the relevant elements, i.e. a decision as to the substance of the contractual dispute as well as to all aspects of the enforcement, or would different decisions be required? Finally, and related, was the intention of the circular to facilitate the enforcement of monetary decisions or was it addressing contractual overdue payables, or both? Quite some open questions, which the new provision of the RSTP appears to answer clearly.

[98] Cf. art. 12bis para. 4 of the RSTP.
[99] Cf. art. 17 paras. 3 and 4 of the RSTP.
[100] Cf. art. 46 para. 3 of the FIFA Statutes.
[101] Cf. FIFA Circular no. 616, dated 4 June 1997.

Firstly, art. 24bis of the RSTP establishes that the various decision-making bodies of FIFA shall decide on the substance of the (contractual) dispute and, at the same time, also on the consequences of the failure to comply with the monetary part of such decision. In other words, the possible consequence will be part of the decision as to the substance of the dispute. To enhance clarity in this respect, the relevant provision explicitly stipulates that such consequences shall be included in the findings of the decision.[102] However, this mechanism will be in place for monetary decisions only, i.e. when the deciding authority instructs a party (a club or a player) to pay another party (a club or a player) a sum of money in terms of outstanding amounts or compensation.[103]

Secondly, the addressees of the norm are also clearly specified. It is about clubs and players being ordered to pay a certain sum to either (another) club or a player. Consequently, and considering the jurisdiction of the Players' Status Committee and its Single Judges as well as of the DRC and the DRC judges,[104] the scope of the new article embraces disputes on payments based on transfer agreements or on employment contracts signed between a player and a club, as well as litigations concerning training compensation and the solidarity mechanism.

Thirdly, it is evident that the provision aims at establishing prevention from non-compliance with monetary decisions, rather than at pursuing a merely punitive remedy. In fact, the possibly imposed consequences will be lifted immediately and prior to its complete serving, once the due amounts are paid in full.[105]

Consequences on the parties

The consequences of non-compliance with a monetary decision are obviously different depending on the party that is not following the instruction to pay issued by the competent deciding authority.[106]

Club

In case of a club not respecting the pertinent decision, a ban from registering any new players, either nationally or internationally, will be imposed on the respective club. In principle, the ban shall be in place up until the due amounts are paid in full. However, true to the principle of proportionality, the overall maximum duration of the registration ban shall be of three entire and consecutive registration periods. In this respect, the relevant provision further specifies that possible sporting sanctions imposed on the club for breach of contract[107] shall be included. This means that if

[102] Cf. art. 24bis para. 2 of the RSTP.
[103] Cf. art. 24bis para. 1 of the RSTP.
[104] Cf. art. 22 in conjunction with art. 23 and 24 of the RSTP.
[105] Cf. art. 24bis para. 3 of the RSTP.
[106] Cf. art. 24bis para. 2 of the RSTP.
[107] Cf. art. 17 para. 4 of the RSTP.

a club is found to have breached a contract without just cause during the protected period and is instructed to pay a certain sum of money as outstanding amounts and/or compensation to the player concerned, plus banned from registering any new players, either nationally or internationally, for two entire and consecutive registration periods for such unjustified breach, the consequence of non complying with the monetary part of the decision will be a registration ban for a maximum of one further registration period.

As mentioned above, the ban for non-compliance with the decision will be lifted immediately and prior to its complete serving, once the due amounts are paid in full. Obviously, this does not impact the registration ban imposed for the unjustified contractual breach. The latter will have to be served entirely, independent of the payment of the due amounts.

Player

In case of a player not respecting the pertinent decision, a restriction on playing in official matches will be imposed on the player. In principle, the restriction shall be in place up until the due amounts are paid in full. However, and again bearing in mind the principle of proportionality, the overall maximum duration of the restriction shall be of six months on playing in official matches. Alike the approach chosen with respect to clubs, possible sporting sanctions imposed on the player for breach of contract[108] shall be included. Consequently, if a player is found to have breached a contract without just cause during the protected period and is instructed to pay a certain amount of money as compensation to his previous club, plus imposed a four-month restriction on playing in official matches for such unjustified breach, the consequence of non-complying with the monetary part of the decision will be a restriction on playing in official matches for a maximum additional period of two months.

Similarly to what has been established for the clubs, the payment by the player of the full amount due will lead to the immediate lifting of the restriction on playing in official matches prior to the complete serving of the suspension, however, only with respect to the part of the measure related to art. 24bis of the RSTP. The restriction on playing in official matches imposed for the contractual breach will have to be served entirely, independent of the payment of the due amounts.

So much for the theory. How does the practice look like? On 8 August 2019 FIFA issued a circular letter dedicated to art. 24bis of the RSTP.[109] While providing detailed information about how the relevant article will be applied and what is expected from the parties, the following paragraph was also included:

> "*Art. 24bis of the RSTP will not apply to decisions whereby sporting sanctions (registration ban or restriction to play in official matches) have been imposed on the basis of art. 17 of the RSTP, the execution of*

[108] Cf. art. 17 para. 3 of the RSTP.
[109] Cf. FIFA Circular no. 1686.

which will still continue to be carried out by the Disciplinary Committee".[110]

In other words, it would appear that in case of a contractual breach without just cause during the protected period, where sporting sanctions are imposed on the fallible party (club or player, as the case may be) based on art. 17 para. 3 or 4 of the RSTP respectively, the consequences provided for in art. 24bis of the RSTP will not be included in the decision and, in case of non-respect of the monetary part of the decision, the party entitled to financial reparation will have to tread the path via the Disciplinary Committee from the outset.

While the chosen approach is understandable from a practicabilty perspective, it shoud be noted that this modus operandi seems to render part of art. 24bis para. 2 of the RSTP kind of obsolete. Indeed, if the sporting sanctions as per art. 17 of the RSTP are not going to be combined with the consequences provided for in art. 24bis of the RSTP, it does not appear to be necessary anymore to limit the overall maximum duration of the registration ban and the restriction on playing in official matches as per the latter provison with reference to the sporting sanctions.

Besides this admittedly mere formal and academic aspect, one may also raise the question if the chosen approach will always be in the best interest of the party concerned. If, for example, a player is awarded outstanding salaries and compensation by the DRC following the untilateral termination of his contract by the club without just cause and during the protected period, sporting sanctions might also be imposed on the club. However, they will not be lifted in case of compliance with the monetary part of the decision, since they concern the contractual breach.[111] No consequences as per art. 24bis of the RSTP will be included in the decision. Consequently, there is no real incentive for the club to swiftly comply with the monetary part of the decision. This, however, ultimately is the main objective of the player.

Coming back to the actual contents of art. 24bis of the RSTP; it goes without saying that the entire enforcement process requires for the decision to have become final and binding. Furthermore, particular emphasis has been put on the responsibility and due diligence of the creditor. The latter is required to provide the debtor with the required bank details for the payment. The 45-day time limit for the settlement of the debt will only start running as of then. Consequently, the registration ban (for a club) or restriction on playing in official matches (for a player) will become applicable only if the due amounts are not paid within the aforementioned period and the creditor having duly complied with the pertinent formal requirement.[112]

Finally, in case that the pertinent monetary decision continues not to be complied with even after the relevant consequences (registration ban on a club or

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[110] Cf. FIFA Circular no. 1686, 1.
[111] Cf. art. 17 para. 4 of the RSTP.
[112] Cf. art. 24bis para. 4 of the RSTP.

restriction on playing on a player) having unsuccessfully elapsed, referral to the FIFA Disciplinary Committee will remain at the creditor's disposal.[113]

i. *Relation between art. 12bis and art. 24bis of the RSTP*

Since both provisions seek to pursue very similar objectives, i.e. to ensure that financial obligations are respected and to create efficient enforcement mechanisms, it is appropriate to raise the question as to the relation between art. 12bis of the RSTP, which forms the basis for the "fast track" procedure relating to overdue payables of a contractual nature, and the new art. 24bis of the RSTP, which, as explained above, governs the execution of monetary decisions passed by the respective competent deciding bodies. In particular, it is worth analysing whether a combined application of art. 12bis and art. 24bis of the RSTP would be possible.

In this respect, firstly, it must be emphasised that the scope of art. 12bis of the RSTP is to safeguard that *clubs* comply with their contractual financial obligations. This is a very similar scope as the one of art. 24bis of the RSTP. The latter, however, also addresses financial obligations of different nature.

In fact, it seeks to secure proper enforcement of due compensation too.[114] Now, in relation to contractual disputes the RSTP provide for the award of compensation (to a player) only with respect to the unjustified premature termination of a contract.[115] Art. 12bis of the RSTP, on the other hand, explicitly stipulates that the terms of the relevant article are without prejudice to the application of further measures in accordance with art. 17 of the RSTP in the event of unilateral termination of the contractual relationship.[116] In other words, the "fast track" procedure for overdue payables of a contractual nature is only applicable to a player against club dispute, as long as the player is not intending to put an early end to the contractual relation with his club and solely tries to recover his promised remuneration in accordance with the employment contract at stake.

Furthermore, it is easily identifiable that the addressees of the two provisions are not the same. While art. 12bis of the RSTP contemplates debtor clubs only,[117] art. 24bis of the RSTP envisages both, debtor clubs as well as debtor players.[118] Consequently, if one was to accept the combined application of art. 12bis and art. 24bis of the RSTP, the system would create a misbalanced risk of potential double sanction to the detriment of clubs only. Indeed, if a club would be sanctioned for contractual overdue payables based on art. 12bis of the RSTP and then, within the same proceedings, also for the non-compliance with the respective monetary decision based on art. 24bis of the RSTP, the club would actually be sanctioned

[113] Cf. art. 15 of the FIFA Disciplinary Code.
[114] Cf. art. 24bis para. 1 of the RSTP.
[115] Cf. art. 17 para. 1 of the RSTP.
[116] Cf. art. 12bis para. 9 of the RSTP.
[117] Cf. art. 12bis paras. 1 – 3 of the RSTP.
[118] Cf. art. 24bis para. 1 of the RSTP.

twice for the "same" offence by the same authority. Such scenario is not conceivable in relation to players.

Finally, and as already mentioned above, the scope of art. 24bis of the RSTP is wider than the one of art. 12bis of the RSTP also with respect to debtor clubs. Contrary to art. 12bis of the RSTP, it also embraces litigations concerning training compensation and the solidarity mechanism.

On account of all of the above, the combined application of art. 12bis and art. 24bis of the RSTP should be excluded.

Despite the above-mentioned considerations and in contrast to the opinion and conclusion previously expressed and reached, it would appear that the cumulative application of art. 12bis and 24bis of the RSTP is being considered and probably preferred. Yet, the approach that is likely to be adopted in practice could appear as a Solomonic solution.

In this regard, and considering that, *de facto*, art. 24bis of the RSTP imposes a ban from registering any new players on a club, if the debtor club fails to pay the amount awarded by the relevant decision in due time, and this, in principle, until the due amount is paid, definitive transfer bans under art. 12bis of the RSTP will probably no longer be applied on clubs.

Furthermore, a "*registration ban with probationary period*"[119] is also unlikely to continue to be imposed. Such position is taken in view of the fact that art. 24bis of the RSTP *de facto* covers all overdue payables matters submitted to FIFA as of 1 June 2018 in case of non-execution of a monetary decision, including those passed in application of art. 12bis of the RSTP.

In summary, art. 12bis and art. 24bis of the RSTP will probably be applied in combination, but no registration bans will be imposed on clubs anymore based on art. 12bis of the RSTP.

Ultimately, and for the sake of good order, it should be noted that, under both the provisions at stake, and independently of the approach which will finally be chosen and considered legitimate, in case of persisting non-fulfilment of the financial contractual obligations (decision on the basis of art. 12bis of the RSTP) or of the monetary decision, including the execution mechanism (decision on the basis of art. 24bis of the RSTP), a subsequent referral to the FIFA Disciplinary Committee remains possible.[120]

ii. *Appeals to CAS*

To conclude this technical promenade through the most recent developments of the RSTP, it appears appropriate to examine what impact art. 24bis of the RSTP will have on appeals of decisions of the Players' Status Committee and the DRC before CAS.

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[119] Cf. art. 12bis paras. 7 and 8 of the RSTP.

[120] Cf. art. 15 of the FIFA Disciplinary Code.

It is also important to mention once again that the consequences imposed under art. 24bis of the RSTP are part of the decision as to the substance of the dispute. Consequently, any potential appeal against the relevant decision, including the application of art. 24bis of the RSTP, should be made within the 21 days following the notification of the motivated decision, pursuant to art. 58 of the FIFA Statutes.

A. Does FIFA need to be called as a respondent?

As explained above, any decision of the Players' Status Committee and the DRC containing a monetary element will also comprise the consequences of non-compliance with the relevant decision. The latter are specific measures to be imposed on the player or the club concerned.[121] In view of this fact, the question arises whether even a purely contractual, respectively a merely financial dispute between two parties, which was referred for decision to the respective FIFA body, changes its nature from having to be considered a so-called "horizontal" dispute to becoming a so-called "vertical" dispute.[122] Such conclusion has to be refused.

It cannot be contested that, even if finally the relevant decision will contain a sanctioning element, the dispute at the basis of the judgement involves two indirect members of FIFA, i.e. a club and a player, or two clubs, with one party requesting from the counterparty the payment of a certain amount of money, either on the basis of a contract (transfer agreement or employment contract signed between a player and a club) or of specific provisions in the RSTP (training compensation and solidarity contribution). FIFA is called into the matter merely and exclusively to decide on the dispute, however, it does not have any particular personal interest. Consequently, the dispute is and remains of a "horizontal" nature.

The possible consequence are a mandatory and indispensable (the deciding authority will not be in a position to renounce including it) part of the decision as to the substance of the dispute. It is an ancillary element thereto. If a party, a club or a player, is instructed to pay another party, a club or a player, a specified sum of money, the consequences in case of non-compliance provided for in art. 24bis of the RSTP are automatic. The relevant deciding authority, the Players' Status Committee or the DRC, as the case may be, will not have a separate discussion on that aspect when assessing, analysing and adjudicating the "horizontal" litigation. If they find that a party has to pay a sum of money to the counterparty, the

[121] Cf. art. 24bis para. 2 of the RSTP.

[122] Very briefly, a "horizontal" dispute is characterised by it concerning two members (direct or indirect) of an association, and the latter only being called to adjudicate on the matter as a deciding, dispute resolution entity. The association has no personal interest in the outcome of the litigation. In contrast, a "vertical" dispute concerns a matter between an association and one of its members (direct or indirect), typically disciplinary proceedings, in which the association is defending its own interests.

judgement must include the consequences relating to potential non-compliance. The deciding body does not have any scope of discretion in this respect.

In view of the above, it will not be required to call FIFA as a respondent when appealing a monetary decision at CAS, even if it contains the consequences for non-compliance as per art. 24bis of the RSTP. In case a party nevertheless decides to involve FIFA, the latter will have valid arguments to decide to adopt a passive stance in the proceedings.

B. Can CAS impose the relevant sanction on its own?

Sooner or later we will certainly come across the following situation. The Players' Status Committee or the DRC, as the case may be, will reject the financial claim of a player or a club against a player or a club. Consequently, the pertinent decision will not contain any consequences for the case of non-compliance. Indeed, nobody will be instructed to pay the other party a sum of money. In case of an appeal to CAS, the following question arises: If CAS accepts the appeal and instructs the counterparty to pay a specified amount of money to the claimant, must it impose the consequences for possible non-compliance on the basis of art. 24bis of the RSTP? This question has to be answered affirmatively, in both cases, with FIFA having been called as a respondent before CAS, or without the involvement of FIFA in the appeal procedure.

In case FIFA has been called as a respondent, no further discussion is needed, since the imposition of sanctioning elements, i.e. the consequences for not respecting a monetary decision, would follow the principles already developed by CAS in its well-established jurisprudence[123] in relation to its competence to impose sporting sanctions. Moreover, in such a case FIFA would, at the very most,[124] defend the challenged decision as to its substance, i.e. try to demonstrate why the judgement of its deciding authority not to instruct the counterparty to pay a certain sum of money to the claimant was correct. However, it would certainly not object to CAS including in its award the consequences for the possible non-compliance with the decision as per art. 24bis of the RSTP, should the appeal be upheld and the respondent be order to pay an amount of money to the claimant.

But also in the absence of FIFA as a respondent CAS must proceed to include in its decision, awarding a sum of money to the claimant, the consequences stipulated in art. 24bis para. 2 of the RSTP for the case that its monetary judgement will not be complied with. As already mentioned, the pertinent consequence is an automatic ancillary element to the decision as to the substance of the matter. It is

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[123] Cf. CAS 2017/A/5359 para. 66 ff. and CAS 2018/A/6068 para. 95: sporting sanctions can only be discussed in an appeal procedure if FIFA is a party; as well as CAS 2014/A/3852 para. 122 and CAS 2016/A/4826 par. 124: sporting sanctions can only be requested in an appeal procedure if FIFA is a party.

[124] As mentioned above, in line with its usual practice, FIFA would most likely choose to adopt a passive stance in the appeal procedure.

a mandatory and indispensable part of the decision/award. Equally, there are no formal obstacles for CAS not to impose the relevant measure. The provision at stake does not concern the procedural rules of proceedings carried out before the various FIFA bodies, but is part of the substantive regulations. Lastly, as emphasised above, the nature of the dispute remains of a "horizontal" nature and FIFA's involvement in the appeal procedure is therefore not required.

Should a Panel choose to act differently and not to include the consequences provided for in art. 24bis para. 2 of the RSTP for the case that its monetary decision is possibly not complied with, it would play into the hands of those parties that try to delay a due payment as much as they can. In other words, it would expose itself to the reproach of undermining the objective of the provision at stake. Indeed, under the circumstances, as the only alternative to referring the matter directly to the Disciplinary Committee,[125] and thus to preserve all of its available enforcement rights, the successful appellant would have to refer the matter again to the competent FIFA body only to have the consequences of art. 24bis applied. Not really in the spirit of procedural economy.

Notwithstanding the above, and faithful to the principle of "safety first", it would be perfectly understandable if an appellant seeking to overturn before CAS a FIFA decision not awarding him/it a claimed amount of money, would call FIFA as a respondent, to secure that the consequences provided for in art. 24bis of the RSTP are imposed by CAS in case of a successful appeal. Such course of action could be reasonable at least until CAS has clarified that it is ready to include the relevant consequences in its award, even if FIFA is not called as a respondent. As already mentioned, if called as a respondent, FIFA would most likely choose to adopt a passive stance only in the relevant appeal proceedings.

C. Challenge to the consequences for non-compliance

A last question that deserves being addressed is whether it will be possible to challenge the consequence contained in the monetary decision for the case of non-compliance at the time of its actual imposition.

In this respect, one has once again to remember that the relevant measure is an automatic ancillary element to the decision as to the substance of the pertinent litigation. The consequences shall be included in the findings of the decision as to its substance.[126] In case a party (club or player) that has been instructed to pay a sum of money to a counterparty (club or player) decides to challenge the consequence imposed for the possible non-compliance with the monetary decision only at the time it is going to be finally applied, it will have waited until after the judgement at stake has become final and binding. Indeed, the ban on registering new players or the restriction in playing in official matches will become applicable

[125] Cf. art. 15 of the FIFA Disciplinary Code.
[126] Cf. art. 24bis para. 2 of the RSTP.

only if the due amounts are not paid within the established time limit and the relevant decision having become final and binding.[127] In other words, the actual imposition of the consequence will never be at stake as long as the monetary decision has not become final and binding.

In view of the above, a party will not be in a position to challenge only the measure imposed on the basis of art. 24bis para. 2 of the RSTP at the time of its actual implementation, i.e. when the monetary decision concerned has not been complied with. At that time, the decision as a whole, with all its elements, will have become final and binding. Because the possible consequence will be part of the decision as to the substance of the dispute, the only option for a party having been instructed to pay a sum of money to a counterparty will be to challenge the monetary decision as a whole before it has become final and binding, even if it is unhappy merely with the potential consequence in case of non-compliance.

6. Definition of "third party"

As per the original definition of the RSTP, a third party was a party other than the two clubs transferring a player from one to the other, or any previous club, with which the player had been registered.[128]

Reading the aforementioned provision, it was legitimate to raise the question whether a player had to be considered a third party in the sense of the regulations. Or could he/she participate in his/her own compensation payable in relation to his/her future transfer from one club to another, or be assigned any rights in relation to his/her future transfer or transfer compensation?[129]

Indeed, the text approved by the then FIFA Executive Committee appeared to suggest that a player needed to be considered a third party.

Notwithstanding the above, upon respective queries, the FIFA administration expressed the following opinion, emphasising that it was of a general nature and served a purely informative purpose only, and, as a result, was without prejudice whatsoever.

An agreement between a club and one of its professional players stipulating that in case of future transfer of the player the club would pay him/her a certain lump sum, which is in relation with the transfer compensation paid by the new club to the player's previous club, could continue to be permissible. This conclusion, however, would be subject to the lump sum having been agreed between the player and the club in advance. Furthermore, in case the agreed lump sum was progressively indexed (e.g. in case of a transfer for 100'000 to 199'999, the player will receive 10; in case of a transfer for 200'000 to 299'999, the player will receive 15; etc.), the graduation may not be that small that it becomes actually equal to a percental participation of the player in his/her future transfer

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[127] Cf. art. 24bis para. 4 of the RSTP.

[128] Cf. point 14. of the Definitions section of the RSTP until 31 May 2019.

[129] Cf. art. 18ter para. 1 of the RSTP.

compensation. The FIFA administration deemed that the relevant amount promised to the player could be seen as part of the remuneration due to the player under the employment relationship between the professional player and his/her club.

In summer 2018 the FIFA Disciplinary Committee passed several decisions regarding the above-mentioned topic,[130] and basically supported the opinion already previously expressed by the FIFA administration. In short, it concluded that players are not to be considered a "third party" in the sense of point 14. of the Definitions section and art. 18ter of the RSTP.

In the cases at stake, the relevant clubs had entered into agreements with some of their respective players that entitled them (i.e. the players) to receive a specific compensation – a lump sum or a percentage – in case of their future transfer to another club.

Such amounts promised to the players were seen by the FIFA Disciplinary Committee as part of the remuneration due to the players under their employment relationships with their clubs. Consequently, the deciding authority found that the players could not be considered a third party with respect to their own future transfers. Therefore, the fact that they may receive a specific compensation – regardless of it being a lump sum or a percentage – in relation to their future transfer to a new club could not be considered a violation of FIFA's rules on third-party ownership of players' economic rights.

In view of the above, the Task Force suggested amending the definition of "third party" in the RSTP, in order to bring the relevant language in line with the aforementioned jurisprudence of the FIFA Disciplinary Committee. Such measure appeared to be appropriate in view of enhancing legal clarity and security. The FSC and subsequently also the Players' Status Committee endorsed the pertinent proposal, and ultimately the FIFA Council approved a respective amendment to the RSTP on the occasion of its meeting in Miami, USA, on 15 March 2019. The new wording of the definition of a "third party" in the RSTP came into force on 1 June 2019 and reads as follows:[131]

> "*Third party: a party other than the player being transferred, the two clubs transferring the player from one to the other, or any previous club, with which the player has been registered*".

In this respect, it must be emphasised that the impact of this amendment is limited to the possible participation of a player in his/her own transfer compensation in case of a future transfer. Indeed, the sole aim of the adapted definition of what is considered a third party as per the RSTP, is for a player to be able to participate, in full or in part, in compensation payable in relation to his/her own future transfer to a new club. In this situation, he/she will not be considered a third party.

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[130] These decisions are unpublished but the relevant media release is available at www.fifa.com/about-fifa/who-we-are/news/latest-decisions-of-the-fifa-disciplinary-committee-in-relation-to-third-party-r.

[131] Cf. FIFA Circular no. 1679 dated 1 July 2019.

In practical terms, what will be allowed is for a club to promise the player to pay him/her X% of the transfer fee that the club will receive in case of a future transfer of that same player to a new club.

On the other hand, the player will not be permitted to promise a part of the remuneration he will be receiving on that basis, to a third party, for example his/her agent. In fact, the altered definition does not change anything to the principle that no player shall enter into an agreement with a third party whereby a third party is being entitled to participate, either in full or in part, in compensation payable in relation to the future transfer of a player from one club to another, or is being assigned any rights in relation to a future transfer or transfer compensation.[132]

Besides the above, another concern that was raised with respect to the amended definition, regards the maintenance of contractual stability. Obviously, a player entitled to participate in part in his/her future transfer compensation will tend to try to move to a new club prior to the expiry of the term of his/her current contract, which contains the participation clause. If he/she transfers at the end of the contract as a so-called "free agent", the relevant entitlement will be worth nothing.

Having said that one must consider that, ultimately, it is the player, who decides if he/she wants to move. A participation clause in the above-mentioned sense will, as shown, certainly increase a player's wish to move prematurely out of an existing contract. On the other hand, however, it will also reduce the risk of a player deciding to breach unilaterally a contract prior to its expiry, since such action would preclude him/her from participating in a possibly agreed transfer fee.

III. The first "Reform Package"

As mentioned at the beginning of the present chapter, the FSC has mandated the Task Force to carry out a detailed review of the transfer system at working level. The relevant activity is ongoing, with interesting and constructive discussions and debates between the stakeholders occurring regularly, both at a formal level within the Task Force, or more informally on the occasion of different technical meetings.

The Task Force started its operations in January 2018 and has since then convened 13 times. At the start of its activities, it established a working plan, which, in accordance with the purpose of the Task Force, covers a wide range of areas that directly concern the transfer system. The following topics were identified as being of essential importance:

– Topic 1: Agents
– Topic 2: Training Reward for Clubs and Young Players
– Topic 3: Squad Size and Registration
– Topic 4: Fiscal Regulation and Home Grown Players.

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[132] Cf. art. 18ter para. 1 of the RSTP.

As one can easily imagine, work has not advanced equally at all levels. On some topics, more important progress was made than on others. A first set of conclusions, proposals and recommendations elaborated by the Task Force were presented to the FSC on 24 September 2018. Some of the key points of the principles finally endorsed by the aforementioned committee (the first "Reform Package") will be briefly outlined below (cf. points III. 1 to 5.).

In this respect, it should be noted that the FIFA Council equally endorsed the pertinent first "Reform Package" in its meeting of 26 October 2018 held in Kigali, Rwanda. The said package lays out the fundamental principles in the various areas, which will eventually become a set of concrete regulations. The latter still need to be drafted with the involvement of the Task Force, while continuing to consult the representatives from the clubs, the leagues, the players as well as member associations and confederations. Ultimately, the Players' Status Committee will have to endorse the proposed specific amendments to the regulations, before they can be submitted for formal approval to the FIFA Council.

1. Agents

As one will remember, FIFA began its agent regulatory system in 1991. Originally, the system was focused on regulating the agents themselves by establishing a licensing system (control the access to the activity), with, initially, licenses being issued by FIFA before the system eventually evolved to one in which member associations were responsible for issuing licenses for agents within their jurisdiction.[133] In 2009, a reform of the existing players' agents system was initiated, with the aim to address several shortfalls, leading to the adoption of the Regulations on Working with Intermediaries.[134] The latter replaced the FIFA Players' Agents Regulations as of 1 April 2015, in a bid to tackle the issues of the previous licensing system. The current system does not regulate access to the activity but provides a framework for tighter control and supervision of the single transactions, to enhance transparency. The implementation and supervision of the various principles is to be done primarily by the member associations and not by FIFA.

FIFA's research into the current landscape of 'intermediaries' in football showed that there needs to be a heightened emphasis on how the activities of intermediaries/agents are 'regulated' as opposed to regulating the individuals themselves. Furthermore, the amounts of money paid to intermediaries as fees for their services continues to increase, while the money flowing to training clubs via solidarity contributions and training compensation mechanisms have stalled. Conflicts of interests still plague football's transfer system, and the implementation of the current intermediary system needs to be improved, with important differences

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[133] Cf. FIFA Players' Agents Regulations in force as of 1 March 2001.

[134] www.fifa.com/mm/Document/AFFederation/Administration/02/36/77/63/RegulationsonWorkingwithIntermediariesII_Neutral.pdf.

existing in the regulatory framework and actual realisation of the various principles at national level.

In view of the above, the Task Force concluded that the issues identified above show that the current intermediary system introduced in 2015 is not (properly) working and if left unchecked, the key elements and integrity of the system will continue to be compromised. A revised system is required to address the issues identified and restore confidence in the system.

The overall objective of the envisaged reform of the agents' regulations is to raise professional and ethical standards for the occupation of intermediaries to protect players who have short careers[135] and to protect contractual stability and solidarity.[136]

a) Raising professional standards

In order to raise professional standards, an agents' licensing system should be reintroduced, with anyone wishing to act as an agent having to successfully pass a respective examination, and being committed to subsequently undergo "Continual Professional Development" at regular intervals. Agents should be obliged to act in the player's best interest, and standard representation contracts should be drafted and provided. Finally, but of utmost importance, the success of any new system will be dependent on an efficient, viable and functioning enforcement mechanism with respective sanctions to be imposed on any party – club, player or agent – acting in violation of the regulations.

b) Raising ethical standards

In order to raise ethical standards, mechanism to maximise transparency in agents' activity in dealing with players and clubs should be created. Clear provisions preventing conflicts of interests should be elaborated. Finally, compensation and representation restrictions should be considered and introduced.

c) Protecting contractual stability and solidarity

The role of agents should be aligned with the objectives of the transfer system as a whole. Agents' fees should be controlled to prevent the transfer system to be turned into a speculative market for agents, with sporting reasons to be the primary motivation for a transfer and not the (high) commission to be possibly earned from the transfer of a player to another club. Furthermore, the solidarity system should be protected by ensuring that the solidarity contributions that go to training clubs remain at a credible level compared to the fees paid to agents.

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[135] Cf. case T-192/02, Piau v. EC, para.102.

[136] Cf. European Commission Press Release 02/824 concerning FIFA/UEFA principles with European Commission.

d) The role of TMS

Licensed agents' data should be kept and managed through a dedicated platform within TMS. Licensed agents should be required to update their account with specific information for every individual contract/mandate/transaction in which they are involved. The relevant information could then be cross-checked with the information and documentation provided by the association(s) and club(s) concerned in TMS.

Such an approach would allow the system to flag any possible conflict and considerably facilitate the task of the entity running compliance.

Furthermore, and in order to enhance transparency, agents and clubs should be required to disclose/report all commissions received (for agents) and paid (for clubs and players) as well as the pertinent transaction details on an annual basis through TMS.

e) Dispute Resolution System

When acquiring a licence, agents will become, inter alia, subject to the jurisdiction of the football authorities. On the other side of the coin, licensed agents will, again, be able to refer their disputes with their clients, for example in case they do not receive the due amount from the client under the representation agreement, to the competent body within the dispute resolution system established inside the football structures.

This is only a summary of some of the points that were considered within the scope of the extensive discussions held so far. The latter included, in particular, also a lengthy consultation process with a representative group of agents and the outcomes from these consultations, where relevant and appropriate, have been encapsulated within the decision-finding process.

In summary, for the time being, first the FSC and then the FIFA Council endorsed the following principles within the first "Reform Package". New and stronger regulations for agents need to be established, with an agreement on the principle of introducing compensation and representation restrictions. Discussions on how these restrictions should exactly look like in detail are ongoing. Furthermore, it was found that the payment of agents' commissions should be made through the "clearing house" (cf. point III. 2. below) and that licensing and registration of agents should be controlled and managed through the TMS.

2. Creation of a "clearing house"

One of the centrepieces of and most significant initiatives within the first "Reform Package" is, without any doubts, the envisaged creation of a "clearing house". At the suggestion of the Task Force, the FSC and the FIFA Council endorsed the principle that a "clearing house" should be created to process transfers, with the

aim of protecting the integrity of football and avoiding fraudulent conduct. This should ensure the good functioning of the system by centralising and simplifying the payments associated with transfers, such as solidarity contribution, training compensation, agents' commissions and, potentially, also transfer fees.

No need to say that the potential implementation of a "clearing house" requires in-depth legal and practical feasibility studies, which are currently still ongoing. However, and certainly not least once again with an eye on the persisting malpractice of overdue payables, it must be stated that a "clearing house" is a viable option to consider to monitor club-to-club overdue payables, by improving transparency, accountability and enforcement. At the same time, a "clearing house" would also ensure the good functioning of football by centralising and simplifying the procedure by which training compensation and solidarity contributions, as well as, possibly, transfer fees are paid.

In summary, the entire transfer system would benefit from the implementation of a "clearing house". Payments concerning transfers would be made 'visible' to those, which are regulating. This increased transparency will ensure that those clubs, which have overdue payables to other clubs and to intermediaries/agents can be identified (enhanced accountability). And last but not least, enforcement could be improved and strengthened because the different payments will go through the "clearing house" and, as already mentioned, by that mechanism they will be visible to the regulator.

3. Mandatory introduction of electronic player registration and domestic transfer systems

Efficient and fair redistribution of funds to those clubs that invest in the training and development of young players is a central objective of the RSTP. Unfortunately, the analysis of the situation in the market, particularly based on data collected by TMS, demonstrates some worrying trends highlighting that the current regimes no longer meet the demands of modern day football. The pertinent systems, in particular the manner in which payments are calculated, as it is applied today, appear to be overly complicated and burdensome, especially for smaller training clubs and those clubs who are responsible for making payment. Consequently, there is a lack of awareness and understanding of these regimes resulting in incorrect calculations and reporting or non-payment of fees owed under the regimes. Moreover, the tracking of players' history is complicated as player passports are not electronic and records are poorly kept making it difficult for training clubs to justify potential claims. Equally, FIFA does not have any measures to ensure the full amount of solidarity contribution and training compensation is paid other than if a club files a complaint with the DRC.

As mentioned above, the envisaged implementation of a "clearing house" could certainly contribute to a considerable amelioration of the situation and to an important increase of efficiency. However, this will require a complete and reliable

set of data concerning the entire career history of a player to be available. For this reason, the Task Force recommended the mandatory introduction of an electronic transfer system at national level following the model in place for international transfers as well as of a domestic electronic registration system. Both the FSC as well as the FIFA Council endorsed this principle within the scope of the first "Reform Package". This measure will, in particular, allow for the creation of a complete electronic player passport, which, as already stated, is of particular importance for the proper enforcement of the training reward mechanisms available for training clubs.

Concrete measures have already been taken in this respect. Namely, FIFA is offering to all its member associations, free of charge, the domestic transfer matching system (DTMS) for the online management of their national transfers, and the FIFA Connect platform for the electronic registration of all players at national level.

Member associations wishing to continue using their existing electronic systems at domestic level may obviously do so. In these cases, FIFA will endeavour to take the necessary technical steps in order to create the appropriate interface between the existing national and international systems.[137] The proper and sound identification of every individual player will be ensured by means of the so-called "FIFA Connect ID", which will be attributed to all players at the time of their first registration.

On the regulatory side, the necessary amendments to the RSTP, which concern the mandatory implementation of the "FIFA Connect ID", the electronic registration at national level, the domestic electronic transfer system and the application of TMS for the international transfer of amateur players, were endorsed by the Bureau of the Players' Status Committee on 17 May 2019 and subsequently formally approved by the FIFA Council in Paris, on 3 June 2019. They will come into force on 1 October 2019, while mandatory implementation will be required from 1 July 2020.[138]

The ultimate aim is to create a system that will allow for the automated calculation and distribution of training rewards to the clubs investing in the training and development of young players. The combination of the "clearing house" with the transfer data obtained through ITMS/DTMS/FIFA Connect platform or through existing alternative national electronic registration and transfer systems (electronic player passport), should lead to a more efficient and consistent redistribution of the funds. At the same time, it should ensure that the legitimate beneficiaries receive the due amounts without delay and without having to claim them through the dispute resolution channels. On the enforcement side, mechanisms could be put in place to secure proper payment of training rewards. For example, it could be considered to prevent an association from requesting the international transfer

[137] Cf. FIFA Circular no. 1654 dated 26 November 2018.
[138] Cf. FIFA Circular no. 1679 dated 1 July 2019.

certificate (ITC) of a player for a specific club, as long as the latter has not complied with its obligation to pay the training rewards due for a previous transfer.

4. Solidarity mechanism to apply to domestic transfers with an "international dimension"

Art. 1 para. 1 of the RSTP states that "[t]*hese regulations lay down global and binding rules concerning the status of players, their eligibility to participate in organised football, and their transfer between clubs belonging to different associations*" (emphasis added). As a result, the solidarity mechanism provided for in Annexe 5 of the RSTP does not apply to national transfers, not even in cases where the training club(s) are affiliated to a different association.[139] This understanding has been constantly confirmed by the DRC and corresponds also to the jurisprudence of CAS.[140]

The majority of the members of the Task Force considered this to be contrary to the spirit of solidarity, which is one of the central pillars of the RSTP, and should also be an essential element of any well-functioning transfer system. Why should, for example, an African training club that contributed to the development of a player, who was able to start a successful professional career, only benefit from the desired and justified solidarity within the football movement, if said player moves, for example, between clubs of different European associations? Then again, why should a club have to demonstrate solidarity with a training club of a player affiliated to a different association only if it acquires the services of that player from another club affiliated to a different association, but not if the player joins them from a club within the same association?

In order to eliminate this discrepancy, the majority of the Task Force deemed it appropriate to suggest that the solidarity mechanism should apply to domestic transfers with an "international dimension". This means that, subject to the conditions of Annexe 5, art. 1 para. 1 of the RSTP being fulfilled, the domestic transfer of a professional player will trigger the entitlement to a solidarity contribution for all clubs affiliated to a different association that contributed to the training and development of said player during the respective period of time.[141]

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[139] Example: The player X is trained by the clubs A and B, both affiliated to the association Z, before the age of 23. After becoming a professional player, at a certain stage of his career, the player moves from club S to club T, both affiliated to the association M, for a transfer fee of 5Mio. Since the player moves nationally within the association M., the RSTP, including the solidarity mechanism, do not apply. Consequently, the clubs A and B will not be able to claim any solidarity contribution based on Annexe 5 of the RSTP.

[140] Cf. CAS 2007/A/1307 *Asociación Atlética Argentinos Juniors v/ Villareal C.F. SAD* (concerning the player Riquelme), and CAS 2007/A/1287 *Danubio FC v/ FIFA & Internazionale Milano* (concerning the player Carini).

[141] Example: A Bolivian club that trained an Ecuadorian player during the pertinent period of time, would be entitled to the solidarity payment in case the player returns on an international transfer to Ecuador and is subsequently transferred within Ecuador.

The relevant proposal was endorsed by the majority of the members of the FSC within the scope of the first "Reform Package", and later on the pertinent principle found the support of the FIFA Council.

In the meantime, the pertinent provisions of the RSTP[142] have been amended, then endorsed by the Players' Status Committee and finally approved by the FIFA Council on 24 October 2019. By means of specific language, the applicability of the solidarity mechanism has been explicitly extended to circumstances where a professional player is transferred, either on a definitive or loan basis, between clubs affiliated to the same association, provided that the training club is affiliated to a different association.[143] The relevant changes will come into force as of 1 July 2020.[144]

On a side note, and for the sake of good order, it should be added that the opportunity was seized to place two amendments without any material impact to provisions concerning the training compensation. The first one aims at harmonising the language between art. 20 and Annexe 4, art. 2 par. 1 i. of the RSTP. Both provisions now refer to the first registration of the player as a professional, which is also in line with existing jurisprudence.[145] The second amendment concerns art. 22 lit. e) of the RSTP and simply codifies existing practice. The relevant provision now confirms that FIFA, specifically the DRC, is competent to deal with disputes relating to training compensation also between clubs belonging to the same association provided that the transfer of a player at the basis of the dispute occurs between clubs belonging to different associations.[146] Also these formal changes will come into force as of 1 July 2020.[147]

5. Regulation of loans of players

Prior to entering into the substance of the thoughts of the Task Force in relation to possible changes and amendments to the regulation on loans, the opportunity should be seized to clarify an aspect, which tends to be overlooked. Only professional players, i.e. players who have a written contract with a club and are paid more for

[142] Cf. art. 1 par. 2 and Annexe 5, art. 1 par. 1 and 2 of the RSTP.
[143] Cf. Annexe 5, art. 1 par. 2 ii. of the RSTP.
[144] Cf. FIFA circular no. 1709 dated 13 February 2020.
[145] DRC decision of 19 September 2019, ref. no. 09192966-E; DRC decision of 22 June 2019, ref. no. 06190545-E; TAS 2012/A/3009 Arsenal FC vs. Central Español FC.
[146] The situation envisaged by this specification is the following: Player X is registered with club A at association 1. He is then loaned to club B at association 2. At the end of the loan he returns to club A. Finally, he moves to club C, which is again affiliated to association 2, on a definitive basis. According to the applicable practice, subject to all pertinent prerequisites being met, club C will, in principle, have to pay training compensation to club A, but also to club B, where the player was on loan. However, one may challenge the international dimension, since clubs B and C are both affiliated to the same association 2. The existing practice saw the international dimension, and thus the competence of FIFA to deal with such dispute, in the international transfer of the professional player from club A to club C. This fact has now been codified.
[147] Cf. FIFA circular no. 1709 dated 13 February 2020.

their footballing activity than the expenses they effectively incur,[148] can be loaned. Art. 10 of the RSTP is very clear in this respect, both in its title ("*Loan of professionals"*), as well as in the text of the pertinent provision, which states that *"*[a] *professional may be loaned to another club ...*".[149]

There is a clear legal logic behind that approach. In case of a loan, the club of origin of the player, to whom the latter is bound by a valid contract, will allow the player to be registered and play for a different club during a certain period of time. This authorisation is linked to the obligation for the player to come back to his club of origin after expiry of the agreed loan period. This obligation is based on the employment contract concluded between the club of origin and the professional player, the effects of which are suspended for the duration of the loan, but will raise again at the end of the loan period.

An amateur player is, by definition, not bound to a club by a contract.[150] Consequently, there is no legal basis for his club "to have to authorise" him to leave for a certain period of time, and even less to oblige him to come back after that period.

After this specification, let us turn our attention again to the activities of the Task Force in relation to loans. In this respect, first it needs to be mentioned that the current RSTP dedicate one provision only to the loan of professional players.[151] Besides stating the obvious, i.e. that a professional may be loaned only if both clubs and the player concerned agree to it, it establishes that any such loan is subject to the same rules as apply to the transfer of players.[152] The latter refers, primarily, to the administrative procedure in case of a transfer of a professional player. Furthermore, the relevant article defines the minimum duration of a loan and explicitly recognises the possibility of a sub-loan.[153]

In view of the above, one could certainly argue that a lack of regulation on this area exists and that this fact has left large and discretionary opportunities to the clubs and agents to utilise loan transfers for a variety of reasons.[154]

In its analysis and discussions, the Task Force found, in particular, that, currently, the RSTP do not define what the "loan system" should be used for. As such, the purpose for which loans are used has been largely undetermined. It was considered that FIFA should clearly define the purpose for which the "loan system" should be utilised. This brought into question practices like the loan of an older or

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[148] Cf. art. 2 para. 2 of the RSTP.

[149] Cf. art. 10 para. 1 of the RSTP.

[150] Cf. art. 2 para. 2 of the RSTP.

[151] Cf. art. 10 of the RSTP. Material reference to loans is also made in Annexe 3, art. 8.3 and Annexe 3a, art. 5 of the RSTP, however, only in relation to the administrative procedure governing the transfer of players between associations.

[152] Cf. art. 10 para. 1 of the RSTP.

[153] Cf. art. 10 paras. 2 and 3 of the RSTP.

[154] Cf. European Commission, 'An update on change drivers and economic and legal implications of transfers of players' - Final Report to the DG Education, Youth, Culture and Sport of the European Commission (March 2018), 43.

"mature aged"' player, let us say of 26 years and over. Presumably, the player has completed his training and development phase. Therefore, what is the purpose for loaning that player unless it is commercial and driven by the desire for the club to maintain the player on its books, even though the player is not playing regularly?

Research and case studies demonstrate that the "loan system" can be used in an excessive and abusive manner, and consequently it can have a decisive influence on the performance of clubs to which players are loaned. In particular, excessive and abusive use of the loan system might affect the integrity and fairness of competitions. Sub-loans, where a player is loaned out to a club, which then subsequently loans the player out once again, are another example of such behaviour. These transfers may erode the stability of contract and the duty of care owed by a club to the player because of a lack of proximity between the parent club and the player. Loaning a young player can be positive for both the club and the player, particularly when the player is not provided with the opportunity to play regular first team football at his club of origin. On the other hand, the "stockpiling" and subsequent loaning of players, especially young players, can be detrimental to their development due to the unsettled nature of being "on loan".

Another aspect to be taken into consideration are the so-called "bridge transfers". They take place where a player is transferred from one club (A) to a club (B) and then immediately transferred (whether permanently or on loan) to another club (C) without ever having appeared for the club (B), to which he was initially transferred. The intention of the parties is, from the outset, to have the player moving from club A to club C. There is no intention for the "middle club" (B) to ever field the player, nor for it to obtain any sporting benefit out of the transfer. The Task Force was of the view that efforts to prevent and counter the growing practice of this unethical behaviour, which could significantly affect the integrity and fairness of the game, should be improved. The message is clear: transfers, whether on a loan basis or permanent, should always be done with a legitimate "sporting reason".

Actually, the practice of "bridge transfers" has already been determined by the FIFA Disciplinary Committee as a breach of the RSTP, based on Annexe 3, art. 9.1 para. 2 of the RSTP, which provides for the imposition of sanctions on clubs who have entered untrue or false data into the system or for having misused TMS *"for illegitimate purposes"*.[155] CAS also confirmed that "bridge transfers" should be forbidden, considering them as *"unlawful practices"*. However, CAS stated that FIFA does not have an adequate legal basis to forbid and sanction "bridge transfers" under the current RSTP.[156]

Bearing in mind, in particular, the above-mentioned aspects, but also other empiric data extracted from and research performed in the "loan market",

[155] Cf. www.fifa.com/governance/news/y=2014/m=3/news=argentinian-and-uruguayan-clubs-sanctioned-for-bridge-transfers-2292724.html.

[156] Cf. CAS 2018/A/5637 *Institución Atlética Sud América c. FIFA* and CAS 2014/A/3536 *Racing Club Asociación Civil v. FIFA*.

the Task Force suggested regulating rather than prohibiting loans. The relevant regulation of loans of players should be developed for the purpose of youth development as opposed to commercial exploitation. The number of loans per season and between each club should be limited. Finally, "bridge transfers" should be explicitly forbidden, and sub-loans prohibited.

The FSC endorsed the above proposals within the scope of the first "Reform Package", and the FIFA Council did alike.

In the meantime, the explicit prohibition of "bridge transfers" has become a reality. Art. 5 of the RSTP has been amended, a new art. 5bis of the RSTP added, and a "bridge transfer" has been defined on point 24. of the Definitions section of the RSTP. All these changes have come into force on 1 March 2020.[157]

The definition emphasises the aim of the registration of the player with the middle club, which is to circumvent the application of the relevant regulations or laws[158] and/or defraud another person or entity.

Furthermore, the only legitimate purpose for the registration of a player is for him to play organised football, except for cases where a player may have to be registered with a club for mere technical reasons.[159]

"Bridge transfers" are now explicitly declared illegitimate practices. Furthermore, in order to render the prohibition as effective as possible, a reversal of the burden of proof has been included. Parties are presumed to have been involved in a bridge transfer if 2 consecutive transfers of the same player occur within a period of 16 weeks. They may, however, provide evidence to the contrary to refute such assumption.[160]

This may be the case if a club can demonstrate that it was their intention from the outset to engage a player and loan him out immediately afterwards, in order for the player to gain experience playing competitive football with another club. Another thinkable scenario is a player, who is signed at the beginning of the registration period. He takes part in the pre-season activities of the club and the coach concludes that he will most likely not have much playing time. The club and the player therefore agree that the best solution is for the player to "rotate" in another club on loan. Or then a player, who is signed at the beginning of the registration period. During the pre-season he has serious problems with certain colleagues, and even with the coach. The club and the player therefore conclude that it is better for both parties that he moves to another club immediately.

All of the above are probably not completely exceptional cases, which show that there might be totally legitimate subsequent transfers within a relatively short period of time, i.e. shorter than 16 weeks. Consequently, the timing element

[157] Cf. FIFA circular no. 1709 dated 13 February 2020.

[158] One may primarily think of the provisions on training compensation or tax laws.

[159] Cf. art. 5 par. 2 of the RSTP; a registration for mere technical reasons becomes necessary, for example, if a player is coming back from a loan with club B and shall be loaned out immediately again to club C. For technical reasons the player will need to be briefly registered with club A, his club of origin (return from loan), before being registered for his new club C.

[160] Cf. art. 5bis para. 1 and 2 of the RSTP.

at the basis of the regulatory assumption must be treated with the necessary caution and sensitiveness. It will be for the FIFA Disciplinary Committee to take care of this certainly not simple and straightforward task,[161] and to concretise the specific scope of the prohibition, including the range of the assumption, by means of its respective jurisprudence.

IV. The Second Reform Package

Since the findings and recommendations of the Task Force did not yet address all the topics included in its working plan, the FSC decided to extend the mandate to the Task Force, so as for it to continue its analysis and discussions on the other areas. This includes, in particular, the training reward system, squad size, protection of minors, registrations and fiscal regulations.

Following the endorsement of the first "Reform Package" the work of the Task Force focused on finalising the agents and loans frameworks respectively. Equally, it invested quite some time in analysing and discussing a possibly reformed training reward system. The pertinent conclusions, proposals and recommendations concerning the aforementioned topics were presented to and endorsed by the FSC on 25 September 2019. On 25 October 2019 the FIFA Council supported the suggestions of the FSC and equally endorsed the relevant second "Reform Package". Like for the first "Reform Package", the endorsement concerns the fundamental principles, which will eventually need to be "translated" into a set of concrete regulations in accordance with the process described above for the first "Reform Package" under point III.

The key points of the principles at stake will be briefly outlined in the following paragraphs.

1. Agents

As mentioned when shortly describing the principles of the new agents framework endorsed by the FSC and the FIFA Council within the first "Reform Package", an agreement was reached on the principle that compensation and representation restrictions should be introduced. How exactly they should look like had remained open. The efforts of the Task Force therefore built on the recast agents framework, by proposing representation and remuneration principles that are designed to realign the relevant regulatory framework with the original objectives of the regulations and consequently, address the growing concerns that had been identified. Each of the proposed reforms are necessary and proportionate to the achievement of legitimate objectives, in particular: to raise the professional and ethical standards for the occupation of agents; to protect players who have short careers; and to protect contractual stability.

[161] Cf. art. 5bis para. 3 of the RSTP

Specifically, the following concerns were outlined:

i. The market is driven by speculation and not solidarity, in particular:
   - As the amount of transfer fees increases the amount of commissions paid to intermediaries by clubs in international transfers has also increased dramatically;
   - While the flow of money to short-term intermediary commissions increases, the amounts of money used to make sustainable investments in football via the training reward regimes haves stalled. Fixing the solidarity regime does not in itself resolve the concerns of speculation and the threat to contractual stability.
ii. Conflicts of interest plague football's transfer system. The current FIFA regulations allow for conflicts of interest to exist subject to full disclosure and explicit consent of the player and club(s) involved in the transaction,[162] leading to the possibility that transfers may be concluded despite obvious and actual conflicts of interest being present.

Besides, the discussions and considerations of the Task Force took into account the requirements of the FSC for any reform:

i. *Simplicity*: to ensure that all stakeholders and parties concerned are able to understand the framework and their respective roles, rights and obligations.
ii. *Enforceability*: it follows that a simple framework will facilitate its enforceability.
iii. *Meaningful*: the framework adequately addresses the issues of the current landscape.
iv. *Legally robust*: the framework is justified and defensible in accordance with appropriate legal considerations.

Furthermore, it should be mentioned that the Task Force kept an open dialogue with a representative group of agents also throughout this phase of its work.

At the end of intensive and extensive, but always constructive and fruitful debates, ultimately, the Task Force proposed the following representation and remuneration principles, which were subsequently endorsed by both the FSC and the FIFA Council:

i. Representation
   In principle, no dual or multiple representation shall be permitted, i.e. an agent can only represent one party in one given transaction (not all three parties, not both clubs, not the player and the releasing club). However, as an exception to this general rule, an agent may represent both player and engaging club in one and the same transaction.
ii. Remuneration: Establishment of a cap on agents' commissions
   - Where the agent acts for the releasing club, a commission up to 10% of the transfer fee can be paid to the agent by the releasing club for the negotiation of the transfer agreement with the engaging club.

[162] FIFA Regulations on Working with Intermediaries, art. 8.

- Where the agent acts for the player only, a commission up to 3% of the player's remuneration can be paid to the agent by the player for the negotiation of his employment contract with the engaging club.
- Where the agent acts for the engaging club only, a commission up to 3% of the player's remuneration can be paid to the agent by the engaging club for representing it in the transfer.
- Where the same agent represents both the player and the engaging club, a commission up to 6% of the player's remuneration can be paid to the agent for the services provided to both the player and the engaging club in the transfer.

2. Loans

As mentioned above, within the first "Reform Package" it was established that loans should be regulated rather than prohibited, and that youth development and not commercial exploitation should be at the basis of the new loans framework. While already stating that the number of loans per season and between the same two clubs should be limited, the specific figures had not yet been fixed. Consequently, the Task Force had to address these open aspects in order to finalise its work concerning this topic.

In this respect, it was recalled that the current loan system has been plagued by abusive and excessive practices. In general, it was observed that a lack of a clear purpose and objective as to how the loan mechanism should be used has left large and discretionary opportunities to the clubs and agents to avail themselves of the loan mechanism for a variety of reasons,[163] which have often led to the aforementioned practices. More specifically, several excessive and harmful practices linked to the economic aspects of loans were identified, in particular:

i. *Player hoarding*
   Linked directly to the problem of unrestricted squad sizes, a number of clubs, notably from the top 5 leagues, are engaged in the hoarding of players. The stockpiling and subsequent loaning of players, particularly young players, can be detrimental to their development due to the unsettled nature of being "on loan".
ii. *Uncertainty of competition*
   The unregulated use of the loan mechanism is enabling certain clubs to increase their sporting strength substantially, in particular where they have a close relationship with a major club, which can consistently loan players to it. As a result, competition results are distorted, often in favour of the club receiving players on loan and to the detriment of other clubs in the same league/competition.

[163] European Commission, 'An update on change drivers and economic and legal implications of transfers of players' - Final Report to the DG Education, Youth, Culture and Sport of the European Commission (March 2018), page 43.

iii. *Integrity of competitions*

A growing phenomenon is the provision of numerous players on loan from one club to a preferred club. This could give the engaging club an unfair sporting advantage as it is able to avail of talent that is not available to other clubs in the same league.

Furthermore, clubs "loaning out" players may choose to do so on the basis that it negatively impacts the sporting results of a competing club. Conversely, clubs, which hoard players, are able to ensure that they are not loaned to clubs which are considered a threat in either domestic or continental club competitions. Hoarding also means that these clubs can choose which players to keep on and which to loan out, with clubs becoming gatekeepers to players' services.

Therefore, a series of limitations to curtail these concerns have to be implemented. Besides putting the development of young players at the heart, the proposal of the Task Force is also seeking to promote competitive balance and to ensure uncertainty of outcome. In this respect, it should be noted that all of these objectives have been recognised by the European Court of Justice in various cases[164] as well as the European Commission[165] as legitimate.

The recommendation and proposal provided by the Task Force included specifications in relation to promoting player development by, in principle, excluding players aged 21 or younger from any suggested restrictions on loans and the importance of distinguishing between "club-trained" and "association-trained" players. The Task Force members also sought clarity around the application of possible restrictions at domestic level.

Based on all of the above, the Task Force eventually proposed the following principles for loan limitations, which were subsequently endorsed by both the FSC and the FIFA Council:

i. For international loans

- For players aged 22 or older and non club-trained players aged 21 or younger a limitation shall apply as per the following transitional period:

Maximum allowed loans in:
8 as of the season 2020/21
7 as of the season 2021/22; and
6 as of the season 2022/23
Maximum allowed loans out:
8 as of the season 2020/21
7 as of the season 2021/22; and
6 as of the season 2022/23
The limitations refer to the maximum number of players loaned in or out at any given time of the season.

[164] Bosman, para. 106; Case C-325/08, Olympique Lyonnais, [2010] ECR I-2177, para. 39; Case C-176/96, Lehtonen, [2000] ECR I-2681, para. 54.

[165] Background Paper to the White Paper on Sport, 68.

- For players aged 21 or younger
  No restriction on the number of players that can be loaned in or out either during or prior to the year of their 21st birthday, provided that they are club-trained players (i.e. players that, irrespective of nationality and age, have been registered with the club for a continuous period of three entire seasons, between the age of 15 (or the start of the season during which they turn 15) and 21 (or the end of the season during which they turn 21).
- For loans between the same clubs
  Maximum allowed loans in: 3
  Maximum allowed loans out: 3
  The restriction applies irrespective of the age of the player and whether they are club-trained players.

ii. For domestic loans
  While these provisions apply to the international loan of players, the member associations of FIFA have been granted a period of three years from when the new rules on loan restrictions enter into force in order to implement rules on a loan system which are in line with the above principles.

3. Training reward system

For various reasons, the current regimes on training compensation and the solidarity mechanism are not achieving their intended objective of incentivising and rewarding clubs for investing in the development and training of young players. This is in large part due to the significant amount of money, legitimately owed, not reaching training clubs. The current regimes do therefore appear to no longer be fit for purpose.

A key element of the first "Reform Package" was the decision to create a "clearing house" (cf. point III. 2. above). In particular, payments of solidarity contributions and training compensation should be centralised and simplified so as to ensure the good functioning of the system.

Equally, the decision to apply the solidarity mechanism also to domestic transfers with an "international dimension" (cf. point III. 4 above) will contribute to a more efficient and target-oriented regime of training rewards.

The principles for the current training rewards regimes,[166] provide for two distinct pillars, training compensation and the solidarity mechanism, for the distribution of money within the football community in favour of clubs that invest in the training and development of young players. It is well accepted amongst the industry that the appropriate distribution of funds in accordance with these mechanisms is an ongoing challenge. In particular, the following issues need to be highlighted:

[166] Cf. art. 20 and 21 in conjunction with Annexes 4 and 5 of the RSTP.

i. According to data available to TMS, in 2017, the aggregate amount of declared[167] training compensation was USD 20.3 million compared to the expected aggregate solidarity contribution of USD 318 million, which equates to approximately 15 times more. This raises the question of how relevant training compensation is vis-à-vis solidarity contributions in modern day football.
ii. The regimes, in particular the manner in which payments are calculated, as they are applied today, are overly complicated and burdensome, especially for smaller training clubs and those clubs who are responsible for making payments. It was identified that this concerns, in particular, training compensation. Indeed, the latter is currently based on complex rules often resulting in incorrect calculations/reporting and non-payment/non-collection of amounts due. The complexities of training compensation (especially considering all the exceptions and particularities such as the categorisation of clubs, the possibility to claim early termination of the training period, special provisions applicable within the European Union/European Economic Area, like, for example, the necessity of demonstrating a true and genuine interest in the player, possibility of waiving the entitlement to training compensation, overlapping seasons etc.) means, amongst other things, that it would not be possible to readily automate the process via the "clearing house". Nonetheless, such an automated process is fundamental in order to ensure that amounts due to training clubs are actually paid in an efficient and timely manner.
iii. A lack of awareness and understanding of these regimes has resulted in incorrect calculations and reporting or non-payment of fees owed under the current principles. For example, TMS data revealed a staggering USD 1.1 billion difference between actual solidarity contributions paid and the expected amounts due between 2011 and 2017.

In 2017 alone, despite solidarity contributions in the amount of approximately USD 318 million being expected to be paid to training clubs, only USD 64 million was recorded in TMS as having been paid, meaning a difference of USD 254 million, increasing from USD 178.9 million in 2016 and USD 157 million in 2015.

Following the endorsement of the first "Reform Package", as per the mandate of the FSC, the Task Force continued its research and discussions in relation to the training rewards, however, to this date, it could not reach a finalised position on the manner in which the regimes should be updated to address the issues identified and mentioned above. The Task Force has reinforced its support for training reward payments to be made via the proposed "clearing house" and the value in having a complete and reliable player history available[168] to facilitate payments to training clubs, the latter being the ultimate goal of both regimes.

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[167] Additional training compensation might have become payable following decisions of the DRC on pertinent disputes. Furthermore, the figure needs to be treated with a certain caution, since, for example, waivers and other agreements reached between the clubs involved may have an impact on the amounts actually declared in the system.

[168] Cf. point III. 3 above.

Furthermore, it was recalled that the overriding aim when reviewing the current training reward regimes has been:

i. to ensure that the system works, so that clubs training players are fairly and actually rewarded for their efforts;
ii. to simplify and facilitate the system so that it becomes easier to manage and understand; and
iii. to improve enforceability and automated payments to ensure that there is an increase in the training rewards actually paid (e.g. training clubs to receive compensation without having to litigate or waive entitlement).

The original legitimate objectives of the regimes still remain valid and it is important to ensure that these continue to be pursued. The solidarity mechanism was developed to incentivise the training of professional players and to ensure solidarity within the system as part of the good functioning of football community structure. Training compensation was developed to promote and encourage the training of young players, the pursuit of which has been recognised by the European Court of Justice (ECJ) in cases like Bosman[169] and Olympique Lyonnais ("Bernard")[170] as being a legitimate objective. It constitutes a form of refund of the training costs, while aiming at avoiding more powerful clubs being able to acquire the services of a player cheaper than if they had trained the player themselves**.**

As mentioned, the Task Force did not manage to reach agreement on the details of the future training rewards system ahead of the meeting of the FSC in September 2019. However, in order for it to progress and continue its work on defining a reformed regime, the following principles that should form the basis of the latter have been identified and presented to the FSC and subsequently also to the FIFA Council:

i. the reformed regime
   - should be based on a revisited training compensation which better rewards training clubs;
   - should attempt to aim at decreasing the hindrance effect;
ii. elite clubs should pay more training compensation;
iii. medium and small sized clubs should pay less training compensation;
iv. the calculation and payment of the training reward amounts should be automated;
v. grounds for litigation should be reduced;
vi. a new model of governance should be implemented.

4. Next steps

As one will note, the findings and recommendations of the Task Force contained in the second "Reform Package" did still not address all the topics included in its working plan. Consequently, the FIFA Council also endorsed the continuation of

[169] Case C-415/93, European Court reports 1995, I-04921, para. 106.
[170] Case C-325/08, Olympique Lyonnais, paras. 39 – 41.

the Task Force's work on further pertinent topics, including training rewards, fiscal regulations, rules about minors, squad sizes and transfer windows. Normally, the next set of conclusions, proposals and recommendations will be presented to the FSC for endorsement in September 2020. No need to mention that these continue to be interesting times for the future of the transfer system.

On the other hand, the RSTP are being further shaped and developed also by other initiatives. By means of its circular no. 1709 dated 13 February 2020, to which reference was already made on previous occasions, FIFA informed its member associations, pertinent stakeholders and the public of certain amendments to the RSTP, which will come into force on 1 March 2020, that concern the process for the provisional registration of players, i.e. situations in which an ITC is not delivered by the former association. The relevant adjustments were made in cooperation and consultation with the stakeholders and aim at streamlining the proceedings concerned, so as to allow an even more fluid and efficient handling of the respective requests. Ultimately, the goal is to create a process which allows a player to pursue his career, even in case of disputed circumstances, as smoothly as possible, while waiting for a final decision as to the substance of the litigation.

In order to properly understand the latest amendments, it is worth briefly summarising the process in place until 1 March 2020. In case of an international transfer, the association of the prospective new club would have to request the ITC from the association of the former club of the player. The latter would then have 7 days in order to contact its club and to reply to the ITC request, either by issuing the certificate or rejecting the request.

In case of no response to its ITC request within the above-mentioned deadline, the new association could either just wait or ask for FIFA's intervention in order to obtain a decision from the Single Judge of the Players' Status Committee regarding the possible provisional registration of the player for his new club. In case the new association would decide to wait, it would be authorised to provisionally register the player if it did not receive any response from the former association within 15 days of the ITC request.

If FIFA's intervention was requested by the new association, FIFA would start proceedings concerning the potential provisional registration of the player for his new club, and contact the former association, granting it a deadline of 5 to 8 working days in which it should provide its position in the matter. Only then would the FIFA administration submit the matter for decision to the Single Judge of the Players' Status Committee, who would base its assessment on the arguments presented by the new association to request the provisional registration, and those presented by the former association – and possibly the former club of the player – to object to the registration of the player for a new club. The same process would apply in case the former association would reject the ITC request, and the new association would ask for FIFA's intervention.

The major changes caused by the amendments of 1 March 2020 relating to the process described above are the following.

Firstly, in case of no response from the former association to the ITC request, the new association will have the right to immediately proceed to provisionally register the player for his new club after expiry of the above-mentioned 7-day deadline,[171] and will not have to wait for 15 days as of the ITC request.

Secondly, in case the former association decides to reject the ITC request, the adapted provisions prompt it to justify its decision. It will have to do so by uploading a duly signed statement in TMS supporting its argumentation for the rejection of the ITC.[172] This is an essential element, since later on, in case of request for FIFA's intervention by the new association, the former association will not have another possibility to submit its or its club's position in relation to the registration of the player for a new club anymore. By means of this instruction, the pertinent provision ensures that the right to be heard of the former association is guaranteed in the procedure.

Indeed, at the request of the new association, FIFA will start proceedings for a possible provisional registration of the player for his new club and submit the matter to the Single Judge of the Players' Status Committee for decision, without granting the former association a further opportunity to submit any statement.[173] This means that the Single Judge of the Players' Status Committee may now immediately decide on the authorisation of the provisional registration (provisional measure) of the player with the new club. When passing his decision, the Single Judge of the Players' Status Committee will take into account the arguments presented by the former association to justify the rejection of the ITC request.[174]

V. Conclusions

Contrary to a widespread opinion, the RSTP have experienced quite some development and evolution since their complete reform following the "Bosman ruling" of the European Court of Justice[175] and the coming into force of its September 2001 edition. Certain amendments and changes were of major importance, while others had less of an impact or served to codify already existing jurisprudence. What is true is that the fundamental principles at the basis of the regulations have remained unchanged in the last 18 years. The currently ongoing work of the Task Force, which, under the auspices of the FSC is analysing and assessing the current status of the transfer system, will show, in particular, if the objectives envisaged by the regulations are still relevant for today's world of football, what the major issues are and what kind of measures might potentially be taken in order to address them in an efficient and appropriate way.

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[171] Cf. Annexe 3, art. 8.2 para. 6 in conjunction with Annexe 3, art. 8.2 para. 4 of the RSTP.
[172] Cf. Annexe 3, art. 8.2 para. 4 of the RSTP.
[173] Cf. art. 23 par. 4 of the RSTP.
[174] Cf. Annexe 3, art. 8.2 para. 7 of the RSTP.
[175] Case C-415/93, European Court reports 1995, I-04921, para. 106.

In this respect, it is worth mentioning that the Task Force recognised that to have the best chances of success, the different topics it included in its working plan have to be discussed and dealt with in stages, noting however, the complexity and "interconnectedness" of all the issues.

The persisting malpractice concerning overdue payables has been a leading motive for many of the most recent amendments to the RSTP, which started with the introduction of art. 12bis and found its continuation in the implementation of art. 14bis, the amended art. 17 para. 1, art. 18 and, in particular, of art. 24bis of the RSTP. While the regulatory basis for a stricter handling and management of this kind of undesirable behaviour, mainly by clubs, now appears to have been created and put in place, much will depend also from its application in practice. It will therefore be interesting to see the evolvement of the decisions of the DRC based on the new, respectively amended provisions, and what impact they will have on parties' behaviour. Subsequently, also CAS will have an important role to play in the fight against unfulfilled financial obligations.

EMPLOYMENT AGREEMENTS OF FOOTBALL PLAYERS

by *Salvatore Civale*[*] and *Luca Pastore*[**]

1. Introduction

The negotiation of the commercial, financial and legal terms of employment agreements between football clubs and players represents the more complex and relevant part of a transfer. A clear and well-drafted employment contract is not only essential in order to set out the obligations of the parties but it also plays a fundamental role in minimising possible future disputes between them.

Employment contracts between professional football players and clubs have become more and more complex in recent decades. Professional football is nowadays a specific industry, a "special sector" with features that deviate from the standard practices of the labour market. The relationships between clubs and players are defined within domestic and international legal frameworks: as a result, employment contracts are not only dependent on the agreement of the parties and on the principles of the domestic labour legislation, but they must also comply with the rules of the relevant League, national Association, regional Confederation and, of course, with the principles provided by the FIFA regulations.

In this chapter, the Authors take stock of the applicable rules and relevant issues that arise at international level when parties negotiate and draft an employment agreement, with a focus on the key clauses which are most relevant and often lead to disputes between the parties. In such a perspective, the mutual rights and obligations binding footballers and clubs are analysed in the light of the relevant FIFA and CAS jurisprudence.

The aim of this chapter is to offer a practical guide to the professionals involved in football law, with the due premise that constant updating is essential for continuous development.

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1.1 The maintenance of contractual stability

Since the introduction of the FIFA Regulations on the Status and Transfer of Players (hereinafter: the *FIFA RSTP*),[1] implemented within FIFA's regulatory framework in September 2001, FIFA has focused its attention and main efforts on safeguarding the maintenance of contractual stability between professional players and clubs in the world of international football.[2]

In this sense, the FIFA RSTP contain a set of rules regarding the maintenance of contractual stability, from article 13 to 17, specifying when one of the contractual parties is allowed to unilaterally early terminate the employment contract, and what the consequences are for the parties in cases of termination without a so-called "just cause".[3]

The goal is clearly indicated in the FIFA Commentary under article 13*:* "*The Regulations aim to ensure that in the event of a club and a player choosing to enter into a contractual relationship, this contract will be honoured by both parties. A contract between a player and a club may therefore only be terminated on expiry of the contract or by mutual agreement. Unilateral termination of a contract without just cause, especially during the so-called protected period, is to be vehemently discouraged*".

The attention of FIFA on this principle goes beyond the direct application of the FIFA RSTP, since FIFA expressly provided that each national association "*shall include in its regulations appropriate means to protect contractual stability, paying due respect to mandatory national law and collective bargaining agreements*".[4]

The principle of contractual stability is of paramount importance in the world of football, as a key pillar of the entire system of international sports law, which is especially recognised in the jurisprudence of the sports justice bodies. In fact, of all disputes that fall within the competence of the FIFA Dispute Resolution

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[1] Article 1, para. 1 of the FIFA RSTP indicates its scope: "*1. These regulations lay down global and binding rules concerning the status of players, their eligibility to participate in organised football, and their transfer between clubs belonging to different associations*".

[2] O. Ongaro, '*Maintenance of contractual stability between professional football players and clubs – The Fifa Regulations on the Status and Transfer of Players and the relevant case law of the Dispute Resolution Chamber*', European Sports Law and Policy Bulletin 1/2011, 27-67.

[3] As will be analysed more into details at para. 7, FIFA Regulations do not provide a definition of "just cause".

[4] Article 3, para. 3, lett. b) of the FIFA RSTP sets the following list of principles to be considered by the national association, namely, – article 13: the principle that contracts must be respected; – article 14: the principle that contracts may be terminated by either party without consequences where there is just cause; – article 15: the principle that contracts may be terminated by professionals with sporting just cause; – article 16: the principle that contracts cannot be terminated during the course of the season; – article 17 paras. 1 and 2: the principle that in the event of termination of contract without just cause, compensation shall be payable and that such compensation may be stipulated in the contract; – article 17 paras. 3-5: the principle that in the event of termination of contract without just cause, sporting sanctions shall be imposed on the party in breach.

Chamber[5] in the first instance, and the Court of Arbitration for Sport of Lausanne in appeal,[6] the most intensive debates arise in relation to aspects pertaining to the maintenance of contractual stability between professional players and clubs.

Besides, and as a more apprehensive aspect for the parties, the calculation of the compensation payable for the premature unilateral termination of a contract without just cause, in breach of the principle of *pacta sunt servanda*, also represents a controversial point when it comes to the application of article 17 of the FIFA RSTP and its relationship with the national law chosen by the parties and with Swiss law, which is applicable subsidiarily.[7]

1.2 Professional vs. Amateur Players

Article 2 of the FIFA RSTP classifies players who participate in organised football on the basis of their status as Amateur or Professional.[8]

According to the definition provided by the FIFA RSTP, the main difference between the two categories is that a Professional is a player who has at least a written employment contract[9] with a club and is paid with economic entitlements in a higher amount than the expenses he effectively incurs in return for his footballing activity.

Players who have another regular working activity or employment besides their remunerated football activity (so-called semi-professionals) shall also be considered as professionals if they comply with the above requirements.

All other players are considered as Amateurs, namely players who pursue sport just for fun or as a hobby, without any material gain, and who do not receive any remuneration or, if they do, this is limited to their actual expenses incurred.[10]

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[5] 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 FIFA RSTP.

[6] Cf. art. 24 para. 2, last sentence, of the FIFA RSTP, which specifies: "*Decisions reached by the DRC or the DRC judge may be appealed before the Court of Arbitration for Sport (CAS)*". Cf. art. 58 para. 1 of the FIFA Statutes, 2018 edition, which specifies: "*Decisions reached by the DRC or the DRC judge may be appealed before the Court of Arbitration for Sport (CAS)*".

[7] For a complete view on this matter, U. Haas, '*Applicable law in football-related disputes - The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law*', CAS Bulletin, 2015/2, 7-17.

[8] The term "*professional*" replaced the former expression, "*non-amateur*", to more reflect the evolution of professionalism in football over the years.

[9] The written contract is also mentioned as "*contract as a Professional*" (cf. art. 20 of the FIFA RSTP) or as "*professional contract*" (cf. art. 7 in annex 6 of the FIFA RSTP).

[10] The Commentary on the FIFA RSTP (page 12) specifies that the Amateur basically has no written contract with the club with which he is registered. In this sense, CAS 2004/A/691 FC Barcelona SAD v. Manchester United FC, award of 9 February 2005, goes into details on the hypothesis that an Amateur has a written contract: the mere existence of a written agreement between an amateur and the club for which he is registered does not suffice to trigger the application of the FIFA RSTP regarding contractual stability. These provisions are only applicable to professional contracts. In other words, amateur status is not defined by reference to an "amateur

The fact that the new club may play with one of its teams in a professional league has no impact on the status of the player if the player is only registered with the new club as an amateur and not bound by an employment contract.

The social aspects of participating in the group of a club, as well as his own health and fitness, play a predominant role for an amateur player. Expenses incurred through involvement in a match or in training (e.g. travel and hotel, insurance etc.), and the costs of a player's equipment, can be reimbursed to the player without jeopardising his amateur status.

Players of both status, Professional and Amateur, must be registered with an association to be eligible to participate in organised football.[11] A player may only be registered for one club at a time and for a maximum of three clubs during one football season (defined by the FIFA RSTP as "the period starting with the first official match of the relevant national league championship and ending with the last official match of the relevant national league championship"). However during this period, the player is only eligible to play in official matches for two clubs.

Whenever a player wishes to change from professional to amateur status, he has to wait for a period of 30 days after his last match as a professional before becoming eligible to play as an amateur. It does not make any difference if the player is reassuming amateur status at the same club or if he is transferring to a new club and reacquiring amateur status.

The timeframe in which the player is not (yet) eligible is applied for purely sporting reasons, since it preserves the regularity of competitions and guarantees that the provisions on the restriction of player transfers provided for in national and international regulations are not circumvented.[12]

The FIFA RSTP do not control the relationship between amateur players and clubs, and contain no provisions about the establishment or substance of such relationship. Consequently, the regulations concerning the maintenance of contractual stability are not applicable to the relationship between an amateur player and a club.

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contract" but by the fact that a player has never received any remuneration other than the reimbursement of the actual expenses incurred. The interests of a club that has engaged an amateur player are protected by the provisions on training compensation when an amateur player becomes professional (para. 76 & 77).

[11] Cf. art. 5, para. 1, of the FIFA RSTP.

[12] The Commentary on the FIFA RSTP (page 13) specifies that at national level, the rules regarding the registration of amateurs are generally less restrictive than at international level (cf. art. 6 para. 4 & annex 3 art. 3). Moreover, the deadline of 30 days in which the player is not yet eligible to play as an amateur starts as from the last match effectively played by the player as a professional. It may therefore occur that at the moment the player requests to reacquire amateur status, the 30 days have already elapsed and he is therefore entitled to be fielded for the amateur club with immediate effect. On the other hand, a player that changes from amateur to professional status is not requested to comply with a deadline for the acquisition of the new status. However, he can only be registered and thus become eligible to play as a professional player during one of the registration periods established by the relevant association.

In the light of the definition of an amateur player, whenever a player changes from professional to amateur status, the club for which he was previously registered is not entitled to training compensation.

If the player reacquires professional status within 30 months of being reinstated as an amateur, the new club shall pay training compensation to the former club(s) in accordance with art. 20 of the FIFA RSTP. In this way, the regulations safeguard the work done by the training clubs at an earlier stage, in the event that the player reverts to professionalism. Training compensation would be payable in such an event until the end of the season of the player's 23rd birthday.

Professionals who end their careers upon the expiry of their contracts and Amateurs who terminate their activity, shall remain registered at the Association of their last club for a period of 30 months.[13] This period begins on the day when the player makes his last appearance for the club in an Official Match. This "extended" registration period is applied for two main reasons. First of all, it allows the player to know which club and association has his registration in case he wishes to resume playing again, as this association will need to reactivate the registration of the player for a club affiliated to the same association or issue an international transfer certificate (ITC) to a club affiliated to another association. Moreover, it safeguards the interests of the player's last club in the event that, cumulatively, (1) the player signs an employment contract with a new club within 30 months, and (2) at that moment, he is still younger than 23, as in this case training compensation would be payable in application of art. 3 para. 2 of the FIFA RSTP.

1.3 Negotiations and culpa in contrahendo

Negotiations involve discussions and potential compromises on the terms and conditions of a contract in order to reach a final agreement. During the negotiations, each party will try to obtain the best possible deal for themselves and, therefore, the negotiation phase often leads to differences between the parties, who may need to focus on which provisions are more important to them in order to safeguard their respective rights.

First and foremost, the financial aspects of the employment relationship are key: there are essential financial terms that must be indicated in the employment contract for its validity – i.e. the salary – and other terms that might be negotiated and inserted into an employment contract but do not represent essential elements for the validity of the contract – i.e. collective or individual bonuses, flight tickets, accommodation, medical insurance, car and driver, school fees for children, bank guarantees, and other fringe benefits.

Furthermore, there are a number of additional terms that, albeit not mandatory, have a huge impact on the relationship between the parties and therefore

[13] The mutual termination of an employment contract also falls under the description of art. 4 para. 1.

must be carefully analysed among them, termination options, pre-liquidated damages/compensation clauses, release/buy-out clauses, penalties/disciplinary measures and taxation.

The freedom of the parties to negotiate specific terms and conditions of an employment contract is however restrained by national laws, collective bargaining agreements, national and international sporting regulations. Some countries provide well-defined and rigid legal frameworks, whereby the freedom of the parties mainly concerns only the commercial aspects of the employment relationship. In other countries, the applicable regulations are less stringent and therefore, in the absence of standard templates for labour agreements, the contractual freedom of the parties is wider: in such cases, the negotiations are of fundamental importance.

The negotiations phase is not only essential for the parties to agree upon the commercial conditions of their employment relationship. It is also a delicate step under which certain provisions of the FIFA RSTP[14] must be considered in order to avoid the occurrence of serious breaches of the regulations.

As a matter of fact, a club intending to conclude a contract with a professional, who is under contract with another club, must inform his current club in writing of its interest before entering into any kind of negotiations with that professional. Without the authorisation of the player's current club, the new club is not allowed to contact the player. Breaching such obligation may result in the new club being sanctioned for inducing the player to breach his contract.

It goes without saying that a player cannot wait until the expiry date of his contract to negotiate and sign a new employment agreement, otherwise the possibility of finding new employment would be extremely limited and the player would risk remaining out of contract. In order to avoid such possibility, the regulations allow players to enter into employment contracts with a new club in the last six months of their existing employment contracts. This six-month rule provides a reasonable period of time for a player to enter into negotiations with and sign for a prospective club, and for the current club not to suffer any instability as a result of the departure of the player caused by external factors. The player's new contract must not include anything that would interfere with the proper completion of the player's existing contract, and the attitude of the player must not hinder the correct conclusion of the current contract.

A player can only enter into one employment relationship at a time.[15] A player who enters into more than one employment contract with different clubs for the same period of time contravenes the provisions of Chapter IV of the FIFA RSTP and must be sanctioned in accordance with art. 17. Besides the circumstances surrounding the breach committed by the player, the role played

[14] Cf. art. 18 of the FIFA RSTP.

[15] As an exception, the only situation in which a player is entitled to enter into two employment contracts for the same period of time is whenever the player transfers on loan: in such event, the employment contract with the parent club is suspended during the loan period.

by the second club for inducement to contractual breach must also be ascertained.

An essential role in players' transfers and in the negotiation of employment contracts is played by intermediaries, who normally represent players and/or clubs in the relevant negotiations. The intermediaries involved in such negotiations shall at least be named in that contract, or even better, shall put his/her signature on it.

As said above, the set of rules of the FIFA RSTP apply only to professional players, however specific provisions have been implemented in order to safeguard the interest of minors, which will be dealt with in a dedicated chapter of this book.[16]

The duty to act in respect of the principle of good faith already exists at the time of contractual negotiations and its violation entails *culpa in contrahendo*, according to which a party to a negotiation for a contract has to act in good faith and is liable to compensate the damages incurred by the other party, if it did not act in good faith during the negotiations and thereby breached the confidence of the other party in the negotiations.

This principle has also been adopted by FIFA. The FIFA DRC decision no. 16860 of 12 January 2006 states that "… *with his behaviour, the sport director of the club gave the strong impression to the player that an employment contract would be concluded with him. The Chamber particularly referred to the fact that the player was provided with an offer on 18 June 2004, received an assurance confirmation signed by the sport director on 26 June 2004 in case he would get injured in a test match, was given a copy of the contract dated 3 July 2004, signed by the sport director, and finally, on 6 July 2004, was informed that no contract would be concluded with him. ... On account of the above outlined circumstances, the Chamber referred to the legal principle of culpa in contrahendo, according to which a party to a negotiation for a contract has to compensate causal damages incurred by the other party, if it has infringed on its own fault its obligation to act in good faith during the negotiations and thereby breached the confidence of the other party in the negotiations*".

The DRC adopted the same approach in the following years[17] but lately no decisions of the DRC have been published that awarded compensation based on *culpa in contrahendo*. Apparently, the existence of a valid employment contract properly executed by the parties is always considered more relevant for the Chamber to assess whether or not compensation can be awarded in employment-related disputes. However, the duty to act in good faith during negotiations and the liability for *culpa in contrahendo* have been confirmed by the CAS in the recent

[16] For an interesting analysis on the FIFA RSTP provisions concerning minors and relevant CAS jurisprudence: CAS Bulletin 2019/1, Juan Pedro Barroso, "*La protection des joueurs mineurs au sens de l'art. 19 RSTJ*" (available at this link: www.tas-cas.org/fileadmin/user_upload/CAS_Bulletin_2019_1.pdf).

[17] Cf. FIFA DRC no. 1061318 of 26 October 2006, FIFA DRC no. 28079 of 15 February 2008.

award issued in the case CAS 2016/A/4489 ("*Beijing Renhe FC v. Marcin Robak*"). In particular, the Panel stated that the "*duty to act in good faith already exists in fact at the time of contractual negotiations – i.e. independent of the existence of a written preliminary contract, letter of intent, or similar things – and is known as culpa in contrahendo. Culpa in contrahendo under the here applicable Swiss Law means the negligent/intentional breach of pre-contractual duties. A finding of culpa in contrahendo requires the existence of contractual negotiations, trust that merited protection, a breach of a duty, harm, a causal connection, and fault [includes intent and negligence]. The breach of a duty in particular derives from the principle of good faith. At the contractual negotiation stage it includes – regardless of whether a contract is later concluded – certain duties of care, considerateness, good faith, and of providing information, including the duty to negotiate seriously and in a fair manner. It essentially constitutes an independent basis of liability, somewhere between a contract and a tort. According to Swiss legal doctrine, it is a special form of liability for breaches of trust (see for example SFT 120 II 331 p. 335, 336)*".

In a different case, CAS 2014/A/3573[18] ("*Damián Alejandro Manso v. Al Ittihad Club*") the Panel clarified that *no culpa in contrahendo* exists when a party starts negotiations with more than one party: *"the Club has not provided any satisfactory evidence to assume that the Player had acted in breach of the general obligation to act in good faith. Furthermore, the Club has not proved that the Player could have committed culpa in contrahendo nor that the Club was induced by the Player to conclude the contract. Rather, it is to be considered quite normal that – lacking any particular reasons or contractual limitations – in the employment market, an employee evaluates more than one possible job offer at the same time*".

1.4 Essential elements of an employment agreement

The FIFA Executive Committee have discussed the importance of having a minimum standard across the world for the employment relationship of professional football players and, by virtue of the Circular Letter no. 1171/2008,[19] it has approved guidelines indicating the "*minimum requirements*" for contracts with the aim of covering the most important and essential rights and duties of the parties.

FIFA only indicates the minimum requirements which need to be negotiated and finalised by the parties, taking into account the national legislation and any mandatory provisions, as well as the collective bargaining agreements, if applicable, and the other FIFA Regulations.

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[18] The award is available at link: https://jurisprudence.tas-cas.org/Shared%20Documents/3573.pdf.
[19] Circular Letter no. 1171 of 24 November 2008, available at following link: www.fifa.com/mm/document/affederation/administration/97/29/01/circularno.1171-professionalfootball playercontract minimumrequirements.pdf.

Among the essential requirements, the contract must be in writing, duly signed by both parties, indicating the details of the club[20] and of the player,[21] the place and date of when the contract was signed, a clear starting and ending date (day/month/year) and the financial obligations. Each signatory party must receive a copy of the contract.

In spite of FIFA's guidelines,[22] often the agreement signed by the parties does not reflect the perfect outline described above and the first issue to be sorted out is whether the contract signed by the parties can be considered as a valid and binding employment contract, i.e. if the agreement includes all the elements required by the applicable regulations for the validity of an employment contract.

The FIFA jurisprudence provides further information on the basic elements of an employment agreement as a result of a case by case analysis based on the specific circumstances and facts of the disputes brought to the DRC's attention.

In the FIFA DRC decision no. 0315187 of 12 March 2015, at para. II/11, it is specified: "*in this context, the DRC deemed it appropriate to remind the parties of the basic elements of a valid and binding contract, namely an offer, consisting of an expression of willingness to contract on a specific set of terms, with a view that they are accepted by its counterparty and that all sides involved will become contractually bound, and an acceptance of said offer, consisting of an expression of absolute and unconditional agreement to all the terms set out in the offer, by means of a signature*".

In the same sense, FIFA DRC decision no. 03152984 of 17 March 2015, at para. II/9, says: "*In this context, and in view of the Respondent's allegations, the DRC judge first recalled that in order for an employment contract to be considered as valid and binding, apart from the signature of both the employer and the employee, it should contain the essentialia negotii of an employment contract, such as the parties to the contract and their obligations, the duration of the employment relationship, the remuneration and the signature of both parties*".

Similarly, FIFA DRC decision no. 11151019 of 26 November 2015, at para. II/10, reads: "*In this respect, the DRC judge recalled that in order for an employment contract to be considered as valid and binding, apart from the signature of both the employer and the employee, it should contain the essentialia negotii of an employment contract, such as the parties to the contract and their role, the duration of the employment relationship, the remuneration and the signature of both parties. After a careful study of the*

[20] A professional football player contract can only be concluded by a football club and its legal entity, as defined according to the National Club Licensing Manual/Regulations, which is member and duly registered with the national football association and professional league. Any other legal entity may not conclude such a player contract without the prior written consent of the competent national body or FIFA.

[21] The agreement states the name, surname, birth date, nationality as well as the full address of the residency of the Player. In the case of a minor the parent/guardian must also be mentioned accordingly.

[22] Reference to the Circular Letter no. 1171 of 24 November 2008.

document serving as employment contract presented by the Claimant, the DRC judge concluded that all such essential elements are included in the pertinent document, in particular, the fact that the contract established that the Claimant was entitled to receive remuneration, i.e. a monthly salary in the amount of USD 1,000, in exchange for his services to the club as a player".

In the FIFA DRC decision no. 1602079 of 30 November 2017, "*the DRC noted that the offer in fact contained the names of the parties, the duration of their relationship, the player's remuneration due for providing his services as a football player and the signature of both parties. Consequently, the Chamber considered that all essentialia negotii were present in the offer and therefore, it should be considered per se as a valid and binding contract*".

The stance adopted by FIFA is also confirmed by the jurisprudence of the CAS. In the award issued in the case CAS 2015/A/3953 and 3954 ("*Stade Brestois 29 & John Jairo Culma v. Hapoel Kiryat Shmona FC & FIFA*"), the Panel listed the elements that constitute the *essentialia negotii* for a valid employment contract "*A document that includes i) a date, ii) the name of the parties, iii) the duration of the contract, iv) the amount of remuneration and v) the signature of the parties includes essentialia negotii, and thus is considered a valid and binding agreement*".

The award passed by the Panel in CAS 2016/A/4709 ("*SASP Le Sporting Club de Bastia v. Christian Koffi N'Dri Romaric*") identifies the essential elements in order to consider a contractual document for the extension of an employment contract as a valid and binding employment contract itself: "*If a contractual document signed by both parties in order to envisage the extension of an existing employment contract contains all the necessary essential elements, i.e. an agreement on the performance of a work against remuneration, the names and the signatures of the parties, the club's stamp, a signature date, a reference to the parties' underlying contract of employment, and further stipulates the starting date of the extended employment contract, the player's guaranteed and conditional remuneration during said extended period of time and the counterparty's financial entitlements related to a further conditional extension of the parties' contractual relationship, it contains all the contractual essentialia negotii to be considered as a valid and binding employment contract in itself*".

As a result of the above jurisprudence,[23] and considering that a case by case analysis is always required, the *essentialia negotii* can be summarised as the following: the names of the parties, agreement on the performance of work for remuneration, the financial terms, the duration, a signature date and the signatures of the parties.

[23] In the context of DRC decisions, see also F. De Weger, *The jurisprudence of the FIFA Dispute Resolution Chamber*, 2nd Edition, Asser International Sports Law Series, Springer, 2016, 141.

In addition to these essential elements, the agreement may include ancillary elements, including the payment of taxes, paid leave, the health and safety policies of the Club, and anti-doping prevention.

Furthermore, it is worth specifying all of the player's obligations towards the club, namely to play matches to the best of his ability, to participate in training and match preparation, to maintain a healthy lifestyle and high standard of fitness, to comply with club officials' instructions, to attend events of the club, to obey club rules, to abstain from participating in other football activities or potentially dangerous activities, to take care of the property of the club, to notify the club in case of illness or accident and to not undergo any medical treatment without prior notification to the club, to undergo medical examinations and treatment upon request of the club, not to bring the club or football into disrepute, not to gamble or undertake other related activities within football etc.

One of the main issues in the negotiation of top players' contracts is the exploitation of the player's image rights. This matter has become a crucial point, which has many complications, as will be analysed in a dedicated chapter of this book.

The contract may also indicate the club's internal disciplinary rules with sanctions/penalties, the necessary procedure, as well as stating the process for disputes between the parties and the confidentiality of the agreement.

1.5 The validity of drafts and pre-contracts

Once the parties have agreed upon the essential elements of the employment relationship, the agreement needs to be formalised.

It is not uncommon for the parties to sign[24] a draft, letter of intent or a preliminary contract, on the understanding that a final employment contract will be concluded at a later time. In such cases, an issue may arise in the event that a party decides not to sign the final employment contract.

This is particularly relevant in countries where the national football association requires specific formalities for a valid employment contract to be concluded.[25]

This type of issue can arise when a written detailed offer,[26] normally sent by a club, is accepted by the player who signs it. Similarly, in cases when the parties sign a preliminary contract on the understanding that they will execute the proper employment contract at a later stage.

The validity of the so-called "pre-contract" has been assessed by both FIFA and CAS in several decisions, in cases where one of the parties to a

[24] The existence of the signature of both Parties in the relevant documents is of utter importance.

[25] For instance in Italy, where the employment contract must be concluded on the form provided by the Italian FIGC in order to be valid and binding.

[26] A detailed offer should set out all the conditions of the employment relationship between the Parties and all the *essentialia negotii*.

pre-contract has refused to conclude a proper employment contract at a later time. In these cases, the main issue to consider is whether or not pre-contracts can be considered as binding on the signatory parties.

As noted by the Panel in the case CAS 2008/A/1589 ("*Mke Ankaragücü Spor Külübü v. J*".) "*the FIFA Regulations and Swiss law do not provide a specific, explicit definition of a "precontract". This notion is however well known in legal practice and the Panel would define it as the reciprocal commitment of at least two parties to enter later into a contract, a sort of "promise to contract" (in French: "promesse de contracter"). The clear distinction between a "precontract" and a "contract" is that the parties to the "precontract" have not agreed on the essential elements of the contract or at least the "precontract" does not reflect the final agreement. On the contrary, if the interpretation of the "pre contract" leads to the conclusion that the parties agreed on all the essential elements of the final contract, on the basis of the general principles applicable to the conclusion of a contract as defined under Article 1 et seq. of the Swiss Code of Obligations (SCO), the "precontract" would be nothing else but the final contract*".

The Panel in CAS 2016/A/4489 ("*Beijing Renhe FC v. Marcin Robak*"), in the award of 13 February 2017, confirmed that: "*Whereas the FIFA Regulations and Swiss law do not provide a specific, explicit definition of a "pre-contract", with respect to pre-contracts in football, CAS jurisprudence has acknowledged that this notion is well known in legal practice as a sort of "promise to contract" and has defined it as the reciprocal commitment of at least two parties to later enter into a contract. Unlike when concluding a contract, the parties to the pre-contract have not agreed on the essential elements of the contract, or at least the pre-contract does not reflect the final agreement. In some cases letters of intent can be considered as pre-contract as the parties agree on some important elements in view of the negotiation of the final contract and may provide for sanctions to be imposed in case of violation of specific commitments already taken at the level of the letter of intent. However, good practice requires from the parties to expressly mention that the document is not the final contract and that it does not represent the definitive agreement between the parties, as it is well known that in contractual negotiations, the parties must consider the risk to be bound at an earlier stage than they sought*".

As a result, according to the CAS jurisprudence, under Swiss law a pre-contract may be considered as a valid and binding employment contract if it presents all the essential elements of the final contract.

The same stance has been adopted by FIFA. It has been the constant jurisprudence of the DRC that when a document – regardless, for example, of its title – contains all the essential elements of a contract – i.e. the *essentialia negotii* – said document is to be considered as a valid and binding contract.

In the DRC decision no. 3121066 of 1 March 2012, the Judge stated: "*in order for an employment contract to be considered as valid and binding, apart from the signature of both the employer and the employee, it should contain the essentialia negotii of an employment contract, such as the parties to the contract and their role, the duration of the employment relationship, the remuneration and the signature of both parties. After a careful study of the "pre-contract agreement" presented by the Claimant, the Chamber concluded that all such essential elements are included in the pertinent document [...] the members of the Chamber concluded that by having signed the "pre-contract agreement" a valid and legally binding employment contract had been entered into by and between the Claimant and the Respondent*".

An agreement of the essential elements of the employment contract is therefore the minimum requirement for a pre-contract to be considered as a valid and binding employment contract. In a recent DRC decision of 7 June 2018, "*the Chamber held the opinion that the Claimant and the player had not reached an agreement on all the essential conditions of an employment relationship and that the precontract, which is the only document on file referring to contractual terms, could not be viewed as a valid and binding employment contract*".

As a result, if the pre-contract contains all the *essentialia negotii*, there is no doubt that it constitutes a valid and binding employment contract. As such, in the event of a breach of such a pre-contract, the compensation for damages would be the same amount that could be claimed by the injured party in the event of a breach of an employment contract.

However, it must be noted that even if a valid employment contract has not been concluded, pre-contracts might entail a liability in case of breach and compensation might still be awarded. As a matter of fact, if the parties had no intention to bind themselves to give "value" to the preliminary agreement, for what reasons would they have signed it? The pre-contract serves as some kind of warranty for the contractual parties that they will not withdraw from the negotiations lightly and, indeed, have already agreed on some of the main terms of the employment relationship.

According to the award rendered in the case CAS 2016/A/4489 ("*Beijing Renhe FC v. Marcin Robak*"), the damages incurred in the event of a breach of a pre-contract are generally lower than damages resulting from a final employment agreement, given that there was still a chance that the employment agreement would not be signed.

Interestingly, the Panel found that "*the scope of Article 17(1) of the Regulations is not limited to definite employment contracts, but that also the compensation for breach of a "pre-contract" can be calculated on this basis. Indeed, Article 17(1) of the Regulations is headed "consequences of terminating a contract without just cause*". Thus, the Panel calculated the compensation due by applying Article 17(1) of the FIFA Regulations on the Status and Transfer of Players.

1.6 Conditions applicable to employment agreements

The validity of an employment contract may be subject to several conditions. Hereinafter the authors analyse the most important ones.

1.6.1 The passing of medical examinations

Article 18, para. 4, of the FIFA RSTP, which refers to contracts between professionals and clubs, reads: "*The validity of a contract may not be made subject to a successful medical examination*".

As a result, the validity of an employment contract between a player and a club cannot be made subject to the positive results of a medical examination. In fact, in the event that such a condition is included in an employment agreement, the relevant clause is not admissible and shall be considered as null and void. In CAS 2008/A/1593 *("Kuwait Sporting Club v. Z. & FIFA")*, the Panel stated that such condition cannot be considered valid even if included in a different contract: "*A club cannot justify the termination of an employment contract by relying on an illegal successful medical examination clause contained in the same employment contract or in a loan agreement, to which a player is not party and which is completely autonomous and independent from the employment contract. It is, and has always been the buying club's duty to ensure for itself that the player they intend to contract is in good physical condition. The lex mercatoria between clubs and players has always seen buying clubs conducting medical examinations on players before concluding any employment contract with the prospective player*".

In other words, this means that in the event that the new club does not honour the contract because of the player's failure to pass the medicals, such conduct of the club constitutes a unilateral breach of contract without just cause. The player's prospective club is therefore required to undertake all necessary tests and take all appropriate steps "before" executing the employment contract.

Violations of this provision are considered as negligence by the new club as it has not exercised the usual care expected in business. In fact, the new club has the duty to perform the medical examination before signing the employment contract and the player has to put himself at the club's full disposal and supply the prospective club with all necessary information and documents in order to facilitate this task. If the club does not use the necessary diligence when signing a player, it cannot unilaterally terminate the contract on the basis of (existing or presumed) medical conditions.

The Dispute Resolution Chamber of FIFA, according to its well established jurisprudence, has consistently clarified that a club cannot unilaterally challenge the validity of the contract during its course based on the physical state of the player and that the player's physical conditions do not constitute just cause in the

sense of art. 14 of the RSTP.[27] It is therefore an obligation of the new club to act with due diligence and perform all the necessary exams to ascertain the health of the player, including a thorough medical examination.

Whereas it is clear why employment contracts cannot be made subject to a successful medical examination, a "pre-contract" may be made conditional to the successful passing of a medical test. As clarified in the DRC decision of 24 October 2011: *"Based on the clear wording of the aforementioned article of the Regulations* [Article 18(4)]*, the DRC judged* [sic] *was eager to emphasize that para. 3 and 4 of said pre-contract* [according to which the validity of the pre-contract was made conditional upon the successful passing of a medical examination] *are to be considered as ambiguous and its application as arbitrary, since they lead to an unacceptable result based on non-objective criteria, which entitles the Respondent to unilaterally terminate the contract depending on the positive results of a medical examination carried out after the signature of the contract. Therefore, the DRC judge concluded that such clause inserted in an employment contract could not be considered as valid and pointed out that the lack of objective criteria by the application of the relevant rule would lead to an unjustified disadvantage of the Claimant's financial rights and to the destabilization of a contractual relationship concluded in good faith by both parties. Notwithstanding, the DRC judge was equally eager to stress that the pre-contract, according to the explicit wording of its para. 4, is a temporary agreement and that such condition was known to the Claimant by the time of its signature. By having agreed to sign the pre-contract, the player also accepted the condition of its provisory nature and of its possible, but not necessary, conversion into a permanent employment relationship with the Respondent, in case certain pre-requisites should be fulfilled".*

Finally, it must be noted that, contrary to employment agreements, transfer agreements can be made subject to the player's successful medical examination. It is advisable to perform the medical examination before the conclusion of the relevant transfer agreement or, if this is not possible, to make the transfer agreement conditional upon the player's successful passing of medical examinations.

1.6.2 The signature of a Transfer Agreement

Best practice suggests that in order to complete a transfer, firstly a transfer agreement should be signed by the two clubs involved, and only afterwards the new club and the player enter into the relevant employment contract.

On this point, the jurisprudence of the FIFA Players' Status Committee (the "FIFA PSC") is clear: *"[T]he Regulations are based on the following concept: first, the player's former club and the new club should find an*

[27] *Ex plurimis*, DRC decision of 2 March 2017.

agreement and sign the relevant contract regarding the transfer of the player. Then, the medical examination should be performed and only then, with these prerequisites established and after careful research and taking all appropriate steps, the player and his new club should sign an employment contract" (Decision of the Single Judge of the FIFA PSC, 19 March 2013, para. 14).

However, this sequence of events does not always occur. Sometimes a club might need to immediately bind a player and therefore it first concludes an employment contract with the player and afterwards it negotiates the transfer agreement with the player's club. In this event, the employment contract must be made conditional upon the conclusion of a valid transfer agreement with the player's former club, otherwise it would constitute a breach of the employment contract that the player has in place with his current club.

It must be noted that in the case of an employment contract that is conditional upon the conclusion of the relevant transfer agreement, the player usually does not have any influence on the negotiations between the two clubs, whereas the player's new club, by acting in one way or another, is in the position to unilaterally decide whether the condition precedent is complied with or not.

1.6.3 The issuance of the ITC

An employment contract can be made conditioned upon the signature of a transfer agreement, but not upon the issuance of the International Transfer Certificate (hereafter "ITC").

The responsibility for duly registering a player and to request the ITC relies on the new club: the ITC is requested by the new club through the national association using the Transfer Matching System (TMS) and it requires the "seller club" and its national association[28] to insert specific information and documentation into the system.

However, following the reasoning of the DRC in the decision no. 11172079 dated 30 November 2017 the club's failure to request and obtain the player's ITC and to complete the player's registration in the season in which the contract was supposed to start, can grant the player well-founded reasons to believe that the club was no longer interested in his services and consequently, in light of the 'failure' of his transfer to said club, he can pursue his career somewhere else.

The specific circumstances of this case allowed said conclusion, in consideration of the fact that there was no employment agreement signed between the Parties but rather an offer letter signed by the player as acceptance. The Chamber considered that all *essentialia negotii* were present in the offer and therefore, it should be considered *per se* as a valid and binding contract. Notwithstanding the foregoing, the Chamber noted that even though the offer was already valid, the player had not yet been able to start performing his contract with

[28] In some countries (as example, Brazil), the local football structure provides for the member national association and regional and provincial associations which take part also the ITC process.

the club due to the undisputed fact that the club did not manage to conclude his ITC request in TMS and his registration with the national association in a timely manner.

1.6.4 Visa and Work Permit

In accordance with article 18, para. 4, of the FIFA RSTP: *"The validity of a contract may not be made subject to the grant of a work permit".*

As a result, an employment contract between a player and a club cannot be made subject to the acquisition of a work permit from the local authorities. Such a condition, if included in a contract, is not admissible and shall be considered as null and void.

As a general rule, it falls within the responsibility and remit of a club to ensure that the necessary visa/permit is obtained for a player.[29] Therefore, the club is not entitled to unilaterally terminate the employment contract because of the lack of a valid work permit. [30]

On the other hand, the player has to put himself at the club's full disposal and supply the prospective club with all necessary information and documents in order to facilitate this task. In this sense, if a club appears to have prepared all documents and taken all measures, which were in its power, in order for the player to obtain the relevant working visa and, in other words, a possible non- issuance of a working visa was not to be attributed to the club's negligence but rather to the player's conduct, the player cannot argue that he was prevented from fulfilling his employment contract with the club due to the lack of a valid visa/working permit.[31]

If the club does not use this diligence when signing a player, it cannot claim afterwards that the player has not received a work permit.[32]

1.6.5 Probationary period

In spite of the fact that the possibility to establish a probation period in employment contracts is allowed in most countries according to labour laws, the DRC is of the opinion that probation periods are usually not allowed. For a more detailed examination of probationary period, see paragraph 6.8 below.

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[29] Cf. PSC 5 June 2013, no. 0613864.

[30] Cf. CAS 2007/A/1205 S. v. Litex Lovech, award of 6 June 2007.

[31] See the Decision of the DRC of 21 February 2006, no.26267_684 (available at this link: https://resources.fifa.com/mm/document/affederation/administration/26267_684.pdf).

[32] FIFA Commentary, explanation Article 18 para 4. See also DRC 27 November 2014, no. 1114239.

2. The formal aspects of employment agreements

2.1 The Form

Employment agreements must be made in writing. Whenever a dispute has occurred between a player and a club on the basis of an oral agreement, the DRC[33] has decided that the player was not linked to the oral agreement and therefore was entitled to sign and register for a new club immediately, as he was not bound to the former club by a written employment contract.

The definition of "professional" in the FIFA RSTP is clear: a professional is a player who has a written employment contract with a club and is paid more than the expenses he effectively incurs in return for his footballing activity. It is therefore compulsory to stipulate a written employment contract between the club and a player. Oral arrangements between a club and a player, although possibly admissible by and in conformity with local labour law, do not comply with the mandatory condition provided under art. 2 para. 2 of the FIFA RSTP.

In spite of the above, in an interesting decision dated 26 October 2006,[34] the DRC ruled that, in absence of a written agreement, a "*factual employment relationship*" can be established by the Parties: "*After having examined the two aforementioned documents, copies of which were remitted to the file, the Chamber noted that the two documents had not been signed by the Claimant. Referring to the general principle that every contract requests an offer and the acceptance of the offer, the Chamber concluded that the offer of the Respondent for employment had not been followed by an acceptance of the offer by the Claimant. The deciding authority deemed that this was somehow understandable since the financial terms of the employment contract significantly differed from those contained in the MOU, the latter being closer to the alleged previous negotiations. Therefore, the Chamber considered that no valid employment contract had been concluded between the parties ... After having elaborated that no formal and valid written employment contract had been concluded between the parties, the Chamber acknowledged that the Claimant had actually joined the Respondent, had moved to Y and had taken part in the daily trainings and three preparatory matches with the Respondent from 9 until 14 November 2005 and on 21 November 2005. The Chamber went on to state that the aforementioned actual circumstances of the present matter, in particular the participation of the Claimant in three preparatory matches with the Respondent, lead to the conclusion that a factual employment relationship had been established between the parties and that this factual relationship was to be taken into consideration*".

[33] See FIFA DRC decision 22 July 2004 n. 7472A.

[34] The decision of the DRC is available at following link: https://resources.fifa.com/mm/document/affederation/administration/1061318_8554.pdf.

According to this peculiar decision, even in the absence of a written employment contract, a "factual employment relationship" can be established between a club and a football player.

2.2 The Length

The Parties have to agree on a fundamental point, the length of a contract. As indicated by article 18, para. 2, of the FIFA RSTP, the minimum length of a contract shall be from the date of its entry into force to the end of the relevant sporting season, while the maximum length of a contract shall be five years. Contracts of any other length shall only be permitted if consistent with national laws. The parties may agree termination of the contract even in the course of the subsequent sporting season.

The maximum duration of a contract has been set with due consideration for the balance of interests between clubs and players. On the one hand, it is in relation to the average timeframe needed by a club in order to build a competitive squad, while on the other hand, it represents an adequate timeframe for a player to be bound to a club that does not impede the proper development of the career of the athlete.

In order to safeguard the interests of young players and not hinder their progress through an excessive tie to a club, players who have not reached their eighteenth birthday may not sign a contract for a term longer than three years.[35] Any clause referring to a longer period is not admissible.

Furthermore, any contract that does not indicate a predetermined duration can be terminated at any time in conformity with local labour legislation. The termination shall, however, not occur during the season (cf. art. 16 of the FIFA RSTP) and at the very earliest at the end of the first season after the signing of this contract (cf. art. 18 para. 2 of the FIFA RSTP).

2.2.1 Unilateral Extension Option

Unilateral extension clauses give one party to a contract the exclusive right to extend the employment relationship with the other party. Unlike reciprocal clauses – where both parties need to agree to the extension – unilateral extension clauses do not require both parties to consent to activate the clause. These clauses are often in favour of clubs in employment agreements with players.[36]

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[35] See FIFA DRC decision dated 22 July 2004 no. 74234.

[36] For a complete analysis of this practise, see: "*Unilateral extension options in football contracts: Are they valid and enforceable?"* published on Law in Sport on 19 September 2018 by Tiran Gunawardena and available at following link: www.lawinsport.com/topics/articles/item/unilateral-extension-options-in-football-contracts-are-they-valid-and-enforceable. See also F. De Weger and T. Kroesse, "*The unilateral extension option through the eyes of FIFA DRC and CAS*". Excerpt available at www.drcdatabase.com/newsletterarticles/feb11/casanddrcjurisprudence.aspx.

Normally these clauses are used by clubs in order to secure young players for a short period of time, with the option of securing them for a longer period if they turn out to have the right qualities.

Therefore, if the relevant player does well, the unilateral extension clause will be triggered. Conversely, if the player does badly (and/or he gets injured), the club will not trigger the unilateral extension clause and the player will not get any extension of his contract.

The FIFA RSTP are silent on the legitimacy of unilateral extension clauses; therefore, the applicable law can be an important factor in determining whether a unilateral extension clause is valid or not.

The validity of a unilateral extension clause shall be assessed on a case by case basis.

In order to determine whether such a clause is deemed to be valid or not, several criteria should be taken into account, as per the jurisprudence of both the DRC and CAS.

According to the case law, cases must be assessed on an individual basis taking into account not only the wording of the clause but the factual background and circumstances which contributed to the insertion of the clause. The following elements should be taken into account:[37] I) Maximum duration of the extension must not be excessive; II) The extension must be exercised within an acceptable deadline before expiry of the current employment contract; III) The salary reward deriving from the right to exercise the extension option must be defined in the original contract; IV) It is important that one party is not considered to be "at the mercy" of the other party. This is particularly important with regards to salary in that a club cannot unilaterally extend a contract without increasing upon the original salary; V) The option to unilaterally extend the contract duration must be stipulated in the original contract; VI) Extension period must be proportionate to the main contract (i.e. the extension should not exceed original contract duration); VII) Number of unilateral extension options must be limited to one.

It should be noted that even in the event that such a clause does meet all of the above seven criteria, this does not automatically render the clause reasonable and valid. Whether the clause is valid will always come down to the individual circumstances of the case.

Furthermore, in assessing the likelihood of such a clause being declared valid, one has to ask the following questions:[38] was the player assisted and represented during the negotiations of the employment contract, either by a lawyer or intermediary? Did the player explicitly agree with the effects of the unilateral extension option (either in writing, verbally or can it be drawn by his actions)? Can it be argued that the club only exercised the option in order to allow them to claim higher compensation?

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[37] CAS 2013/A/3260 *Gremio Football Porto Alegrense v Maximiliano Gaston Lopez*.

[38] F de Weger, *The Jurisprudence of the FIFA Dispute Resolution Chamber*, 2nd Edition, (2016), 190-191.

The general DRC's approach[39] is to consider to be invalid unilateral extension options of a "potestative" nature, on the basis that they excessively restrict the employees' freedom and give the unilateral right to the club to terminate the contract or extend its duration.

On the contrary, if the clause provides a reciprocal right for both parties to extend the contract, such clause might be deemed valid. Also, it must be noted that nothing prevents the parties from agreeing a fixed-term employment contract that automatically extends for an additional period upon the occurrence of a certain condition or in the event that neither party notifies the other of the intention to terminate it within a certain deadline.

The validity of unilateral extension clauses has been challenged several times before CAS.

In CAS 2004/A/678 ("*Apollon Kalamarias FC v Oliveira Morais"*),[40] the Panel took into account, *inter alia*, that there was inequality of bargaining power between the club and player, all the advantages of the unilateral extension clause were in favour of the club only, the financial terms of the clause took no account of the possible enhancement of the player's value over the 5-year period and that five years represents a significant portion of a footballer's career.

The same elements were considered in CAS 2005/A/973 ("*Panathinaikos FC v Sotirios Kyrgiakos*"), whereby the Panel concluded that the two unilateral options in favour of the club to unilaterally extend the employment contract had to be considered as valid.[41]

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[39] See DRC decision n. 310607 of 18 March 2010 available at http://resources.fifa.com/mm/document/affederation/administration/drclabour/310607.pdf and DRC decision n. 06132616 of 13 June 2013 available at http://resources.fifa.com/mm/document/affederation/administration/02/25/89/13/06132616_english.pdf.

[40] A player signed an initial 1-year contract with the club, but the club had a unilateral right to renew the contract annually for up to 4 more years. The club only had to give the player notice within 5 days of the Greek summer transfer window every year. In May 2004, the club tried to exercise its first one-year option, and informed the player that he would be receiving the same wages as in the prior year. The player declined, and filed a claim challenging the validity of the unilateral renewal. The FIFA DRC ruled that the contract was deemed to be terminated after 1 year, stating that unilateral options were *"in general, problematic, since they limit the freedom of the party that cannot make use of the option in an excessive manner. Furthermore, such options are not based on reciprocity, since the right to extend a contract is left exclusively at the discretion of one party".* At the CAS, the panel upheld the FIFA DRC's decision. The CAS award is available at link: https://jurisprudence.tas-cas.org/SharedDocuments/678.pdf.

[41] A player signed an employment contract for an initial period of two years, with two unilateral options in favour of the club to extend the contract. The first option was for an additional two years, and the second option was for a further one year. The club exercised such options but the player challenged the validity of them. The FIFA DRC decided in favour of the player, ruling that the second option was invalid. In appeal proceedings, the Panel decided that contrary to FIFA's decision, the total length of five years was not, by itself, a reason to invalidate the option(s), as a contract for five years was permitted under the FIFA RSTP. The Panel then looked at the benefits

In CAS 2005/A/983 & 984 ("*Club Atlético Peñarol v Carlos Heber Bueno Suarez, Cristian Gabriel Rodriguez Barrotti & Paris Saint-Germain*"),[42] the Panel reasoned as follows:

"La Formation arbitrale considère à cet égard que le sport est par nature un phénomène transcendant les frontières. Il est non seulement souhaitable, mais indispensable que les règles régissant le sport au niveau international aient un caractère uniforme et largement cohérent dans le monde entier. Pour en assurer un respect au niveau mondial, une telle réglementation ne doit pas être appliquée différemment d'un pays à l'autre, notamment en raison d'interférences entre droit étatique et réglementation sportive. Le principe de l'application universelle des règles de la FIFA – ou de toute autre fédération internationale – répond à des exigences de rationalité, de sécurité et de prévisibilité juridique. Tous les membres de la famille mondiale du football sont ainsi soumis aux mêmes règles, qui sont publiées. L'uniformité qui en résulte tend à assurer l'égalité de traitement entre tous les destinataires de ces normes, quel que soit le pays où ils se trouvent".

The Panel concluded that the unilateral extension clauses were invalid, as it allowed Club Atlético Peñarol to unilaterally extend the players' contracts without any additional benefits to the players. In this case, Atlético Peñarol submitted a report of Professor Wolfgang Portmann which stated that unilateral extension clauses could be valid under Swiss law if the following conditions were satisfied: a) the potential maximum duration of the employment relationship must not be excessive; b) the unilateral extension clause has to be exercised within an acceptable

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provided to the player under the two options, and noted that both of them provided improvements of the financial terms for the player. Given these increases, the panel did not believe that Panathinaikos had "unequal bargaining power" or that the player had no apparent gain from the options. Interestingly, it was discovered that the player had received a more lucrative offer from a third club than he would have earned under the second option with Panathinaikos. The Panel took this into account and concluded that this was, in fact, the reason he decided to terminate his employment contract with Panathinaikos. The Panel concluded that the player "*decided to escape his obligations by artificially claiming the nullity of the unilateral option*" and this action did not respect the "*bona fide*" principle. Thus, it was "irrelevant" that the player could have received a higher salary elsewhere than at Panathinaikos. In conclusion, the CAS Panel determined that the unilateral options were valid, meaning the player breached his employment agreement without just cause by leaving club and was ordered to pay the club damages.

[42] Carlos Bueno and Cristian Rodriguez, two Uruguayan professional footballers, were seeking to sign new contracts with Club Atlético Peñarol. At the time, there was a Uruguayan Football Player's Statute in force that allowed clubs to unilaterally extend a player's contract for an additional 2 seasons. Moreover, the club only had to increase the player's wage in accordance with the national Consumer Price Index, but had no other obligations to provide any better conditions to the player. If the player refused to accept the unilateral extension, the club was entitled to list him as *'rebellious'* and could stop paying him. The player would only be free to leave the club when the extended contract expired. When Bueno and Rodriguez refused to agree to the club's proposed renewal of their contracts, the club listed them as 'rebellious' and was thus exempted from paying them pursuant to the local regulations. After a period of 4 months, the players signed for Paris Saint-Germain. Club Atlético Peñarol filed a claim against the players and the French club at FIFA, who rejected the Uruguayan club's claim, and an appeal was filed at the CAS. The CAS award is available at link: http://jurisprudence.tas-cas.org/Shared%20Documents/983,%20984.pdf.

deadline before the expiry of the current contract; c) the original contract has to define the salary raise triggered by the unilateral extension clauses; d) the content of the contract must not result in putting one party at the mercy of the other; and e) the unilateral extension clause has to be clearly emphasised in the original contract so that the player can have full consciousness of it at the moment of signing.

The conditions listed by the "Portmann report" have been considered as a landmark by CAS for the evaluation of the validity of unilateral extension clauses. In CAS 2013/A/3260 (*"Gremio Football Porto Alegrense v. Maxi Lopez"*),[43] the Panel reasoned: "*It must be noted that the FIFA regulations do not contain any express provision which prohibits the unilateral extension of contracts. The decisions issued by the FIFA DRC and the CAS on unilateral extension clauses have always been based on the spirit and legal framework which the FIFA regulations intend to foster, in other words, the principles which prohibit excessive and unwarranted restrictions on a player's freedom of movement and personality rights*". The Panel then considered the conditions mentioned in the Portmann's report, but noted that two additional elements had been considered in FIFA and CAS jurisprudence, which were: f) the extension period should be proportional to the main contract; and g) it would be advisable to limit the number of unilateral extension clauses to one. The Panel confirmed the case by case approach: "*with the deciding body having to not only look at the wordings of the said clause, but also at the factual background and circumstances which contributed to its insertion, in particular the parties' attitude during the negotiations and the performance of the Employment Agreement*". After considering the particular facts of the case – notably the fact that the extended term was not excessive, there was no inequality in bargaining power between the parties and the increased financial terms under the clause – the Panel ultimately concluded that the extension clause in the contract was, in fact, valid and enforceable.

In CAS 2014/A/3852 *("Ascoli Calcio 1898 S.p.A. v. Papa Waigo N'diaye & Al Wahda Sports and Cultural Club")*,[44] the Panel stated that

[43] A player signed a ten-month contract with the Brazilian club Gremio, but the contract had an additional clause which "entitled" the club to enter into a 3-year employment agreement with him if they paid him a pre-agreed amount of money. The club later tried to pay the player the money to activate the extension clause, but the player refused to accept the payment. Gremio filed a claim claiming that the player had breached the contract by failing to sign a 3-year contract with the club as agreed. The FIFA DRC rejected the claim and the club appealed to the CAS, arguing that the clause in the contract was *"a promise"* rather than a unilateral extension clause and the player stood to receive a financial benefit from the agreement to conclude an agreement. On the other hand, the player argued that it was a unilateral extension clause which *"allowed one party to force another to contract, in contravention of the principle of freedom of contract".* The CAS award is available at link: http://jurisprudence.tas-cas.org/Shared%20Documents/3260.pdf.

[44] The player signed a 1-year contract with Ascoli Calcio, which had an option to extend the contract by 2 years. The CAS award issued in appeal to the FIFA DRC decision is available at link: http://jurisprudence.tas-cas.org/Shared%20Documents/3852.pdf.

unilateral extension clauses: "*tend to have their validity questioned because, as the Player states, they could interfere with a party's fundamental freedom of movement. However, these clauses are not invalid per se: neither the RSTP nor any case law provided by the Parties holds that unilateral clauses are invalid under all circumstances. On the contrary, a case-by-case assessment must be carried out in order to determine the validity of specific clauses*". The Panel confirmed the reasoning adopted in the Gremio case and stated that "*The overall circumstances of the underlying contract and the parties' equilibrium in it, must be assessed*". As a result, the Panel stated that two main issues should be considered when analysing the initial validity of a unilateral extension clause: "*whether the total duration of the contractual relationship is reasonable and according with the applicable regulations; and whether the ensuing terms and conditions of employment are fair and adequately reflect the right that the player has granted to the club without the need of further negotiation*". The Panel noted in particular that the maximum duration of the contract including the unilateral extension clause was three years (i.e. less than the maximum of five years) and the player's salary under the unilateral extension clause was to increase by either three times or five times (depending on whether the club was playing in the second division or in the first division respectively). Accordingly, considering the circumstances of this case, the Panel concluded that the unilateral extension clause was valid.

In conclusion, it must be noted that in the absence of a specific provision in the FIFA RSTP, the FIFA and CAS jurisprudence identified some relevant criteria to be taken into account when assessing the validity of unilateral extension options, which in any case is dependent on the circumstances of the specific case at hand and the evaluation of the seven elements quoted above, namely: I) duration of the extension period shall be not excessive; II) the unilateral extension clause has to be exercised within an acceptable deadline before the expiry of the contract; III) equal treatment of the parties in the other contractual provisions; IV) the content of the contract must not result in putting one party at the mercy of the other; V) the option to unilaterally extend the contract shall be clear and emphasised in the contract, so that each party has consciousness of it; VI) extension period shall be proportionate to the length of the original contract; VII) the number of unilateral extension options shall be limited to one.

2.2.2 Relegation clause

A relegation clause is often inserted into an employment contract between a club and a player. The parties may agree on a specific future hypothesis of termination strictly linked to the relegation of the club to a lower division.

From the clubs' perspective, relegation clauses are useful in order to avoid the risk of financial distress due to expensive employment contracts that are not affordable in a lower division.

From the players' side, such clauses are beneficial for their careers, since they offer a way out in case of relegation and therefore allow the players to compete in higher and more remunerative divisions, as confirmed by CAS in the case CAS 2008/A/1447 ("*E.. v. Diyarbakirspor Kulübü*"), "*relegations clauses are mainly a way protecting the players' careers, as their employment opportunities and market values would be reduced by playing in lower divisions during their short-term careers*".

The validity of such clauses has been addressed in several FIFA and CAS cases. The FIFA DRC's approach[45] is, once again, based on a case by case basis, taking into account not only the wording of the clause but the factual background and circumstances which contributed to the insertion of the clause, in order to assess whether the clause has a potestative nature or not.

As expressed by the DRC's in its decision of August 10, 2006, "*the general principle that the parties to an employment contract may agree that the anticipated termination of a short-term employment contract is subject to the fulfillment of a condition, as long as such condition is not of a potestative nature, i.e. not depending on the will of a party to the contract or a third party. The condition of the relegation of a club is certainly not a potestative condition, since such relegation is depending on other circumstances than the will of a party to the employment contract. In fact it has to be presumed that the will of clubs and players is always to avoid relegation. The fulfillment of the condition of relegation is thus solely depending on sporting circumstances. In other words, the condition of relegation is a casual condition, not a potestative condition*".

A similar approach has been adopted in the CAS jurisprudence. In CAS 2016/A/4852 ("*Zamalek Sporting Club v. Karim Alhassan*"),[46] the Panel clarified that "*A contractual clause contained in a footballer's employment contract under which only the club, but not the player may unilaterally terminate the employment contract is unilateral and potestative and therefore contrary to the regulations of FIFA. Consequently it is null and void*".

In particular, at para. 70 of the award, the Panel specified: "*Bearing in mind the purpose of Article 17 RSTP, the Panel considers the clause to be unilateral and potestative, for the benefit of the Appellant only and is therefore contrary to the regulations of FIFA. The Appellant is not at liberty to unilaterally terminate the Agreement at will and can only do so without consequence if there is just cause. This finding is in line with the established jurisprudence of the CAS (see CAS 2014/A/3675, para. 57, CAS 2005/A/983 & 984 and CAS 2008/A/1517). The Panel therefore fully accepts the finding of the FIFA DRC which deemed Article 5.10 of the Agreement null and void. Hence, Article 5.10 cannot be arbitrarily or validly invoked as a legal basis for a unilateral termination of the Agreement*".

[45] See FIFA DRC decisions of 10 May 2012, nr. 5121238 and 5121239.

[46] The CAS Award is available at: http://jurisprudence.tas-cas.org/Shared%20Documents/4852.pdf.

In CAS 2016/A/4549 ("*Aris Limassol FC v. Carl Lombé*"),[47] the Sole Arbitrator specified: "*There are relegation clauses stating that the contractual relationship of the parties automatically end in the case of relegation of the club, or give both parties the right to terminate the employment contract in case of relegation. These kinds of relegation clauses do not only benefit clubs but also the players. Therefore, these clauses can be deemed as a valid way to protect mutual interests of both parties of the contract. On the other hand, relegation clauses implying that a club retains full discretion as to whether the employment relationship with the player will continue or will come to an end following the relegation of the club, without protecting any established or substantiated interest of the player, contain an unbalanced right to the discretion of one party only".* At para. 55-56, it was also stated that: *"On the one hand, there are relegation clauses stating that the contractual relationship of the parties automatically end in the case of relegation of the club, or give both parties the right to terminate the employment contract in case of relegation. From these kinds of relegation clauses do not only benefit clubs but also the players. That is to say, players themselves also could find it desirable to include such a clause in their employment contracts in order to protect their sports career, in that they would not be obliged to play in lower level competition in the case of relegation of their actual club. Therefore, these clauses can be deemed as a valid way to protect mutual interests of both parties of the contract. On the other hand, there are relegation clauses which do not automatically lead to the termination of the contractual relationship in case of relegation but only give one party the opportunity to terminate the employment contract without any regulation of compensation for the other party. These kind of clauses bear the risk that they contain an unbalanced right to the discretion of one party only without having any interest of any kind for the other party. Therefore, the Sole Arbitrator needs to analyze the balance of interest according to the specific circumstances in the present case*".

Therefore, for relegation clauses: a) those which find an automatic application are valid whilst b) those with a potestative nature cannot be considered as valid and binding for the parties because that implies that one party, often the club, retains full discretion as to whether the employment relationship with the player will continue or will come to an end following the relegation of the club, without protecting any established or substantiated interest of the player. It establishes unbalanced rights, and it is, therefore, contrary to the freedom of workers as well as contrary to the parity of termination rights.

[47] The CAS Award is available at this link: https://jurisprudence.tas-cas.org/Shared%20Documents/4549.pdf.

2.3 The Signature

The conclusion of a contract requires a mutual expression of intent by the parties and the signature is the clear proof that each party committed to such contract and therefore that the contract is valid and binding upon them.

It can happen that the club or the player alleges not having signed the document which appears to bear their signature.

In this respect, it is important to recall the content of Article 12.3 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (hereinafter the "Procedural Rules"), which provides as follows: "*3. Any party claiming a right on the basis of an alleged fact shall carry the burden of proof. During the proceedings, the parties shall submit all relevant facts and evidence of which they are aware at that time, or of which they should have been aware if they had exercised due care*".

As to the relevant standard of proof that the parties should bear to successfully prove their respective arguments, the necessary standard is that of "balance of probabilities", as it is typically applied in civil law matters.[48]

In the FIFA DRC decision n. 1212235 dated 18 December 2012,[49] the Chamber analysed the player's argument, in accordance to which the agreement submitted by the club was invalid as it would have been a forgery. In this regard, the DRC emphasised that: *"as a general rule, it is not the competent body to decide upon matters of criminal law, such as allegedly falsified signatures or documents, but that such affairs fall within the jurisdiction of national penal courts"*. In continuation, the DRC recalled that "*all documentation remitted shall be considered with free discretion and, therefore, focused its attention on the termination agreement as well as the other documents containing the player's signature. After a thorough analysis of the aforementioned documents, in particular, comparing the relevant signatures, the DRC had no other option but to conclude that for a layman, and in the contrary of the player's point of view, the player's signatures on the various documents available, including the challenged document, seem to be alike*".

Consequently, whenever a forgery is raised by one of the parties the DRC always refers them to the respective national criminal authorities for a solution on the matter and the decision on the merits of the case will be rendered freely considering the evidence presented by the parties.[50]

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[48] See "*Evidentiary Issues before CAS*"; A. Rigozzi & B. Quinn, Weblaw Editions; Bern, 2014. According to the authors of this article: "*The traditional standard of proof in legal proceedings are: a) the "balance of probabilities" (that is, the standard typically applied in civil law matters), and b) "beyond reasonable doubt" (that is, the standard applied in criminal law matters) […] … This standard has developed over the years from a requirement that the accused prove that its version of the facts are more likely than not to have occurred…*" [Emphasis added].

[49] The DRC decision is available at this link: https://resources.fifa.com/mm/document/affederation/administration/02/19/75/69/1212235_english.pdf.

[50] See J.F. Vandellós, "*Forgery in football-related disputes*", Football Legal no. 2, December 2014.

Moreover, unless there is a final decision of an ordinary criminal court establishing the falsification of a signature, the authenticity of the signature must be presumed, with the exception of cases in which the divergence of the signature is blatant or if other evidential circumstances are able to persuade the DRC or CAS that the document is forged.

In an interesting award rendered in the case CAS 2015/A/4177 ("*Hapoel Haifa FC & Ali Khatib v. Football Club Jabal Al Mukabber*")[51] the Sole Arbitrator faced a case of "alleged" forgery. The expert's examination was unable to determine with any certainty either the authenticity or the forgery of the signature of the document but it did produce some indications that the Sole Arbitrator took into account. The Sole Arbitrator specified that when evaluating the evidence, he also took into account all factual circumstances that he deemed relevant in this particular case, such as the player's admission that his father had signed a number of contracts in his name, the fact that the player was not familiar with the written language, and the special relationship between the player and the club officials: "*the Sole Arbitrator concludes that while the expert's examination was unable to determine with any certainty either the authenticity or the forgery of the signature, it did produce some indications that the Sole Arbitrator will duly take into account when deciding upon the issue at stake. However, expert opinions are only one kind of evidence. While they usually are a very valuable auxiliary means for the Sole Arbitrator to establish his opinion, he is in no way restricted to the expert's report as the sole base of his decision-making. On the contrary, within the scope of his adjudication, the Sole Arbitrator is free and equally obligated to take into consideration all provided evidence and all the circumstances of the specific case at hand in order to come to a just and sound judgment. This includes not only the various documents and arguments submitted by the Parties but particularly the Player's testimony during the course of the hearing*".

2.4 Powers of representation of club officials

Another issue strictly linked to the signature of an employment agreement is the power of representation of club officials.

It can happen that the contract does not indicate the correct name of the signatory on behalf of the club, or that the contract is signed by a different official than the one with the name indicated on the contract, or the name indicated and the signature correspond to someone who does not have the representation of the club.

The general approach is to analyse in detail the specific circumstances of the case and verify whether this omission was rectified, *de facto*, by the club

[51] The CAS award is available at this link: https://jurisprudence.tas-cas.org/Shared%20Documents/4177.pdf.

by explicitly acknowledging the existence of the document.[52] Any element which led to the conclusion that the player could legitimately understand that the club considered itself to be bound by the document will be enough to pass such formal issues.[53]

In fact, as confirmed in CAS 2016/A/4489 *("Beijing Renhe FC v. Marcin Robak")*: "*Where a club has provided a signed version of a draft employment contract to a player, the club cannot later on claim that the respective contract did not enter into force because the individual(s) that had signed the draft employment contract on the club's behalf lacked authorisation to conclude it, if the club had ratified the conclusion of the draft employment contract afterwards, e.g. by explicitly and publicly acknowledging its existence and failing to challenge its validity. Whether or not the signature on the draft employment contract was sealed – allegedly a requirement under Chinese law – does not change this in circumstances where the FIFA regulations and subsidiarily Swiss law are the law applicable to the case. The ratification of a contract entered into by an unauthorized representative (e.g. under Article 38(1) of the Swiss Code of Obligations (SCO)) does not have to be made actively, but the passive or tacit ratification suffice*".

2.5 The prevailing Language

International transfers of players can involve parties with at least two different nationalities, which often speak different languages. It is therefore quite common to draft transfer agreements in two languages for ease of use. In these cases, a specific contractual clause containing the clear indication of which language prevails in case of conflict between the two versions is of utmost importance, in order to prevent speculations during the performance of the contract and, even more, in case of disputes.

However, if the contract does not specify which language prevails or in case there are two identical contracts signed on the same day between the same parties but in different languages, it will be necessary to identify the real intention of the parties in order to resolve the conflict, taking into consideration, as usual, the specific circumstances of the case.[54]

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[52] The approval is basically informal and no active ratification is required, the passive or tacit ratification of document by the Club sufficed, for instance by referring to the "objected" document in other correspondence with the Player and his representative or by execution of the document or relying on its legal consequences.

[53] As example, the absence of a seal or headed paper.

[54] See CAS 2013/A/3240 *("FC Karpaty v. Kucherov Pavlo V.")* where a dispute arose between the Ukrainian version and the English version of the same employment contract: *"7.2 As to the language that shall prevail, Mr. Kucherov made clear that he understands the Ukrainian language and held that the Ukrainian version of the documents shall be decisive. Both parties agreed that the 'kontract' and the other agreements concluded between them do not provide for which language to prevail.*

Such stance was adopted by the Panel in CAS 2005/A/893 ("*Metsu v. Al-Ain Sports Club*"), whereby the parties signed the employment contract in two different versions: one in French and the other one in Arabic language. The two versions of the contract however, contained a divergence in the terms of payment of the retainers that the club had to pay in advance. Eventually, the Panel resorted to the behaviour of the parties to determine the real intention of the parties: "*In that context the Panel does not follow the Appellant's opinion according to which the Respondent had breached the financial terms of the employment contract in not settling the second and third retainers provided in article 4 of the second contract. The evidence produced, the differences between the French and the Arabic versions of the second contract as well as the attitude of the Appellant between the signature of the contract and the procedure before the CAS not claiming at all the payment of the above mentioned retainers show that the Parties had in mind that the retainers should be paid at the beginning of each relevant period. As for the period starting on 1 July 2004, it was already clear that the Appellant did not want to remain under contract with the Respondent. There was thus no reason for the Respondent to pay the second retainer*".

2.6 Disciplinary Power of the Employer

The employer may be required to initiate disciplinary proceedings against the player in case of violation of his contractual obligations, especially if such violations are repeated or of a certain gravity.

This matter is of particular interest since it may involve unfortunate situations of players working in foreign countries who are subject to double disciplinary proceedings, led on one side by the national association or local league, and on the other side by the club, or the failure of the club to hand a copy of the internal regulations where the disciplinary rules are stipulated.

The disciplinary power of the club can only be exercised in order to prevent and punish the player's violations of the club's internal regulations: any

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After a careful review of the file, the Sole Arbitrator, finds, that, whenever there is a discrepancy between the Ukrainian and the English text of the 'kontract' and the other agreements between FC Karpaty and Mr. Kucherov, the Ukrainian language shall prevail. This is in line with how FC Karpaty set up its Internal Work Order Rules, which were drafted only in Ukrainian language and had to be signed in this language by Mr. Kucherov. The same goes for all notifications of termination of contracts used by FC Karpaty with all its coaches. These documents were produced exclusively in Ukrainian language and signed by the coaches concerned, including Mr. Kucherov. This result is also seen to be in accordance with the principle of good faith referred to under Art 18(1) Swiss Code of Obligations by the Appellant. Considering all documents submitted by FC Karpaty in the present proceedings and the standing practice of FC Karpaty concerning the use of the Ukrainian language for its rules and orders as well as the fact that the CAS reviews a decision issued by the FFU and the knowledge languages shown by the party representatives and witnesses during the CAS hearing it is the Ukrainian language which shall be decisive for the interpretation based on the principle of confidence and will of the parties".

other different approach constitutes an abuse and it is not permitted (for instance, in the event that a club uses its disciplinary power with the goal to push the employee to leave the club or make the player's life difficult in order to reach an agreement in relation to a possible dispute).

In spite of the reference to separate club regulations, which most of the time are not given to the player, it is recommended to include in the employment agreement a specific clause detailing the basic procedural steps of the disciplinary proceedings as well as the right of defence of the player, the language of the proceedings, the remedy to follow in order to propose appeal against the disciplinary decision, as well as the applicable penalties in case the player is found guilty of the accused violation.

2.7 Conflict between other agreements signed by the parties

The conclusion of subsequent agreements between the parties is also a common situation, which can generate uncertainty and disputes.

Often, the parties sign firstly a pre-contract and subsequently, the full version of the employment contract which contains all the relevant clauses regarding the employment relationship. Moreover, it is common that an appendix or a private agreement is signed by the parties in order to clarify specific conditions of the employment relationship or to define the financial terms.

In order to avoid possible discussions and disputes arising from conflicting terms provided in the different agreements, it is necessary to include in each signed document a specific provision addressing the relationship with the previous document, as well as recall the relevant content.[55] In case of lack of any explicit provision addressing which of the conflicting agreement prevails, the adjudicating body shall be obliged to use the interpretation rules of contracts and other general principles of law to decide which one of them prevails. Normally, the last agreement signed supersedes the previous one.

This stance was clarified by the DRC in a case[56] concerning the prevalence of two different employment contracts concluded between the parties.

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[55] In CAS 2006/O/1055 *("Del Bosque, Grande, Miñano Espín & Jiménez v. Beşiktaş"),* the Parties signed two consecutive employment contracts which contained contradicting jurisdiction clauses, one in favour of CAS and the other in favour of the bodies of the Turkish Football Federation. This circumstance was used by the Club during the CAS proceedings to dispute the jurisdiction of the arbitral tribunal adducing inter alia that the clauses in the standard contract (signed at a later date) substituted or amended the clauses in the private agreement. Eventually, the Panel relied on an explicit provision included in the standard contract indicating the precedence of the so-called private contract in order to decide in accordance with the provisions of the latter: "*[If] there is difference between the provisions of this contract and the special contract, the terms of the special contract will be held valid*". The CAS Award is available at this link: https://jurisprudence.tas-cas.org/Shared%20Documents/1055.pdf.

[56] Decision of the Dispute Resolution Chamber of 30 August 2013 (ref. 12-03001), unpublished.

In particular, on 4 February 2011 the parties entered into a contract signed in the local language, for a period of two seasons with a basic salary. On the following day, the same parties signed another employment contract drafted in English, for a period of one season with a significantly higher remuneration. The contracts, therefore, provided different periods of validity and different salaries. The DRC had to decide which of the two employment contracts was to be considered as valid and binding. After a careful analysis of the contracts, the Chamber concluded that according to general principles of law, the more recent contract prevails. Consequently, it decided that since the contract in English language had been signed after the contract in the local language, it had superseded the latter.

3. Effects on employment agreements in case of temporary transfer/loan

3.1 Definition of temporary transfer/loan

Loans of professionals are regulated by art. 10 of the FIFA RSTP.

First and foremost, it must be noted that only professional players can be loaned, since the club loaning the player must be in possession of a valid employment contract with the player that leaves on loan.[57]

As a matter of fact, the existence of three contracts is required to transfer a player on loan: (i) the employment contract between the player and his/her club of origin; (ii) the loan contract between the two clubs, and (iii) the employment contract between the player and his/her new club. Alternatively, the two clubs and the player may also enter into a tripartite agreement in which the terms of the loan and employment relationship between the player and the new club are established. In this event, the additional employment contract between the player and the new club may not in principle be required, subject to specific formal requirements for the player's registration with the relevant national football association.

It must be emphasised that despite the connection that exists between the loan agreement and the employment contract, such agreements are completely autonomous and independent contracts, which have no relation to each other.

As confirmed in the award rendered in the case CAS 2013/A/3314 ("*Villarreal CF SAD v. SS Lazio Roma S.p.A"*), "*The Loan Agreement and Employment Agreement are necessarily linked (to the point where the latter constitutes a condition precedent for the validity of the former), but are still independent agreements, entered into between different parties, which are subject to separate sets of rules and prohibitions*".

What is more, the provisions of the loan agreement cannot be applied to the employment contract and vice-versa. In particular, a club cannot justify the

[57] FIFA Commentary on the Regulations for the Status and Transfer of Players, comment under article 10.

unilateral termination of the employment contract on the basis of the parent club's false declaration under the loan agreement.[58]

As to the status of the employment contract between a player and his club of origin during a loan to another club, the FIFA RSTP do not offer any indication. However, the FIFA Commentary[59] clearly states that during the period that the player is on loan, the club of origin is not obliged to pay the player's salary or provide him with adequate training and/or other privileges or entitlements as foreseen in the contract. It is the responsibility of the new club to pay the player's salary in accordance with the new contract with the player.

Thus, upon the commencement of the loan period and for the entire agreed duration of the loan, the employment contract between the player and his/her parent club is temporarily suspended. This means that unless otherwise agreed between the relevant parties, the effects, rights and obligations of the employment contract are suspended and come back into force only after the end of the loan period.

Although as a general principle the employment contract between the player and his/her parent club is temporarily suspended during the loan period, the parties are not prevented from agreeing different terms: for instance, the new club is not prevented from taking over the contractual obligations of the club of origin, nor is the parent club prevented from paying the player´s salary during the loan period. However, according to the CAS jurisprudence, in these cases, the burden to prove that the monthly remuneration agreed in the contract signed with his/her club of origin must be respected during the course of the loan period, is borne by the player.[60]

The conditions governing the loan of a professional, such as the duration of the loan and the obligation to which the loan is subject to, are regulated by the loan agreement concluded by the two clubs and often co-signed by the player. It must be noted that if the player does not co-sign the loan agreement, he/she needs to enter into a separate agreement with the club of origin, in order to temporarily suspend the effects of their employment contract.[61]

Pursuant to article 10 of the FIFA RSTP, any loan is subject to the same rules applicable to the transfer of players: as a result, the loan of a player by one club to another constitutes a transfer for a predetermined period of time, which shall be at least the time between two registration periods. Accordingly, rules related to training compensation, solidarity mechanism, registration periods and any other rules provided for permanent transfers, shall apply also to temporary transfers. In particular, it must be noted that according to article 5 para. 2 of the

[58] CAS 2008/A/1593 Kuwait Sporting Club v. Z. & FIFA.
[59] FIFA Commentary on the Regulations for the Status and Transfer of Players, comment under article 10.
[60] CAS 2016/A/4693, *Al Masry Sporting Club v. Jude Aneke Ilochukwu*.
[61] FIFA Commentary on the Regulations for the Status and Transfer of Players, comment under article 10.

FIFA RSTP, players can only be registered with one club at a time and such rule also applies to a loan period. As a result, in order to transfer a player on loan, the new club needs to obtain the relevant ITC, as if it was a permanent transfer.

Finally, article 10 of the FIFA RSTP clarifies that a club that has accepted a player on a temporary basis is not entitled to transfer him to a third club without the written authorisation of the club that released the player on loan and the player concerned.

3.2 Premature termination of loans: consequences

Parties to a loan agreement may agree to prematurely terminate the temporary transfer of the player. In order to do so, the consent of both clubs and the player is necessary: usually, parties express their consent by signing a termination agreement.

It must be noted that the termination agreement itself does not automatically release the parties from all their financial obligations: unless explicitly or impliedly indicated otherwise, the club employing the player is not automatically released from its obligations under the employment contract. Instead, the general principle of *pacta sunt servanda* prevails pursuant to which the player is entitled to any outstanding salaries under the employment contract for the services he had rendered.[62]

In case of premature termination of the loan agreement, the employment contract between the player and the club of origin – which was suspended upon the commencement of the loan period – shall be reinstated. As a result, the player is due to move back to the club of origin and to resume his/her duties under the employment contract.

However, the premature termination of a loan is not always the result of a termination agreement. It may happen that the player or the loan club unilaterally terminates the employment contract without just cause. In the event of the loan being unilaterally terminated, the consequences provided by article 17 of the FIFA RSTP apply. It must be noted that in these cases, the player is not obliged to move back to his/her club of origin before the end of the loan period, nor is the club of origin under the obligation to accept the player back before the expiry of such period: in the case CAS 2008/A/1593 ("*Kuwait Sporting Club v. Z. & FIFA*") stated that "*The Player's employment contract with FC Tallinn had been temporarily suspended by virtue of clause 11.2 of his employment contract with FC Tallinn ... Therefore FC Tallinn was under no obligation to accept the Player back during the period he was entitled to be contracted to the Club on loan. This position is corroborated by Article 10.4 (2) of the FIFA Commentary*".

[62] CAS 2014/A/3483, *S.C.S. Fotbal Club CFR 1907 Cluj S.A. v. Ferdinando Sforzini & Fédération Internationale de Football Association (FIFA)*, award of 31 March 2015.

3.3 Sub-loan transfers

A sub-loan occurs when a club that signed a player on loan transfers the player to a third club.

First and foremost, it must be noted that pursuant to article 10 paragraph 3 of the FIFA RSTP, the club with which the player is on loan needs the written authorisation of the player's club of origin in order to transfer the player to a third club. It goes without saying that any sub-loan also needs the consent of the player, who shall enter into an employment contract with the third club.

Furthermore, the period of the sub-loan must fall within the dates of the loan, and since any loan is subject to the same rules that apply to the permanent transfer of players pursuant to article 10, the sub-loan could only take place during an open registration period of the relevant football association of destination.

It must also be considered that according to article 5 paragraph 3 of the FIFA RSTP, unless the player moves between clubs with overlapping seasons, he/she may be registered with a maximum of three clubs during one season and is only eligible to play official matches for two clubs.

4. Economic entitlements of the player

The financial aspects of the employment agreement are conditions of utmost importance for the players. FIFA[63] and CAS[64] jurisprudence is unanimous in considering the club's obligation to pay a player's wages as its main obligation, in accordance with the principle of contractual stability. In case of failure, the injured party may refer the case to the competent body claiming the application of article 12-bis of the FIFA RSTP[65] or even compensation for early termination of the contract with just cause when the club's failure to respect its commitment reaches a certain gravity.

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[63] See FIFA DRC decision no. 113471/2012: "*late payment of remuneration by an employer does in principle constitute a "just cause" for the termination of an employment contract. Indeed, the club's payment obligation is its main obligation towards the player*".

[64] See CAS 2008/A/1447 *E. v Diyarbakirspor*, award of 29 August 2008. According to the Sole Arbitrator "*an employment contract which has been concluded for a fixed term can only be terminated prior to expiry of the term of the contract if there is "good cause", that is any circumstance, the presence of which means that the party terminated cannot in good faith be expected to continue the employment relationship. In this respect, the non-payment or late payment of remuneration by an employer does in principle constitute 'just cause' for termination of the contract for the employer's payment obligation is his main obligation towards the employee. If, therefore, he fails to meet his obligation, the employee can, as a rule, no longer be expected to continue to be bound by the contract in the future*". See also CAS 2012/A/2844.

[65] As indicated in the FIFA Circular no. 1468 dated 23 January 2015, "*the aim of this new article is clearly to ensure that clubs comply with their financial contractual obligations*".

4.1 Basic salary

The basic salary is the fixed remuneration, namely the amount paid to the player before any extras are added or taken off, such as a penalty or an increase due to bonuses and awards. The basic salary is the guaranteed income of the player for the length of the employment relationship with the club. The parties may agree to indicate it on the contract on a yearly, monthly or weekly basis, according to the common practice in that country, and also specify the date of payment of each instalment. The basic salary is also the basis for the calculation of the remaining value of the contract to award as compensation in case of breach.

4.2 Sign-on fees

A signing or sign-on fee is a sum of money paid by a club to a new player as an incentive to join the club. They are often granted as a way of making a compensation package more attractive to the player, especially if the player is an out-of-contract player. Sometimes, such payments are requested by players and used to pay the commission to the intermediary involved.

4.3 Percentage of the player's future transfer fees

Following the amendments to the FIFA RSTP implemented by FIFA in 2019, the compensation package negotiated between players and clubs can now also include a percentage of the player's future transfer fees.

As a matter of fact, in September 2014, the FIFA Executive Committee decided to ban so-called "third party ownership". Such decision was implemented by means of the Circular Letter 1464 of 22nd December 2014, which provided a definition of "third party", described as "*a party other than the two clubs transferring a player from one to the other, or any previous club, with which the player has been registered*".

Furthermore, the Circular Letter 1464/2014 introduced art. 18ter FIFA RSTP, which established a total ban on third party ownership. Art. 18ter paragraph 1 read: "*No club or player shall enter into an agreement with a third party whereby a third party is being entitled to participate, either in full or in part, in compensation payable in relation to the future transfer of a player from one club to another, or is being assigned any rights in relation to a future transfer or transfer compensation*". Such prohibition came into force on 1st May 2015 and remains valid and binding.

However, in June 2019, FIFA inserted into the FIFA RSTP a new definition of "third party", now described as "*a party other than the player being transferred, the two clubs transferring the player from one to the other, or any previous club, with which the player has been registered*". With this new definition of third party, FIFA has implicitly allowed players to receive a percentage of the compensation payable by a third club for their future transfer.

Such possibility represents a new interesting negotiation tool, both for clubs – which can now offer more attractive compensation packages or offer such participation in future transfer fees in exchange for lower salaries – and players – who can now be part of a highly remunerative market.

It must be noted that in order to safeguard the players' rights, it is advisable to also agree, together with such financial entitlement in favour of the player, a release clause, so that the occurrence of the relevant transfer (and the consequential financial benefit for the player) is not dependant on the arbitrary decision of the club to accept or reject an offer received from a third club.

4.4 Bonuses

A bonus is an extra amount of money paid upon the occurrence of a specific condition or conditions, normally linked to the achievement of certain sporting results.

Bonuses can be individual or collective. The 'individual' bonuses are linked to individual achievements, such as the number of goals scored by a player or the number of assists he provides. Sometimes, bonuses are foreseen by the parties in the contract for a fixed number of appearances[66] in official matches of the first team.

On the contrary, 'team' bonuses are linked to the sporting results of the team (win, draw, qualification to international tournament, domestic and international trophies). From a legal point of view, many disputes arise in relation to the date of payment of said bonuses (if not specified in the contract) or in relation to the right of the player to receive it in case he leaves the team before the end of the season or in the event that the player is deregistered or moved to the reserve team before the achievement of the relevant result. It is therefore good practice to foresee the consequences of such circumstances in the employment contract, in order to avoid possible disputes.

Doctrine and jurisprudence also debate on whether or not bonuses must be taken into account in the calculation of the compensation in case of breach of contract (see para. 6.5.2 V below).

4.5 Fringe benefits

Fringe benefits are additional to the basic salary that clubs pay to their players. Some fringe benefits are given to all the players of a team, while others may be offered only to those considered as top players and are provided for their general satisfaction.

In essence, clubs use fringe benefits to motivate players and convince them to join the club. In fact, the offer of a luxury villa, a driver, a car, fuel

[66] Generally, the presence is subject to the player participating in the game more than 45 minutes in an official match.

contribution, flight tickets, mobile phone, school fees, insurance, etc. may persuade a player to sign in favour of a specific club. Once again, the main issue is not only to establish their existence but also whether or not fringe benefits can be added to the basic salary in the calculation of the compensation due for breach of contract.

Separately, the player may also request the club to be liable for the player's previous commitments and debts to intermediaries or third parties (for instance to pay a bank loan issued in favour of the player in the past).

4.6 Acceleration clauses

The parties may agree to insert in an employment contract a clause specifying that certain obligations will become due immediately in the event of non-compliance with the payment schedule agreed.

These provisions are particularly common in settlement agreements by virtue of which the parties agree on the payment of a specific amount in a certain number of instalments. In order to safeguard the creditor's rights, acceleration clauses provide for an automatic mechanism that obliges the debtor to repay all of an outstanding amount in case of the debt's delay or failure to respect its obligations.

4.7 Bank guarantees

The parties may further agree to protect the economic rights of the player by ensuring the financial commitments of the club with bank guarantees. It represents an additional cost for the club and this request might be seen as a sign of lack of trust from the creditor. However, many clubs, especially from Asia, are ready to satisfy this demand if useful to complete the registration of a top player.

4.8 Penalties and interest for late payments

The parties may also negotiate a penalty clause which protects the creditor's interest in the fulfilment of the contractual obligations. The player is normally the party who requests the insertion of such clause, given his/her interest in the timely performance of the club's main obligation i.e. the fulfilment of the financial obligations agreed in the employment contract.

A penalty clause is a strong deterrent that encourages the club to fulfil its financial obligations towards the player.

The "deterrent" function of the penalty clause has been recognised by CAS jurisprudence: for instance, in CAS 2015/A/4139 ("*Al Nassr Saudi Club v. Trabzonspor FC*") where the Panel stated that "*Higher amounts are appropriate for penalties that are not only intended as liquidated damages but, in addition, prevent the debtor from breaching its contractual obligation in the first place (punitive function of a penalty clause)*".

Due to the fact that contractual penalties are not explicitly regulated in the FIFA RSTP, Swiss law applies in the majority of the contracts with an international dimension, defining the working functions of penalty clauses. In fact, disputes with an international dimension are brought to the appropriate judicial instances of FIFA and, in appeal, before the Court of Arbitration for Sport.[67]

Moreover, in addition to, or as an alternative to the penalty clause, the parties may agree to specify the interest rate to apply in case of a delayed payment.

Penalty clauses for non-compliance with the terms of the contract are common in cases related to football. Under Swiss law, contractual penalties are valid but the judge/arbitrator has the authority to reduce them if they are excessive. Notwithstanding the case-specific characteristics of contractual penalties, CAS Panels have determined some general criteria under which these penalties are considered excessive and when, and to what extent, they should be reduced.

Although the provision regarding the reduction of excessive penalties (Article 163 para. 3 of the Swiss Code of Obligations – "SCO") constitutes part of Swiss public policy, the principle of freedom of contracts dictates that such reduction should only apply when the penalty is unreasonable and flagrantly exceeds the amount admissible with respect to the sense of justice and equity.

In relation to the excessiveness of the penalty clause agreed for the unilateral termination of an employment contract, the CAS has clarified that if the amount does not go over the amount of the remuneration that the player would have earned had the employment relationship ended on expiry of its agreed duration, it is itself proportional[68] and it does not amount to an excessive commitment on the side of a club.[69] The same FIFA DRC case law accepted this reasoning.[70]

In other cases where the compensation amounted to the remaining value of the terminated contract and similar clauses were set forth, the Panel of CAS 2012/A/2910 ("*Club Eskisehirspor v. Kris Boyd*") considered that "*due to the explicit agreement of the Parties on the sum to be paid, and how such sum was to be determined, the Panel does not see a need to deduct any of the amounts that the Player has earned, after the termination of the Contract, with his new employer Portland Timbers (cf. CAS 2012/A/2775, c. 132)*".

Again, in CAS 2017/A/5056-5069 *("James Troisi v Al Ittihad FC & FIFA")* the Panel held as follows: *"The Panel agrees with this view and finds that, applying the above-mentioned test to the matter at hand, the 'non-payment clause' in clause 4 of the First and Second Employment Contract, (...) is not an excessive commitment from the side of the Club and is*

[67] For a detailed analysis of this matter, see D. Mavromati, *"How CAS deals with excessive contractual penalties in football"* published on 30 November 2016 on Law in Sport (www.lawinsport.com/topics/articles/item/how-cas-deals-with-excessive-contractual-penalties-in-football).

[68] CAS 2013/A/3374 *Al Ahli v David O'Leary.*

[69] CAS 2015/A/3999-4000 *De Souza v Al Ittihad & FIFA*.

[70] Amongst others, FIFA DRC n. 412739 of 26 April 2012, FIFA DRC n. 1111796/2011.

not invalid. On the contrary, the Panel considers such clause to be in accordance with Article 337 SCO and the principles enshrined in the Commentary to the FIFA RSTP. In this respect, the Panel considers it important that the Player was entitled to his remuneration on the basis of the First Employment Contract and this specific contractual clause does not create new obligations for the Club. There is no indication whatsoever that the Club and the Player had unequal bargaining powers on the basis of which the Club was 'forced' to accept such clause. Under these circumstances, the Panel finds that the relevant clause does not constitute an excessive commitment from the side of the Club".

Long-standing CAS jurisprudence has confirmed that parties can mutually agree the amount of the penalty and are free to deviate from the statutory regime contemplated in article 337(c) of the SCO, which provides for the *duty of mitigation* by the employee of his compensation, as long as the deviation is not to the detriment of the same employee.[71]

The same was confirmed by the Panel of CAS 2012/A/2775 ("*X. SC v H & FC Y*") who ruled that "*due to the agreement of the Parties on the sum to be paid, and how such sum was to be determined, the majority of the Panel sees no reason to deduct any of the amounts that the Player has earned after the termination of the Contract with his new employer FC Y*".

4.9 Taxation issues

An international transfer may cause various financial streams and another important matter to deal with when drafting an employment contract is taxation. This matter may generate many issues between the parties during the execution of the contract considering the specific tax ramifications, which sometimes have uncertain solutions.

The first issue to address is whether the amounts agreed upon in the employment contract should be considered as net or gross amounts. The salary is composed of two parts: the net amount to be paid to the player, and the corresponding relevant amount of taxes to be paid to the relevant tax authorities. The same structure works for bonuses and other financial entitlements in favour of the employee.

The best practice suggests to indicate in the employment contract whether the amounts agreed are net or gross. Unfortunately, this is not always the case. It might happen – even in high profile transfers – that parties agree on the term of the contract and the salary due but do not specify whether the amounts are to be considered net or gross. In these cases the jurisprudence of FIFA bodies and CAS can help.

Initially, the DRC had a stringent approach to this issue. As for the DRC decision n. 46831 dated 27 April 2006: *"monies must be considered to be payable*

[71] CAS 2013/A/3374 *Al Ahli Club v David Anthony O'Leary*, CAS 2015/A/3999-4000 *De Souza v Al ittihad & FIFA*.

gross, in the absence of a specific clause for the net". The more recent approach of FIFA bodies is however in favour of the opposite stance, which considers the amount as net, even in the absence of a specific clause, in order to guarantee the good faith of the employee, as confirmed by two DRC decisions issued in 2014.[72]

As to the CAS, the approach adopted over the years is similar to the last one adopted by FIFA: thus, also the CAS case law considers the amount indicated in the contract as net unless there is circumstantial evidence that qualifies the amount as gross.[73]

Another issue may arise if the wording of the relevant clause in the employment contract is not clear. In fact, it happens that parties have clearly agreed on the net of any amount indicated in the contract, by specifying literally after the amount due, the wording *"Net after Tax"*, but the contract does not clarify where (i.e., in which country) the relevant taxes must be paid by the employer. In these cases, the presumption is that taxes must be paid where the club is located, i.e. in the country where the employer has its seat. Unless it is clearly indicated otherwise by the parties, by specifically stating the obligation for the club to pay taxes not only in the country where the sports performance is due but also in the country where the player keeps his tax residence during the length of the contract. In such a case, the parties additionally attribute the final taxation liability exclusively to the employer, the club.

It is of utmost importance, during the negotiations, to identify the "planned" country of tax residence[74] of the player for the entire duration of the contract and check the Conventions for the avoidance of Double Taxation and Bilateral Tax Treaties between the interested countries (namely the country where the employer has its seat and the country where the employee has his fiscal residence). Obviously, if the player moves his residence to the same country of the club, no issue arises.

A further practical suggestion is to verify and possibly indicate in the employment contract the exact tax rate applicable in the country where the club has its seat and, thus, where it will pay the taxes.

Moreover, in order to protect the interest of the player, it should be added, among the contractual obligations of the employer, the regular and timely delivery of tax certificates.

A tax certificate is a document issued by the Tax Authority which show the exact percentages and amounts paid by the club as taxes on the amounts paid

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[72] As for the DRC Decision n. 0814747 dated 28 August 2014: *"..to preserve the good faith of the Claimant when signing.. and in the absence to any evidence to the contrary, the Chamber concluded that the amount therein established is to be considered as net"*. In the same sense, the DRC Decision n. 08143653 dated 20 August 2014*: "no mention in the contract, but net mentioned in the offe*r".

[73] See CAS 2007/A/1258 *Aris v. Sérgio Silva de Souza Júnior*, award of 23 October 2007*: "amount to be considered GROSS in case of 'circumstantial evidence'".*

[74] Taking into account the 183-day rule, in light of the principle which establishes the fiscal residence on the basis of a period of stay in a said country for at least six months plus one day. Obviously, by doing a year-by- year analysis/basis, considering the duration of the employment contract. As a consequence, the tax residence can change during the term of the contract.

to the player. Such document allows the employee to check whether the club has paid the taxes due and also to check if it did so at the "agreed/official" tax rate, looking at specific contractual provisions if any.[75] Additionally, by means of tax certificates the player can calculate the balance of the amount to be paid to the Tax Authority of his country of residence.[76]

Another issue related to taxation is linked to the compensation to be paid, in case of early termination of the employment contract. The question again is whether the compensation shall be paid net or gross, and the amount of taxes to be paid in each relevant country. Even in this case, the contract should contain a specific clause that clarifies the matter.

Looking at the jurisprudence of FIFA bodies, the general approach in the majority of cases is to declare a lack of competence on tax-related disputes. The question is: are such demands out of FIFA's sphere of jurisdiction? The answer is not unanimous.

Normally, FIFA bodies simply decide for a certain amount to be paid: it is up to the interested party to discharge the burden of proof in relation to such amount being net or gross. In particular, only if the interested party is able to provide: a) official documentation of the competent Tax Authority; b) clear evidence of the aggregate salary due; c) identification of the party which has the obligation to pay; d) proof of damages suffered by one party who had to pay taxes for the other; then FIFA can award net amounts in favour of the Claimant. This conclusion was adopted in two FIFA PSC decisions *(*see the FIFA Players Status Committee's decisions ref. 08122106 dated 15 August 2012 and ref. 0214242 dated 25 February 2014*)* and in a recent unpublished DRC decision dated 17 May 2018 whereby the Chamber highlighted the Player's failure to offer evidence of his tax residence in Spain and of the Club's obligation to pay a gross up compensation. Moreover, the

[75] Tax Certificates are really important even considering that the Club (Tax Payer) is in the position to sign Bilateral Agreements with the local Tax Authority in order to reduce the amount of Taxes due, and, obviously, the Tax Certificate shows the details of payment.

[76] As a way of example. If a Player from Italy and a Club from China sign a 2-and-a-half year deal for 2,000,000 EUR net per season. The contract is signed at end of July 2018. Before signing the contract, the Player gets info about the applicable Tax rate in China. The Tax rate is 45% but is not clearly indicated in the contract which only says "Net". The Club signs an agreement with the Local Tax Authority in order to reduce the relevant amount of taxes to be paid. For the year 2019, the Player has his Tax residence in Italy, considering that he will spend less than 183 days in China and, in any case, abroad his country. What is the applicable Tax rate in his country? More or less it is the same as China, namely around 45%. So he was sure to receive a net amount for the first year, as agreed with the Club. Nevertheless, which amount the Club has paid as Taxes to the Local Authority? The percentage of the applicable tax rate is not indicated in the contract and there is the possibility of the Club to make aa agreement on a different rate with the local tax authority. Only looking at the Tax certificates is possible discover exactly which amount, in reality, has been paid. Problems may arise in case the Club actually made a deal with the local Tax Authority (for instance, it paid taxes at a rate of 15% or 20% instead of the normal one of 45%), thus, obliging the player to pay the balance of taxes (around 25%) to the Italian Tax Authority on his incomes concerning the year 2019 earned in China while – during the negotiations and at time of signature of the employment contract – he was sure the get a net amount.

DRC clarified that the requested gross up compensation could not be awarded to the Player since "*the Claimant did not put it in a position in order for the Chamber to be able to proceed with the gross up of the due amounts. Nevertheless, in the DRC's view, the Respondent is liable for the payment of the due amounts net of any taxes, as per the clear wording of the settlement agreement*".

Another interesting FIFA DRC decision (nr. 1114815 dated 27 November 2014) deserves to be mentioned. Going briefly into the case, a Chinese Club and a foreign player signed an Employment Agreement, with financial entitlements in favour of the Player agreed as NET. The Parties further signed a Termination Agreement in order to put an early end to the contract, establishing an amount of EUR 500,000 as compensation to be paid within the term of 1 month. The Chinese Club only paid to the Player an amount of around EUR 260,000 arguing that the balance with the fixed compensation (around 240,000) was retained in light of the Chinese provisions of personal income tax legislation. The Player referred his case to the DRC, which accepted it and specified that: "*the Chamber took note that the amount of EUR 223,135.12 had been retained by the Respondent in order to comply with its obligation to pay taxes over the compensation due to the Claimant. In this respect, bearing in mind the legal principle of burden of proof, the DRC considered that the Respondent did not provide any documentation pertaining to its alleged obligation to deduct taxes from the amount payable as compensation. In addition, such deduction was not stipulated in the contract which provides for net amounts as per article 4.5 of the contract. Consequently, the Respondent's argument could not be upheld*" and the amount agreed in the Termination Agreement had to be considered as net.[77]

[77] See also the FIFA PSC decision nr. 01180678 dated 23 January 2018 (available at link https://resources.fifa.com/mm/document/affederation/administration/03/01/01/19/01180678-e.pdf). A Chinese Club and an Italian Coach signed an employment contract, with financial entitlements in favour of the Coach agreed as NET. Coach kept his tax residence in Italy for the entire duration of the Contract *(1 year and a half)* and in spite of the fact that he was earning his salary abroad. Club sacked the Coach for "poor performances" of the Team at beginning of the second sporting season. Since the signature of the contract and till the unilateral termination, the Club paid net amounts to the Coach and timely delivered him the Tax Certificates with clear indication of the applicable Tax rate (43%) as well as of the exact figures paid as taxes. Following his dismissal, the Coach referred the case to the PSC, providing FIFA with full evidence on the Tax issues, a legal opinion of an expert on Chinese Taxation, an explanation on the "RMB currency repatriation rule", as well as copies of all the TAX certificates paid by the Club till the termination. The Claimant clearly underlined to FIFA the financial commitments of the Respondent (to pay salary as Net to the Coach; and to pay taxes at 43% to the Authority) and therefore claimed a gross-up amount as compensation for the breach. PSC partially accepted the Claim of the Coach by deciding the following: The Chinese Club terminated the contract without just cause, thus it was liable to pay a compensation to the Coach equals to the economic residual value of the existing contract; at Para. 23 specified - *"Furthermore, as to the Claimant's request to be awarded such compensation in a gross amount in order to proceed with the payment of the relevant taxes in Italy, the Single Judge considered that he was not in position to decide upon the parties' obligations under the relevant tax law vis-à-vis the relevant*

As well as the FIFA bodies, CAS has also dealt with the topic of the net or gross nature of compensation due for breach of contract.

In CAS 2005/A/909-910-911-912 ("*Giuseppe Materazzi & Giancarlo Oddi v. Tianjin Teda*"), two Italian Coaches claimed the refund of the taxes paid on the salaries received, which according to the employment contract should have been paid net. The Coaches claimed that the relevant tax rate was 45%. The Panel confirmed the decision issued by FIFA at first instance: in lack of a formal decision issued by the Tax Authorities, no refund of taxes was payable by the Club. Only upon receiving the decision from said Authorities, the employees' request for refund was possible.

In CAS 2006/O/1055 ("*Del Bosque, Grande, Miñano Espín & Jiménez v. Beşiktaş*") the Parties agreed to a specific, clear and well-written clause.[78] By virtue of this clause, the Parties specified for each year of the contract, the possible scenario depending on whether the residence of the Coach was in Spain or Turkey. In other words, in Del Bosque's case, the contract between the Parties provided for the applicable tax rate. Thus, a gross compensation was awarded by the Panel.

In CAS 2015/A/4055 (*"Victor Javier Anino Bermudez v. Club Elazigspor Kulubu"*), the Panel awarded a gross compensation for the unilateral termination of the employment contract without just cause, even in the absence of

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tax authorities. As such, the Single Judge did not consider himself in a position to make the gross up of any amounts. Nevertheless, in the Single Judge's view, the Respondent is liable for the payment of the above mentioned compensation net of any taxes, as per the Respondent's previous conduct and the clear wording of the contract and the annex"; and ordered the Club to pay the compensation as "Net of Taxes", in Point 2 of the Findings of the Decision.

[78] The clause referred was written as follows: "*C) TAX MATTERS. As a consequence of the payments (salary and bonuses) being free of taxes according to this agreement, the Club shall gross up the amounts to be paid taken into consideration the tax residence of the Coach. In this sense: C. 1) Considering the Spanish tax regulations, a tax rate of 45% shall be applicable to the net amounts fixed in paragraphs A) and B) to be paid during 2004. Consequently, the Club shall gross up the amounts stated in this agreement so that after deducting the tax rate of 45%, the net amounts fixed in paragraphs A) and B) are the result. C. 2) The amounts fixed in paragraphs A) and B) to be paid during 2005 shall be calculated considering the tax regulations of Turkey, as the Coach will be considered as a tax resident of Turkey. Consequently, the Club shall gross up the amounts fixed in paragraphs A) and B) taken into consideration the tax rate stated in the applicable legislation in Turkey. The Coach will do his best efforts to be considered as tax resident in Turkey for the fiscal year 2005. C. 3) The amounts fixed in paragraphs A) and B) to be paid during 2006 shall be calculated taken into consideration the tax rate of 45% as stated in the Spanish legislation. Consequently, the Club shall gross up the amounts fixed in paragraphs A) and B) taken into consideration the tax rate of 45% or the tax rate stated in the applicable legislation in Spain in 2006. During 2004 and 2006, according to the Tax Treaty to avoid double taxation between Spain and Turkey, the Club shall withhold the non-residents tax and provide the Coach the documents certifying the withheld figure of this tax. As a consequence to the former the Club shall pay the Coach the net amounts agreed upon, plus the difference between the applicable Spanish tax rate (45%) and the tax rate applicable to the non-residents according to the Tax Treaty to avoid double taxation between Spain and Turkey. Without prejudice to what is stated in this clause, the parties commit themselves to study other alternatives to structure and plan their respective tax obligations arising from this contract for a period of two (2) weeks from the date in which this contract is signed".*

a specific clause in the contract. The reasoning of the Panel was to adhere to the CAS precedent of the Del Bosque case, even if in the specific employment agreement there was no provision governing the tax issue in an explicit manner, except for the clear indication of net payment. In essence, in the Panel's view, since the parties had agreed on the payment of a net remuneration, then taxes were to be added to the total sum owed.

The key points of this approach are: a) the non-defaulting party must be put in the position he would have been in, had the employment contract in effect continued; b) at least a provision in the contract for net amounts is required; c) adequate evidence of the tax residence of the player in a country in that specific year must be demonstrated; d) clear proof of the applicable tax rate in the said country through a Tax/Legal Opinion can facilitate the task of the Panel; e) absence of any convincing counterevidence from the club on this point.

There are some other peculiarities concerning taxation, linked to image rights agreements, evasion on term, and repatriation of funds.

In particular, as to the image rights agreements, it is now common practice for employers, in order to pay smaller amounts of taxes, to propose to players the conclusion of 'Image Rights Agreements', in order to deduct a significant part of the salary from the taxable amount. In fact, these agreements are subject to a different (and more lenient) taxation or are even tax-free in some countries. This practice is common in the European and Chinese markets. FIFA bodies, as a general approach, do not consider said contracts to be under their competence. Sometimes these agreements are not even concluded by the club but rather by a private company subsidiary to the club. Very often, these contracts are not filed by the club with the relevant national association: in this way, the club manage to do not consider the relevant amounts for the purposes of club licensing and for other financial controls imposed by the relevant football association. However, this practice constitutes a serious risk for the employee, given that, in case of early termination of the contract, the player is not protected by the remedies offered by the sporting dispute resolution system.

The 'Evasion on Term' is a fraudulent practice called the "11-month rule", which consists of an evasion on the natural term of multi-year employment contracts of high value. The aim of the club is to be subject to a lower tax rate instead of the official one. This practice is frequent in Japan, not only in football but also in other sports, such as baseball. In particular, it consists of a mis-interpretation and mis-application of the relevant local tax laws, by offering to foreigners 11-month term sub-agreements in presence of a multi-year contract. This expedient might entail a relevant reduction of the taxation.

Finally, in some countries, foreign employees might find it difficult to transfer the money earned to their own countries. In China, for instance, concerning the so-called 'Repatriation of Funds', it is very difficult for the employee to exchange Chinese Currency (RMB) into Foreign Currency (EUR, USD, GBP, etc.) and thus transfer abroad the funds earned in China. The transfer is authorised by the

bank only if the employee is able to provide the relevant Tax Certificates which indicate the amount of taxes paid. This is another good reason to contractually bind the club to delivering the relevant Tax Certificates upon the payment of each monthly salary.

4.10 Currency devaluation

A crucial point when drafting an employment contract involving foreigners is the proper indication of the currency agreed by the parties during the negotiations, as well as a clear specification of the payment structure.

It is not unusual for players to negotiate and, thus, agree to accept a job offer in one of the main currencies of the world, namely in Euros, American dollars or GBP. Nevertheless, it may happen that in a certain country[79] the payment in such a currency is not allowed by the local system and, therefore, the corresponding amount in the local currency must be paid by the club to the bank account of the player. In these cases, it is essential to agree on a salary paid in the local currency, in the amount equal to the amount agreed in one of the main currencies (e.g. "an amount of rupees equal to 100,000 USD, calculated at the moment of the payment being due"). What should be avoided, is the indication of a fixed exchange rate and exchange costs. What should be inserted is a clause which clarifies that – in spite of the currency fluctuation – the corresponding "amount in the main currency" is always guaranteed.

As a matter of fact, in order to prevent issues linked to currency devaluation, namely to a deliberate downward adjustment of the value of a country's currency against another currency,[80] it is of utmost importance to avoid any "pre-agreed or fixed in advance" exchange rate which allows the club to pay at a certain exchange rate the figures in the local currency calculated on the amount negotiated and agreed in one of the main currencies. The best practice is always to refer to the official exchange rate, as established, day by day, by the Central Bank of the country where the club has its seat, in order to reflect the correct value of the local currency during the entire duration of the contract.

5. The law applicable to employment agreements

During the negotiations of employment agreements, it is vital that the parties identify the relevant legal framework in order to draft an agreement in compliance with the applicable laws and regulations and safeguard the respective interests in the best possible way.

[79] Russia, for instance.

[80] Devaluation is a tool used by monetary authorities to improve the country's trade balance by boosting exports at moments when the trade deficit may become a problem for the economy. However, even the approval of embargo and other international sanctions may aggravate the local context.

According to the Circular Letter 1171 issued by FIFA in 2008, when concluding an employment contract parties have to take into account the following rules: (a) national legislation and in particular any mandatory provisions; (b) collective bargaining agreements, if applicable; (c) the regulations of FIFA, including the Code of Ethics, the Confederations, the Member Associations and Professional Leagues (if applicable), which are the Statutes, Regulations and Decisions of these bodies.

Despite such a comprehensive listing, from a practical point of view the FIFA RSTP together with the domestic football regulations and the collective bargaining agreements (if applicable) have the greatest impact on employment contracts. It is strongly advisable, before starting the negotiations, to identify the applicable rules and take them into account at all times during both the negotiations phase and the performance of the contractual obligations.

5.1 The impact of national law v FIFA regulations

Pursuant to article 2 of the FIFA Rules Governing the Procedures of the Players' Status Committee and the DRC, "*In their application and adjudication of law, the Players' Status Committee and the DRC shall apply the FIFA Statutes and 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*". Thus, when deciding an employment-related dispute before the DRC, the FIFA Statutes and regulations are primarily applicable. However, the adjudicatory body shall also take into account the laws and regulations of the country concerned.

Pursuant to the FIFA Commentary, the deciding body has a certain amount of discretion as to how the guidelines provided by article 2 shall apply.[81] In any case, by the wording of article 2 of the FIFA Rules Governing the Procedures of the Players' Status Committee and the DRC, it appears clear that FIFA's regulations prevail over any national law that may be applicable to a particular case.

What is more, the DRC has sustained that FIFA's regulations prevail over any national law also when the latter has been specifically chosen by the parties. In particular, the DRC emphasised that the main objective of the FIFA regulations is to create a standard set of rules to which all the actors within the football community are subjected to and can rely on. This objective would not be achievable if the DRC had to apply the national law of a specific party to every dispute brought to it.[82]

The supremacy of FIFA regulations over domestic laws appears to clash with article 22 of the FIFA RSTP, which explicitly allows players and clubs to refer employment-related disputes to domestic civil courts: as a matter of fact,

[81] FIFA Commentary on the Regulations for the Status and Transfer of Players, comment under article 25.

[82] DRC 9 February 2017, no. 02171603, DRC 15 October 2015, no. 1015863.

such courts would be most likely to primarily apply domestic employment laws. Nonetheless, such principle has been consistently applied by the DRC.

In an interesting FIFA DRC decision (no. 0516963 of 26 May 2016), a club concluded an employment contract with a player in the form provided by the relevant football association. At a later time, the parties concluded an addendum to such employment contract, disregarding the mandatory formal requirements requested by the domestic collective bargaining agreement for employment contracts and their possible addenda to be valid.

Despite the fact that pursuant to the applicable regulations the non-compliance with such formal requirements made the addendum null and void, the DRC pointed out that FIFA's regulations prevail over any national law chosen by the parties, and concluded that the agreement was valid since "*the validity of a contract or of an amendment to a contract cannot be made conditional upon the execution of (administrative) formalities, such as, but not limited to, the registration procedure".* This decision appears relevant in light of the mandatory nature, for the validity of the contract under the internal laws and regulations, of the requirements that the DRC qualified as "*(administrative) formalities*".[83]

5.2 Impact of article 17 RSTP with regard to the applicable law

Article 17 FIFA RSTP provides the consequences of a unilateral termination without just cause of an employment contract and specifically states that unless otherwise provided for in the contract, compensation for the breach of the employment

[83] DRC 26 May 2016, no. 0516963: the case revolved around an employment contract drafted on the template provided by the *Italian Lega Nazionale Professionisti* (LNP). The core Italian law for this purpose is L. 91/1981, titled "Rules concerning the relations between clubs and professional sport players". In particular, pursuant to Article 4 para. 1 of L. 91/1981: "*The professional relationship between a player and a club originates from an employment contract in writing, according to the contract template drafted in compliance with the agreement reached every three years between the national sport association and the stakeholder, otherwise it shall be considered null and void*". This provision explicitly refers to the Accordo Collettivo, the *collective bargaining agreement* between each national sport association and the stakeholders. The obligation to draft employment contracts in compliance with the collective bargaining agreement has been also enshrined in the FIGC regulations. In particular, according to Article 93, paragraph 1 of the FIGC Rules: "*The contracts governing the financial and legal relations between clubs and professional players or coaches, must be consistent with the forms provided by collective bargaining agreements with the relevant unions and drafted on forms provided by the relevant League*". As a result, only employment contract drafted on forms provided by the relevant league are valid. The absence of such requirement makes the additional agreement null and void. Subsequently, the club and the player have the responsibility to file these documents with the LNP, which transmits them to the FIGC for approval. Only once it has been approved by the FIGC, may the contract and its addenda be considered binding upon the parties. In the case at stake, the parties did not draft the relevant employment contract in compliance with the agreed form nor it was filed with the LNP, and therefore it resulted null and void. Contrary to the clear wording of Italian laws and regulations, the DRC considered the lack of the requirement for the so-called *forma ad substantiam,* as a mere lack of "(administrative) formalities" which cannot affect the validity of a contract.

contract shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria.

Therefore, in case of claims for compensation brought before FIFA, together with the other criteria listed by the FIFA RSTP, the DRC shall take into account all relevant arrangements, laws and/or collective bargaining agreements that exist at national level, when establishing the compensation amount due**.** It must be clarified that according to the FIFA Commentary,[84] the reference to the laws existing at national level refers to the laws of the country where the club is domiciled.

However, the DRC does not consider the domestic applicable laws and regulations as decisive. According to the stance adopted by the DRC on this point, it is in the interest of football that the termination of contract is based on uniform criteria rather than on provisions of national law that may vary considerably from country to country. Therefore, it would not be appropriate to apply the principles of a particular national law to the termination of the contract but rather the FIFA RSTP, general principles of law and, where existing, the DRC's jurisprudence.[85]

The prevalence of the FIFA regulations over national laws has also been confirmed by CAS, which has acknowledged that the diverse substantive laws governing employment relationships amongst the FIFA member associations make it difficult to balance the interaction between national laws and the FIFA RSTP, particularly when clubs attempt to rely on usually more favourable national laws to ground their submissions in front of the FIFA legal bodies.[86] As a result, FIFA regulations shall always be applied primarily, while the domestic law chosen by the parties shall only be "considered at all times".

The stance adopted by FIFA in relation to the accessory role played by national laws under article 17 was partially amended in the FIFA RSTP adopted in 2018.

On 23 May 2018, FIFA updated its RSTP. This new version of the RSTP came into force on 1 June 2018 and introduced changes to several articles. Among others, article 17 was amended and a new provision was inserted under paragraph 1, which refers to the calculation of the compensation due to a player. The new provision states that "*collective bargaining agreements validly negotiated by employers' and employees' representatives at domestic level in accordance with national law may deviate from the principles stipulated in the points i. and ii. above. The terms of such an agreement shall prevail*".

In light of this new provision, in the calculation of the compensation due to a player, the adjudicating body shall primarily apply domestic collective bargaining agreements.

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[84] FIFA Commentary on the Regulations for the Status and Transfer of Players, comment under article 17.

[85] DRC 27 February 2014, no. 02142147.

[86] CAS 2015/A/4152.

6. Termination

6.1 Introduction

The provisions concerning the termination of a contract between a football club and a football player are provided under section IV of the FIFA RSTP, which is titled "*Maintenance of contractual stability between professionals and clubs*".

It is worth emphasising that the principle of the maintenance of contractual stability represented the core of the agreement concluded between FIFA and the European Commission in March 2001, which is at the basis of the FIFA RSTP. As a result, the maintenance of contractual stability constitutes a cornerstone of professional football, upon which the whole discipline of employment contracts revolves around.

As a general rule, a contract between a professional player and a club can only be terminated upon expiry of the term of the contract, considering a contract between a player and a club shall always be stipulated for a predetermined period of time (cf. article 18 para. 2 FIFA RSTP) or by agreement between the parties: thus, only upon the expiry of the term of the contract, or in the event of termination of the contract by mutual agreement, are the parties no longer bound by the contract, and the player is free to sign with a new club with no need for the approval of the counterparty.

This basic principle, enshrined in article 13 of the FIFA RSTP, might appear self-evident and irrefutable, since it simply reflects general principles of contractual and labour law. However, it must be noted that it has only been since 1995, with the Bosman ruling,[87] that out-of-contract football players have been considered free to move to clubs within the EU without the requirement of a transfer fee.[88]

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[87] Bosman ruling: European Court of Justice, *Union Royale Belge des Sociétés de Football Association ASBL & others v. Jean-Marc Bosman*; Case C-415/93, ECR I-4921 (1995).

[88] Before the Bosman decision, football players could only move from one club to another when the two clubs were in agreement to this, and transfer fees applied regardless of whether or not a player was still under contract with the first club. As a result, the only way for a player to transfer from a club to another was upon the payment of a transfer fee or in the event of free transfer: in both cases the approval of his former club was necessary.The Bosman case arose exactly because a Belgian professional footballer, Jean-Marc Bosman, after the expiry of the employment contract with his club, wanted to sign with another club based in another European Union Member State. The club that held his registration intended to release him only against payment of a transfer fee, which the second club was unwilling to pay. Mr Bosman brought the case before the European Court of Justice, which eventually found that transfer fees for out-of-contract players were illegal when a player moves within the European Union Member State. This principle was eventually implemented in the FIFA RSTP and restrictions on out-of-contract players were lifted. The Bosman case had an extremely substantial impact on the regulatory framework of football international transfers. In light of such decision, FIFA and the European Commission agreed on the main principles for the amendment of the FIFA's rules. Such discussions resulted in the 2001 edition of the FIFA RSTP, which came into force on 1 September 2001.

The principle of contractual stability was key to the new regulations.[89]

In order to strengthen such principle and the "sanctity of the contract", the FIFA RSTP provides stricter consequences in the event of a breach occurring during the initial period of a contract, which, for this reason, is called the "protected period".

The regulatory framework provided by section IV of the FIFA RSTP therefore abides by a strict application of the principle *pacta sunt servanda*, according to which contracts must be respected. However, the application of this principle is not absolute.

As a matter of fact, the regulations provide under article 14 the possibility to lawfully terminate the employment contract without compensating the other party in the event of termination with "just cause". The concept of just cause, and whether just cause exists, needs to be assessed on a case by case basis. To this end, the jurisprudence of the FIFA DRC is central. Nonetheless, the FIFA RSTP explicitly regulates two specific cases of just cause: the termination of a contract with just cause for outstanding salaries under article 14-bis, and the so-called "sporting just cause" under article 15.

For any case of termination without just cause, article 17 applies. This article provides specific indications in relation to the consequences of terminating a contract without just cause. In particular, this article reflects the general principle of contractual law according to which a party in breach of a contract shall pay compensation to the counterparty. As a result, article 17 establishes the obligation for the defaulting party to pay compensation and indicates the criteria that shall be used in the calculation of the compensation due: "*compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period*".

As to the criteria to establish whether just cause exists or not, and the criteria to calculate the compensation due in case of unilateral termination without just cause, FIFA initially opted for an open approach and did not provide a clear and unequivocal answer in its regulations, leaving room for the deciding bodies to create their own jurisprudence on the matter. However, in April 2018 FIFA amended its regulations by means of the Circular Letter 1626,[90] and the new version of the FIFA RSTP gives more indications on both matters (see below).

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[89] FIFA clarified such circumstance in the Circular letter no. 769, whereby it is stated: "*Contractual stability is of paramount importance in football, from the perspective of clubs, players, and the public*".

[90] Available at https://resources.fifa.com/image/upload/1626-68th-fifa-congress-moscow-2018-handling-of-daily-allowances-for-delegates.pdf?cloudid=b7x3zsctsot1j0e0fvga.

Finally, it must be underlined that together with the maintenance of contractual stability, another principle that is essential in the legal framework provided by section IV the FIFA RSTP is the principle of reciprocity. According to this principle, irrespective of whether the defaulting party is a player or a club, the same behaviour shall, *mutatis mutandis*, lead to the same consequences.[91]

6.2 Mutual agreement

The employment contract between a club and a football player can be terminated, like any other contract, by the mutual consent of the parties.

In practice, parties mutually terminate employment contracts by means of a specific termination agreement, whereby they regulate the terms and conditions of the termination.

The FIFA RSTP requires a written form for employment contracts under article 2, para. 2, but do not specifically provide any indication in relation to the form of termination agreements.

In a decision of 13 October 2010, the DRC recalled the general principle of the burden of proof, according to which a party claiming a right based on an alleged fact, shall carry the respective burden of proving such fact. In particular, in relation to the alleged conclusion of an agreement aimed at terminating the employment contract existing between the parties, the DRC concluded that "*in order to validly conclude a termination agreement, an accordance of the will of two parties is required and that such will is represented in each party's signature to the respective document. Since, in the case at hand, the Respondent could not provide such termination agreement or any other pertinent documentation, which would have had to be duly signed by each party, the Chamber deemed that the Respondent could not provide sufficient proof as regards the alleged conclusion of a termination agreement*".[92]

As to the negotiations, according to the jurisprudence of the DRC the mutual termination of an employment contract is admissible only when both parties freely negotiate the terms of the termination, in a manner that is not the result of a unilateral command by only one party to the other.[93] Thus, the freedom of the parties lies at the basis of any termination agreement. Such circumstance is essential in light of the content of the termination agreement: in particular, by means of this agreement parties shall specify precisely the terms and conditions under which they accept the termination of the employment contract, and shall deal with the parties' accrued rights and liabilities and solve any other issue that may arise from the termination of their contract. As a result, the validity of the consent given to the termination agreement is essential.

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[91] O. Ongaro, *Maintenance of contractual stability between professional football players and clubs – the FIFA regulations on the Status and Transfer of Players and the relevant case law of the dispute resolution chamber*, in *Contractual Stability in football*, SLPC, 2011, 33.

[92] DRC 13 October 2010, no. 10102000.

[93] DRC 10 June 2004, no. 64132.

Finally, it must be emphasised that also for termination agreements, the DRC confirmed the general principle according to which a party signing a document of legal relevance without knowledge of its precise contents, does so on its own responsibility.[94]

6.3 Unilateral termination with just cause

Pursuant to article 14, para. 1 FIFA RSTP, "*A contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause*".

First and foremost, it must be clarified that only the party that terminates the contract with just cause does not suffer consequences. On the contrary, once the just cause has been ascertained, the defaulting party is required to compensate the counterparty for the damages suffered as a consequence of the early termination of the contract and, under specific circumstances, sporting sanctions may be imposed. In other words, when a party terminates the employment contract with just cause, this automatically means that a breach of contract without just cause has been made by the counterparty, which needs to be sanctioned accordingly.[95]

The possibility to terminate the employment contract with just cause, shall be considered as a *lex specialis* to the general principle provided by article 16 FIFA RSTP, according to which a contract cannot be unilaterally terminated during the course of a season. Such principle represents a cornerstone of the FIFA regulatory system, which not even the contractual freedom of the parties can supersede: as a matter of fact, the DRC has declared invalid contractual clauses entitling the club to unilaterally terminate the contract at any point in time.[96] As a result, a party is only entitled to unilaterally terminate the contract at any time, i.e. also during the course of a season, if there is just cause.

Article 14 FIFA RSTP reflects the general principle of law according to which one party can terminate a contract if the counterparty violates the agreement, and such breach does not reasonably permit the continuation of the contractual relationship between the parties.

As a matter of fact, lacking a general definition of "just cause" in the FIFA RSTP, CAS Panels have investigated the extent of the concept of just cause by applying Swiss law: "*The FIFA Regulations do not define when there is such "just cause". One must therefore fall back on Swiss law. Pursuant to this, an employment contract which has been concluded for a fixed term can only be terminated prior to expiry of the term of the contract if there is*

[94] DRC 14 August 2013, no. 08132573, DRC 10 July 2013, no. 0713775.
[95] O. Ongaro, *Maintenance of contractual stability between professional football players and clubs – the FIFA regulations on the Status and Transfer of Players and the relevant case law of the dispute resolution chamber*, in *Contractual Stability in football*, SLPC, 2011, 34.
[96] DRC 2 November 2007, no. 21113.

"good cause" (see also ATF 110 I 167). In this regard Art. 337(2) of the Code of Obligations (CO) states – in loose translation: "Particularly any circumstance, the presence of which means that the party terminated cannot in good faith be expected to continue the employment relationship, is deemed to be good cause". The courts have consistently held that a grave breach of duty by the employee is good cause (ATF 121 III 467; ATF 117 II 72). Such a grave breach is particularly given if the employee fails to fulfil his obligation to render his services (ATF 121 III 467)".[97] In light of the above, the CAS Panels have consistently held that a grave breach of duty by the employee constitutes good cause.

This principle is also applicable to employment contracts between clubs and football players, given that they are always concluded for a fixed term: in fact, article 18 para 2 of the FIFA RSTP specifically states that the minimum length of the employment contract shall be from the date of its entry into force until the end of the season, while the maximum length shall be five years (three years for minor players).

According to Swiss case law, whether there is "good cause" for termination of a contract depends on the overall circumstances of the case, and particular importance is given to the nature of the obligation: the existence of a valid reason has to be admitted when the essential conditions under which the contract was concluded, are no longer present. This principle also applies to football-related disputes. However, given the unilateral termination of an employment contract is the most severe penalisation in contractual relationships, it should be applied as *extrema ratio* only, for very serious breaches. By applying the principles borrowed from Swiss law, the breach of the employment contract shall be considered to be of a certain severity when it does not reasonably permit an expectation of the continuation of the employment relationship between the player and the club,[98] such as a serious breach of confidence.

In light of this, it appears clear that it is not possible to provide a complete list of concrete circumstances that constitute just cause, but each case needs to be assessed individually, on a case-by-case basis. The deciding body shall therefore analyse the case and ascertain whether the conduct of the defaulting party is serious enough to justify the unilateral termination of the contract by the counterparty.

Parties to an employment contract are also allowed to agree upon the right to unilaterally terminate the employment relationship upon the occurrence of specific circumstances. In this regard, it must be noted that contractual freedom is not absolute: contractual provision under which a party is allowed to unilaterally terminate the employment contract at will, is to be considered as unilateral and

[97] CAS 2006/A/1062 *Da Nghe Football Club v. Ambroise Alain François Ndzana Etoga*.
[98] DRC 30 September 2016, no. 09160049, CAS 2015/A/4152 *Cerro Porteno v. Roberto Antonio Nanni & FIFA*, CAS 2008/A/1517 *Ionikos FC v. C.*, CAS 2006/A/1180 *Galatasaray SK v. Frank Ribéry & Olympique de Marseille*.

potestative, and therefore contrary to the regulations of FIFA. Such stance has also been confirmed by the CAS. For instance, in CAS 2016/A/4852, the Panel observed: "*Article 5.10 of the Agreement states as follows: The club has the right to inform the player in writing to terminate the contract between them at the end of the season during its validity within fifteen days after last national official match for the club. In this case the player does not deserve any compensation for the rest of the period of the contract the player will receive his financial dues up to the end of the contract". 70. Bearing in mind the purpose of Article 17 RSTP, the Panel considers the clause to be unilateral and potestative, for the benefit of the Appellant only and is therefore contrary to the regulations of FIFA. The Appellant is not at liberty to unilaterally terminate the Agreement at will and can only do so without consequence if there is just cause. This finding is in line with the established jurisprudence of the CAS (see CAS 2014/A/3675, para. 57, CAS 2005/A/983 & 984 and CAS 2008/A/1517). The Panel therefore fully accepts the finding of the FIFA DRC which deemed Article 5.10 of the Agreement null and void. Hence, Article 5.10 cannot be arbitrarily or validly invoked as a legal basis for a unilateral termination of the Agreement*".[99]

6.3.1 Reasons invoked by clubs for the unilateral termination with just cause

The jurisprudence of FIFA and CAS has over time dealt with different cases in which parties justified the unilateral termination of an employment contract with the existence of a just cause. As to the reasons put forward by clubs to justify the alleged just cause, several circumstances have been invoked.

6.3.1.a Poor performance or lack of commitment

The DRC clarified that, regardless of any different agreement of the parties, the player's poor performance does not constitute just cause for a club to unilaterally terminate an employment contract. In particular, the DRC considered that the contractual clause which entitles the club to unilaterally terminate an employment contract for the player's lack of performance, is of a potestative nature and therefore is not valid.[100] As a matter of fact, the assessment of the performance of a player is a subjective perception which could not be measured on an objective scale, and therefore has to be considered as inadmissible grounds for a premature termination of an employment contract.[101] This stance has also been confirmed by the CAS.

[99] See also: CAS 2014/A/3675 *Talaea El Gaish Club v. Dodzi Dogbé*.
[100] DRC 28 July 2005, no. 75975.
[101] DRC 17 June 2016, no. 06161109, DRC 2 November 2007, 1176975, DRC 23 June 2005, no. 65657.

In the case CAS 2016/A/4549 ("*Aris Limassol FC v. Carl Lombé*"), the Panel reaffirmed the principle according to which "*the concept of "poor performance" is principally a subjective concept and that a clause entitling a club to terminate a contract for "continued poor performance" is therefore in principle potestative and would constitute an unacceptable disparity between the termination rights of the player and the club*". However, the adjudicating body left the door open for non-arbitrary evaluations of the players' performances for the purposes of premature termination of employment contracts: "*although the Panel accepts that the concept of "poor performance" is generally a subjective concept which would be invalid, it is not maintained that an employment contract can never be terminated for "poor performance", particularly not if the parties agreed on this ground for termination in the employment contract and the continuous poor performance has somehow been objectively established in an objective fashion, i.e. without influence of the Club. The circumstances under which such a termination can be upheld are however extremely limited, if not only theoretical*".[102]

The consistent stance adopted by the DRC in relation to the invalidity of potestative clauses is not, however, absolute.

In an interesting decision, the DRC gave precedence to the contractual freedom of the parties over such principle, and accepted a contractual clause that granted the club the possibility to terminate the employment contract at the end of each season, should the player have not played a specific number of matches.[103]

The DRC was of the opinion that the clause offered the opportunity for the club to misuse its position and unilaterally terminate the contract, simply by preventing the player from participating in a number of matches sufficient to trigger the termination clause. The DRC also considered the lack of reciprocity for a premature termination of the contract by the player. However, the DRC was of the opinion that it was important to consider that the termination clause was restricted to be triggered only at the end of the season, which provided the player with some legal certainty and stability. In addition, the DRC emphasised that the relevant clause was explicitly accepted by both parties when they signed the contract. Thus, in light of such circumstances, the DRC concluded that the clause was acceptable and the unilateral termination of the contract was confirmed.

However, it must be noted that the consistent stance adopted by the DRC that a club cannot unilaterally terminate the contract due to the player's poor performance, does not apply when the performance considered is that of the collective. In particular, the jurisprudence acknowledged the validity of contractual clauses that make the termination of the employment contract conditional upon the teams' failure to achieve a specific result,[104] or upon the relegation of the club

[102] CAS 2016/A/4846 *Amazulu FC v. Jacob Pinehas Nambandi & FIFA & National Soccer League South Africa*.
[103] DRC 4 February 2005, no. 25247.
[104] DRC 2 November 2007, no. 117466.

to a lower division.[105] In these cases, the relevant contractual clauses do not grant a potestative right to the club, given the automatic termination of the contract upon the occurrence of the specific condition contractually agreed, and therefore are considered valid. As a result, the collective performance of a team can result in the termination of an individual contract.

6.3.1.b The player's injury

Another circumstance analysed by the DRC is the possibility for the club to terminate the employment contract with just cause in case of player's injury.

The decisions issued by DRC on this matter reflect, once again, the basic principle provided by general labour law: pursuant to the consistent jurisprudence of the DRC, if an employee is injured, this does not constitute a just cause for the employer to unilaterally terminate the employment contract. In particular: "*The Chamber stated that according to its constant and persistent jurisprudence, the premature and unilateral termination of an employment contract by a club because of an injury of the player was always considered as an abusive termination of the contract without just cause. Moreover, the Chamber stated that if such a termination would be accepted as a termination with just cause, this would create a disproportionate repartition of the rights of the parties to an employment contract, to the strong detriment of the player. Therefore, the Dispute Resolution Chamber stated that the fact that a player is injured during the course of an employment contract is clearly not a just cause for the club to prematurely and unilaterally terminate the employment contract*".[106]

Such conclusion does not change in the event that the parties specifically agreed upon such possibility in the employment contract.[107]

6.3.1.c The player's permanent incapacity to play

The DRC also clarified that even the player's permanent incapacity to play, and therefore even the circumstance that the player is no longer in a position to render his/her services to the club, does not constitute a valid reason to unilaterally terminate an employment contract.[108] However, the DRC acknowledged that "*although permanent incapacity in itself cannot be considered as a valid reason to unilaterally terminate an employment contract, such specific circumstance will however have an effect on the amount of compensation, in the light of the bilateral character of an employment contract and the*

[105] CAS 2016/A/4549 *Aris Limassol FC v. Carl Lombé*.
[106] DRC 12 January 2006, no. 16828. See also, DRC 28 June 2013, no. 06131988, DRC, 13 May 2005, no. 55230.
[107] DRC 10 December 2009 no. 129881.
[108] DRC 7 February 2014, no. 02141221.

circumstance that in the event of permanent incapacity to play, a player is no longer in the position to render his services to the club".[109]

Furthermore the CAS jurisprudence confirms such stance: in the case CAS 2013/A/3436 ("*UMM Salal Sport Club v. Mario Melchiot*"), the Panel confirmed that "*The employment relationship does not, in the Panel's view, end because of a serious injury, or incapacity, nor do the duties of the parties end upon such an event. Clubs may choose to take out insurance in relation to unforeseeable situations relating to a player's health, precisely because of the risk of injury inherent in the professional life of a valuable player (see CAS 2008/A/1589, award of 20 February 2009; see also M. Bernasconi in: Rechtsfragen bei Spieltransfers mit einem besonderen Blick auf die Frage der Gewährleistung, Schutz & Verantwortung, St-Gallen 2007, 133 et seq.). A club may not terminate an employment agreement prematurely with just cause due to the subsequent emergence of a medical condition or serious injury. This is irrespective of whether such condition was detectable prior to the conclusion of the agreement or arose only at a later stage. In such circumstances, the contract can, in accordance with article 13 RSTP, be terminated only upon expiry of the agreed term or by the mutual agreement of the parties*". As a result, an employment contract cannot either terminate automatically or be terminated unilaterally with just cause on the basis that a player is found, after the contract of employment has been signed, to be permanently unable to continue his professional career.

An interesting award rendered by CAS analysed the conduct that clubs are required to adopt in the evaluation of the reasons put forward by a player for his/her incapacity to play. In the specific case, the player argued that he was suffering from severe depression that would justify his absence from the club. According to the Panel, clubs do not act inappropriately in demanding either a detailed medical report from the player or in conducting their own medical examinations.[110]

6.3.1.d Misbehaviour or absence of the player

A different circumstance that, on the contrary, entitles the club to unilaterally terminate the employment contract with just cause, is the misbehaviour of the player.

The assessment of whether just cause exists or not in case of the player's misbehaviour is subject to a case by case analysis. Relevant conduct which have been considered include the player's uncooperative attitude, the player's thoughtlessness in regard to the directives given by the coach, fights among

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[109] *Ibidem*.

[110] CAS 2015/A/4094, *Lassana Diarra v. FC Lokomotiv*.

teammates,[111] drug abuse,[112] and unjustified absences.[113]

As to the latter, the DRC acknowledged that an absence without a valid reason could constitute a material breach of contract justifying its unilateral early termination, but only when the breach meets a certain degree of seriousness. In particular, the absence should be unauthorised, unjustified and cover a considerable period of time, and the club should put the player in default before terminating the contract.[114] Lacking these elements, the absence does not entitle the club to unilaterally terminate the employment contract.[115]

Such principles have also been confirmed by the CAS. In the case CAS 2014/A/3684 ("*Leandro da Silva v. Sport Lisboa e Benfica*"), the Panel decided that "*8 days' absence of a player cannot be viewed as just cause to terminate the contract, particularly without prior warning by the Club and accepts that only breach or misconduct which is of a certain severity justifies the termination of a contract without prior warning. Further, only when there are objective criteria which do not reasonably justify the expectation of continuation of the employment relationship between the parties may a contract be terminated prematurely. Hence, if more lenient measures or sanctions can be imposed by an employer to ensure the employee's compliance with his contractual obligations of his contractual duties, such measures should be implemented before terminating an employment contract. A premature termination of an employment contract can always only be an ultima ratio*".[116]

6.3.2 Reasons invoked by players for the unilateral termination with just cause

Pursuant to article 14 of the FIFA RSTP, a just cause must also be established if the player wants to terminate the employment contract without consequences.

An interesting situation arises when a player wrongfully believes he has reasons to terminate the employment contract with just cause and acts accordingly. What consequences arise in such a situation?

In the case CAS 2006/A/1100 ("*E. v. Club Gaziantepspor*") the Panel analysed this situation, relying on the principles of Swiss Law: *"... the Panel is satisfied that the Respondent did not commit a breach of contract and that*

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[111] FIFA Commentary on the Regulations for the Status and Transfer of Players, comment under article 14.

[112] CAS 2006/A/1192 *Chelsea Football Club Limited v/ Adrian Mutu.*

[113] CAS 2014/A/3707 *Emirates Football Club Company v. Hassan Tir, Raja Club and Fédération Internationale de Football Association*.

[114] DRC 3 September 2015, no. 09151057.

[115] DRC 21 January 2015, no. 01151159, DRC 20 August 2014, no. 0814549.

[116] CAS 2014/A/3684 *Leandro da Silva v. Sport Lisboa e Benfica* & CAS 2014/A/3693 *Sport Lisboa e Benfica v. Leandro da Silva*.

the Appellant therefore has no valid reason to terminate the Contract early. ... Even if the Appellant did not have a valid reason to terminate the Contract early, the DRC's decision of 27 April 2006 cannot be upheld. At the time, the DRC came to the conclusion that the Contract was still valid and that the Appellant was therefore obliged to immediately resume his services for the Respondent. The Panel does not share this opinion. Instead, the Panel is of the opinion that a player cannot be compelled to remain in the employment of a particular employer. If a player terminates his employment contract without valid reason, then the latter is not withstanding the possibility of sporting sanctions – obliged to compensate for damages, if any, but is not obliged to remain with the employer or to render his services there against his will. This is at least the position under Swiss Law (Art. 337d CO; see also R. WYLER, Droit du travail, Berne 2002, 388 et seq.) and under CAS jurisprudence (Preliminary Decision in the matter CAS 2004/A/678; Preliminary Decision and award in the matter CAS 2004/A/691)". As a result, when a player terminates an employment contract wrongfully assuming that he had just cause to do so, he shall be considered liable for unilateral breach of contract and shall indemnify the club accordingly. On the contrary, when the termination is justified by the existence of a just cause, no compensation shall be paid by the player.

FIFA and CAS have identified several different circumstances that justify the player's unilateral termination of employment contracts with just cause. Recently, for instance, the Panel in the case CAS 2018/A/5981(*"Pogoń Szczecin Spółka Akcyjna v. FC Beroe-Stara Zagora EAD & FIFA"*) decided that a player had just cause to terminate his contract after having received no protection from his former club following harassment by the club's supporters.

However, the most common reasons are the exclusion of the player from the team's activities, and overdue salaries.

6.3.2.a The exclusion of the player from the team's activities' and the player's de-registration

As to the exclusion of the player from the team's activities, the jurisprudence of FIFA and CAS has identified several circumstances that justify a termination with just cause: the illegitimate exclusion of the player from the squad[117] or from the team's activities,[118] often implemented by obliging the player to train alone.[119]

All of these actions are against the so-called "right to play", which constitute an essential right of football players. As confirmed by the DRC, among a player's fundamental rights under an employment contract, there is also his/her

[117] CAS 2017/A/5162 *Atanas Kurdov v. FC Astana*, DRC 8 June 2007, no. 67229.
[118] CAS 2017/A/5465 *Békéscsaba 1912 Futball v. George Koroudjiev*, DRC 26 April 2012, no. 412871, DRC 15 March 2013, no. 03132433, DRC 13 December 2013, no. 12131045.
[119] CAS 2015/A/4286 *Sebino Plaku v Wroclawski Klub Sportowy Slask Wroclaw S.A.*

right to access training and to be given the possibility to compete with his/her fellow teammates.[120] This stance descends directly from Swiss law, and in particular from the principle according to which a worker has a legitimate interest to carry out his/her profession effectively in order to avoid losing his/her value in the employment market.[121]

For instance, in the case CAS 2017/A/5465 ("*Békéscsaba 1912 Futball v. George Koroudjievthe*"), the Panel ruled in favour of the player, who had been excluded from the first team's training and was not summoned to travel with the team to a training camp during the winter mid-season break. In particular, the Panel confirmed that, in the absence of justified reasons, not allowing a professional football player to train with his teammates constitutes a severe breach of said player's personal rights by the club, which employs him.[122]

However, it must be clarified that the players' right to play and develop their professional career is legitimately limited by the right that coaches and clubs have, in certain sporting circumstances, to adopt technical and disciplinary decisions and move players to the second team. These rights may conflict and when they do, a review of the facts of each case needs to be undertaken.[123] For this reason, the existence of just cause shall be established on a case-by-case basis, considering all the circumstances of the specific situation.

Within this framework, it is worth mentioning another circumstance considered as relevant to justifying the player's unilateral termination of an employment contract with just cause, i.e. the deregistration of a player.

In light of the fundamental "right to play", the deregistration of a player constitutes a club's abusive conduct since it jeopardises the fundamental player's right to carry out his/her profession, which is protected by Swiss law. As a result, the DRC has acknowledged that *by refusing to register the Claimant, in spite of its express commitment to do so, the Respondent is effectively barring, in an absolute manner, the potential access of the Claimant to competition and, as such, is violating one of his fundamental rights as a football player*".[124]

Also in this matter, it must be noted that the existence of just cause shall be established on a case-by-case basis, considering the overall circumstances of the dispute: the DRC[125] and CAS[126] have confirmed that since the unilateral termination has to be considered as *extrema ratio*, applicable only in case of very serious breaches, the temporary deregistration of a player or the deregistration during a period in which no or very few official matches are taking place, cannot be considered grave enough to justify the unilateral termination of the contract.

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[120] DRC 10 April 2015, no. 04151073.
[121] SFT 4A_558/2011 of 27 March 2012.
[122] See also: CAS 2015/A/4322 *Dubaï Cultural Sports Club v. André Alves Dos Santos*.
[123] CAS 2014/A/3642 *Erik Salkic v. Football Union of Russia & Professional Football Club Arsenal*.
[124] DRC 10 April 2015, no. 04151073.
[125] DRC 16 November 2012, no. 1112987.
[126] CAS 2013/A/3091 *FC Nantes v. FIFA & Al Nasr Sports Club*, CAS 2013/A/3092 *Ismaël Bangoura v. Al Nasr Sports Club & FIFA*, CAS 2013/A/3093 *Al Nasr Sports Club v. Ismaël Bangoura & FC Nantes*.

Finally, it is worth noting that according to the CAS jurisprudence, in the event that a club informs a player that his/her services are no longer needed, and does not provide further instructions or does not assist him/her in finding a mutually convenient solution, the player has just cause to terminate the employment contract. In particular, in the case CAS 2014/A/3579 ("*Anorthosis Famagusta FC v. Emanuel Perrone*") the Panel stated: "*a professional football club cannot expect a player to do nothing than to wait for further instructions after the club notifies the player – especially during the transfer period – that his services are no longer needed. The club rather has the explicit duty to offer training on a professional level and also, in fulfillment of its contractual duty of care, to help finding a solution for the player regarding the continuation of his career as a professional football player. This obligation to provide assistance can either be manifested in working on finding a loan solution or in cooperating with the agent of the player at a more concrete level in order to seek a definitive transfer solution*".

6.3.2.b Overdue salaries

As to the overdue salaries, the DRC and the CAS have consistently confirmed that a club failing to pay the salary of a player during a certain period constitutes just cause for the player.[127]

In the case CAS 2006/A/1180 ("*Galatasaray SK v. Frank Ribéry & Olympique de Marseille*"), the Panel ruled: "*The non-payment or late payment of remuneration by an employer does in principle – and particularly if repeated as in the present case – constitute "just cause" for termination of the contract (ATF 2 February 2001, 4C.240/2000 no. 3 b aa; CAS 2003/O/540 & 541, non-public award of 6 August 2004); for the employer's payment obligation is his main obligation towards the employee. If, therefore, he fails to meet this obligation, the employee can, as a rule, no longer be expected to continue to be bound by the contract in the future. Whether the employee falls into financial difficulty by reason of the late or non-payment, is irrelevant. The only relevant criteria is whether the breach of obligation is such that it causes the confidence, which the one party has in future performance in accordance with the contract, to be lost. This is the case when there is a substantial breach of a main obligation such as the employer's obligation to pay the employee. However, the latter applies only subject to two conditions. Firstly, the amount paid late by the employer may not be "insubstantial" or completely secondary. Secondly, a prerequisite for terminating the contract because of late payment is that the employee must have given a warning. In other words, the employee must have drawn the employer's attention to the fact that his conduct is not in accordance with the*

[127] CAS 2012/A/2967 *PAE Levadiakos v. Yero Dia*.

contract (see also CAS 2005/A/893; CAS 2006/A/1100, marg. no. 8.2.5 et seq.)".

The conditions under which just cause exists, have changed over time and recently they have been codified in the FIFA RSTP.

A new article 14-bis was adopted in 2018 by FIFA in the FIFA RSTP, in order to address the specific matter of overdue salaries.

According to this provision, when a club fails to pay a player at least two consecutive monthly salaries, the player is entitled to terminate the employment contract with just cause, provided that he has put the debtor club in default.

The rule provided by article 14-bis FIFA RSTP codifies a principle that had already been recognised by the case law: in fact, both FIFA and CAS have consistently adopted the general principle of labour law according to which the persistent failure of the employer (the club) to respect its contractual obligations towards the employee (the player) constitutes an unjustified breach of the employment contract, which entitles the player to unilaterally terminate the contract with just cause.[128] However, whether the extent of the breach falls within the concept of "persistent failure" or not needs to be assessed by the deciding body on a case by case basis, considering the behaviour of the club and the circumstances of the specific case. This approach led to the principle previously adopted by FIFA according to which if a club failed to pay three consecutive salaries, "just cause" was granted; however, just cause could have arisen sooner if the circumstances warranted it.

The wording of article 14-bis FIFA RSTP now provides objective criteria for determining whether just cause applies. In particular, it specifically states the number of outstanding salaries that allow a player to terminate a contract with just cause, by reducing from at least three-monthly salaries, which was previously set forth by the jurisprudence of FIFA and CAS, to at least two overdue monthly salaries. As for the salaries which are not due on a monthly basis, art. 14-bis FIFA RSTP, para. 2 states that such payments shall be considered pro-rata and that delayed payment of an amount which is equal to at least two months shall also be deemed as just cause for the player to unilaterally terminate the contract.

In addition, article 14-bis FIFA RSTP also provides specific guidelines as to the *modus operandi* that players need to respect in order to legitimately terminate their employment contracts for outstanding salaries. In particular, the player is required to put the debtor club in default in writing, granting a deadline of at least 15 days to comply with its financial obligations. On this point, the new provision reflects the stance previously adopted by the FIFA DRC – although not consistently – which was to require the player to warn the club in writing before terminating the contract.[129]

The reduction of the number of the outstanding salaries required, and the specific indication of the formalities that players are required to comply with in

[128] DRC 26 October 2006, no. 1061207.
[129] DRC 10 August 2007, no. 87745.

order to duly unilaterally terminate their employment contracts, represents a significant improvement for the players' position and for the legal certainty of the system. It must also be noted that the late payment of the outstanding salaries shall not be taken into account when determining whether the player's unilateral termination was justified by just cause. As confirmed in the award issued in the case CAS 2006/A/1100 ("*E. v. Club Gaziantepspor*"), "*According to the jurisprudence of the Swiss Federal Tribunal the circumstances which occur after the declaration of termination shall not be taken into account while determining whether there was or not a valid reason to terminate a contract*".

In another interesting award, the CAS clarified two further aspects. In particular, in the case CAS 2017/A/5242 ("*Esteghlal Football Club v. Pero Pejic*") the Panel stated that "*If, instead of the delayed payment period of around three months based on CAS jurisprudence, the employment contract states that after a delayed payment for 45 days the whole contractual amount shall become due for payment and the player has just cause to terminate the employment contract, this specifically agreed clause between the parties has priority over the general indicative principle of the three months' delay based on FIFA and CAS jurisprudence and, therefore, this clause is to be considered an early termination clause*". The award was issued in 2017, i.e. before the new version of article 14-bis FIFA RSTP: however, the authors deem that such principle, which enhances the parties' contractual freedom, may find application – *mutatis mutandis* – also in the new legal framework provided by the 2018 version of article 14-bis FIFA RSTP.

In addition, the award issued by CAS also considered whether the notice period provided under article 14-bis FIFA RSTP needs to be given in any case or, in the event that the parties to a contract have previously agreed on an early termination clause setting a valid grace period, they do not have the obligation to grant an additional grace period. On this point, the Panel stated: "*If by contractual agreement an early termination clause setting a grace period of 45 days to comply with payment duties was concluded, this means therefore, that the parties did not wish to first set another grace period to pay before the early termination is possible and may be with just cause even if given without prior warning. This solution chosen by the parties complies with Swiss law (art. 102 of the Swiss Code of Obligations) and with the jurisprudence of the Swiss Federal Tribunal which clarifies that in case of a severe breach of a contract, the termination without prior warning is justified*".

Furthermore, the reform implemented by FIFA in 2018 also inserted a new paragraph 6 into article 18 of the FIFA RSTP, which now prohibits the so-called contractual "grace periods" for the payment of salaries towards players: a further protection for players' rights.

Finally, pursuant to the last paragraph of article 14-bis, collective bargaining agreements validly negotiated at national level may deviate from the above-mentioned principles.

6.3.2.c The club's abusive conduct

FIFA also amended Article 14 FIFA RSTP in 2018, by adding a second paragraph concerning the abusive conduct of a party aimed at forcing the counterparty to terminate, or change the terms of, the employment contract. Pursuant to this new paragraph, the party suffering from such conduct is entitled to terminate the contract with just cause.

Previously, the right for the players to terminate their employment contracts due to clubs' abusive conduct was already recognised by the jurisprudence of FIFA and CAS, but there was nothing expressly stated in the FIFA RSTP: the 2018 amendment to the FIFA RSTP specifically addressed these issues, clarifying once and for all the illegitimacy of such practices.

Furthermore, the new paragraph 2 of article 14 not only includes any abusive conduct aimed at forcing the other party to "terminate" the contract, but also conduct aimed at forcing the counterparty to simply "change" the terms of a contract. Thus, a preliminary assessment of the reasons behind each contested conduct is essential for the purposes of article 14, para. 2 FIFA RSTP.

To date, only a few decisions have dealt with the application of paragraph 2 of article 14 FIFA RSTP. In a decision passed on 21 January 2020, FIFA ascertained that a player had terminated the employment contract with just cause following the abusive conduct of the club, which excluded the player from the training sessions with the first team for almost one month in order to force him to change the terms of his contract (which was due to expire at the end of the following season). After three warnings, the player eventually terminated the employment contract and FIFA recognised the existence of just cause ex article 14, para. 2 FIFA RSTP.

In a different decision, passed on 29 January 2020, FIFA recognised that the exclusion of the player from training sessions with the first team together with the non-payment of the salary constituted relevant circumstances for the purposes of article 14, para. 2 FIFA RSTP. As a result, FIFA decided that the termination of the employment contract notified by the player to the club, which followed two previous warnings, had to be considered legitimate.

6.3.2.d Unilateral termination with sporting just cause

The FIFA RSTP specifically regulates under article 15 a particular case of just cause that can be invoked by players.

In particular, article 15 FIFA RSTP provides "established" professional players with the ability to unilaterally terminate their contract for sporting just cause where they have played in less than 10% of the total club's fixtures of the season.

The rationale behind article 15 is to secure the players' right to an effective employment and therefore to protect the players' professional career, which is

relatively short. As clarified by CAS in the case CAS 2007/A/1369 ("*O. v. FC Krylia Sovetov Samara*"), "*the aim of this article is to permit a player to terminate the employment contract unilaterally if he is in a situation in which he is prevented from exercising his/her professional activity with a reasonable frequency and, as such, is prevented from progressing professionally*".

Article 15 finds its legal basis in the general principle provided by article 328 of the Swiss Code of Obligations, according to which the employer has the obligation to protect the employee's personality. The case law has determined that some categories of employees, and in particular employees whose inoccupation can prejudice their future career development, have the right to be employed and the employer is not authorised to employ them at a different or less interesting position than the one they have been employed for.[130]

The application of this principle to professional football players has been confirmed by the CAS jurisprudence. The Panel in the case CAS 2013/A/3091 ("*FC Nantes v. FIFA & Al Nasr Sports Club*") stated "[f]*or athletes, personality rights encompass in particular the development and fulfilment of personality through sporting activity, professional freedom and economic freedom. Under this definition, personality rights protect the right of movement, which comprises in particular the right to practice a sports activity at a level that accords with the abilities of the athletes…This freedom is particularly important in the area of sport since the period during which the athlete is able to build a professional career and earn his/her living through the sporting activity is short*".[131]

Thus, in the event that a player does not play at least 10% of the total club's fixtures during the season, the player's personality rights shall be considered endangered. As a result, the player is entitled to unilaterally terminate the employment contract with sporting just cause, under the terms and conditions provided by article 15 FIFA RSTP.

Once the deciding body has ascertained the existence of sporting just cause and the occurrence of the conditions provided by article 15, "*sporting sanctions shall not be imposed, though compensation may be payable*". The deciding body has therefore a certain discretion in awarding compensation in favour of the club. On this point, it must be noted that contrary to the consequences applicable in case of just cause, compensation may still be payable in case of a sporting just cause.

Finally, it must also be clarified that only a player and not a club can raise the grounds of sporting just cause to terminate an employment agreement: the rationale of article 15 and the clear wording of the provision refers only to players and there are no other provisions of the FIFA RSTP that entitle clubs to termination

[130] CAS 2005/A/909-910-911-912.

[131] CAS 2013/A/3091 *FC Nantes v. FIFA & Al Nasr Sports Club*, CAS 2013/A/3092 *Ismaël Bangoura v. Al Nasr Sports Club & FIFA*, CAS 2013/A/3093 *Al Nasr Sports Club v. Ismaël Bangoura & FC Nantes*.

with sporting just cause. The reason behind such choice is comprehensible: a club could easily instruct the coach not to field the player because the club wants – for whatever reasons – to terminate an agreement with a specific player.[132]

As to the conditions that a player has to demonstrate in order to avail himself of sporting just cause, article 15 FIFA RSTP explicitly requires: (i) that the player is an established professional; (ii) that he has played in less than 10% of the official matches in which his/her club was involved in the sporting season in question; (iii) the player's personal circumstances; and (iv) that he terminates his/her employment contract during the 15 days following the final official match in the season of the club with which he was registered.

(i) The "Established Professional" requirement

As to the first condition, the FIFA RSTP does not provide a definition of "established professional". Some indications can be found in the FIFA Commentary,[133] which focus on the scope of this provision: "*The key element here is the fact that a player with a certain level of footballing skill does not have sufficient opportunities in a club and therefore wishes to leave in order to join a club where he has the opportunity to play on a regular basis. "Established" is therefore first of all a player who has terminated and completed his training period. Furthermore, his level of footballing skill is at least equal to or even superior to those of his team-mates who appear regularly. One possible reason for the player in question not playing (regularly) is because his position has already been taken by another player with similar characteristics*".

In light of the above, an established professional shall be considered as a player that has terminated his/her training period, with footballing skills at least equal to or even superior to those of his/her teammates. Such evaluation is not straightforward and shall be performed by the deciding body on a case by case basis.

This conclusion has been confirmed by the DRC, which identified some objective and subjective circumstances to be considered in the assessment: objective aspects include the age of the player at the time of the termination, his performance and participation during the past seasons, as well as his experience analysed vis-à-vis that of his teammates with similar characteristics. As to the subjective aspects, these include the player's perception and expectations that he might have regarding his participation in a given season depending on the club with which he is registered.[134]

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[132] CAS 2012/A/2844 *Gussev Vitali v. C.S. Fotbal Club Astra & Romanian. Professional Football League*.

[133] FIFA Commentary on the Regulations for the Status and Transfer of Players, comment under article 15.

[134] DRC, 7 June 2018, no. 06181022.

(ii) The calculation of appearances

The second condition required under article 15 FIFA RSTP provides that a player has been fielded for less than 10% of the official matches of the club.

According to the FIFA Commentary, the relevant aspect is not the number of appearances but whether or not the player actively took part in the matches. In relation to this aspect, in one of the few decisions issued by the DRC on sporting just cause, the Judge clarified that "*the sporting just cause is established mainly taking in consideration a floor of 10% of the official matches in which the player in question participated and not the minutes*".[135] This decision was then appealed before the CAS, which overturned the DRC's decision on this point and stated: "*it is not the number of appearances in games but the minutes effectively played therein that is relevant*".[136] The criterion to be taken into consideration in the calculation of the appearances, is therefore debated.

As to the matches that shall be taken into account in the calculation, article 15 FIFA RSTP expressly refers to official matches, which are defined under point 5 of the definitions provided by the FIFA RSTP as "*matches played within the framework of organised football, such as national league championships, national cups and international championships for clubs, but not including friendly and trial matches*".

(iii) The "player's personal circumstances"

Article 15 FIFA RSTP also states that in the assessment of the existence of sporting just case, due consideration shall be given to the so-called "player's personal circumstances".

The FIFA RSTP does not specify which are the relevant "player's circumstances", but the FIFA Commentary lists several situations that need to be evaluated, such as the player's position on the pitch**,** any injuries or suspensions sustained by a player that have prevented him from playing over a certain period of time, as well as any situation that may justify, from a sporting point of view, the fact that the player has not been fielded on a regular basis.

Whether the "player's circumstances" shall be considered as an independent criterion or in the context of the first two criteria, is controversial.[137]

In CAS 2007/A/1369 ("*O. v. FC Krylia Sovetov Samara*"), the Panel considered as "player's personal circumstances" the following elements: the player's "*legitimate aspirations to develop his skills and advance in his professional career*", whether or not the player "*expressed the slightest discontent with regard to the lack of opportunity in his team's games or that he informed the Club that he wished to play in more first team games*" and the

[135] DRC, 10 August 2007, no. 871322.
[136] CAS 2007/A/1369 *O. v. FC Krylia Sovetov Samara*.

player's "*physical and psychological condition*" together with the "*integration of a player in a team*" in order to evaluate the "effective occupation" of a player.

(iv) The "15-day term"

Finally, according to article 15 FIFA RSTP, in order for sporting just cause to apply, the player is required to terminate the employment contract within a specific time frame, i.e. in the 15 days following the last official match of the season of the club with which he is registered.

The respect of this condition is extremely relevant: according to the CAS jurisprudence,[138] article 15 FIFA RSTP does not apply in cases in which the player terminates his/her employment agreement in the course of a season. As a result, such a termination shall be considered as a unilateral termination without just cause, which triggers the consequences provided under article 17 FIFA RSTP.

Furthermore, the termination of the contract after the specific time frame provided by article 15 FIFA RSTP shall be considered as untimely and shall lead to the imposition of disciplinary sanctions, which will be increasingly severe the closer the termination is to the end of the main registration period. In addition, the player shall compensate the club for the damages incurred as a result of the contract being terminated incorrectly.

6.3.3 The calculation of the compensation due by the party that provided the "just cause" for the lawful termination of the employment contract

Article 14, para. 1 FIFA RSTP clearly states that "*A contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause*".

As noted above, only the party that terminates the contract with just cause does not suffer consequences: on the contrary, the party who provided the "just cause" for lawful termination of the contract is required to compensate the injured party for the damages suffered.

The calculation of the compensation due under these circumstances has been clarified by CAS in the award CAS 2012/A/2910 ("*Club Eskisehirspor v. Kris Boyd*") whereby the Panel clarified that "*Focusing on the question of the applicability of Article 17 of the RSTP, which is specifically headed "Consequences of terminating a contract without just cause", it may be noted that a strictly literal interpretation of this provision under its heading would*

[137] On this matter: Gradev G (2010) Sporting just cause and the relating jurisprudence of FIFA and CAS, 111.

[138] CAS 2013/A/3091 *FC Nantes v. FIFA & Al Nasr Sports Club*, CAS 2013/A/3092 *Ismaël Bangoura v. Al Nasr Sports Club & FIFA*, CAS 2013/A/3093 *Al Nasr Sports Club v. Ismaël Bangoura & FC Nantes*.

lead to the conclusion that it does not apply to the case at hand, as the Player undisputedly terminated the Contract with just cause. Having said this, it must be considered that, in cases of breach of contract, compensation is, as a general rule, always payable to the injured party by the party responsible for the breach. Furthermore, Article 17, para. 1., of the RSTP provides for general guidelines for the calculation of possible compensation in the case of termination of employment contracts. In this respect, the Panel considers that the guidelines in Article 17, para. 1., of the RSTP may apply not only in cases of termination of a contract without just cause but more generally in the case of any termination of a contract where a breach of contract has occurred. This interpretation is also supported by the wording of the first sentence of Article 17, para. 1, of the RSTP, according to which "In all cases, the party in breach shall pay compensation". Similar conclusions were drawn in CAS 2010/A/2202, consideration 54. and CAS 2012/A/2775, consideration 126. And the Panel's understanding is also supported by pertinent legal literature, according to which the "addressee of the obligation to compensate in Art. 17(1) RSTP is therefore both a party who terminates unlawfully as well as whoever provided the "just cause" for lawful termination of the contract" (U. Haas, Football Disputes between Players and Clubs before the CAS, in Bernasconi/Rigozzi (Editors): Sport Governance, Football Disputes, Doping and CAS Arbitration, Berne 2009)".

In light of the above, it must be inferred that article 17 FIFA RSTP is also of assistance in calculating the compensation due in case of unilateral termination with just cause by the party that provided the "just cause" for the lawful termination of the contract.

6.4 Unilateral termination without just cause

In light of the above, an employment contract can be unilaterally terminated by either party without consequence of any kind for the terminating party in cases of just cause. On the contrary, if the player terminates the contract with sporting just cause, the deciding body has the discretion to decide whether or not compensation is payable to the club. However, if the contract has been terminated by one of the parties without just cause, the party in breach shall always be obliged to pay compensation to the counterparty, according to article 17 FIFA RSTP.

Article 17 FIFA RSTP is a provision of paramount importance to the regulatory framework provided by FIFA, especially in light of the importance given to the maintenance of contractual stability, and it is applied with the principle of reciprocity for both clubs and players.

According to this provision, in the event that a contract has been terminated by one of the parties without just cause, the party in breach is obliged to pay compensation and, under specific circumstances, sporting sanctions might also apply.

Once again, this provision reflects the fundamental principle of contractual law according to which a party in breach of a contract shall pay compensation to the injured party.

The purpose of article 17 is to strengthen the contractual relationship between a professional player and his/her club, and therefore, to support and foster contractual stability.[139] As clarified in CAS 2008/A/1519-1520 ("*FC Shakhtar Donetsk (Ukraine) v/ Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) & FIFA*"), "*the purpose of art. 17 is basically nothing else than to reinforce contractual stability i.e. to strengthen the principle of pacta sunt servanda in the world of international football, by acting as deterrent against unilateral contractual breaches and terminations, be it breaches committed by a club or by a player* [...] *this deterrent effect shall be achieved through the impending risk* [...] *to have to pay compensation for damage caused by the breach or unjustified termination*".

Such principle was confirmed in CAS 2009/A/1856-1857 ("*Club X. v/ A.*"), in which the Panel stated: "*both players and clubs are warned: if one does breach or terminate a contract without just cause, a financial compensation is due, and such compensation is to be calculated in accordance with all those elements of art. 17 of the FIFA regulations that are applicable in the matter at stake, including all the nonexclusive criteria listed in para. 1 of said article*".

Finally, it must be noted that article 17 FIFA RSTP specifies that, in any case, the provisions of article 20 and annexe 4 FIFA RSTP in relation to training compensation shall apply. This means that, provided that the player is younger than 23 years of age, if the former club of the player unilaterally terminates the employment contract without just cause, no training compensation is due to the former club, as per annex 4, article 2, para. 2 FIFA RSTP. If the player unilaterally terminates the employment contract without just cause, the new club will have to pay training compensation to the former club, in addition to the compensation for contractual breach due pursuant to article 17 FIFA RSTP.

6.4.1 The consequences of terminating a contract without just cause

Article 17 FIFA RSTP sets out the consequences that arise when a party breaches a contract without just cause, namely (i) the payment of compensation and (ii) the imposition of sporting sanctions.

6.4.1.1 The consequences of terminating a contract without just cause

As general rule, when a contract has been breached, the party who suffers as a result of such breach is entitled to receive, from the defaulting party, compensation

[139] CAS 2007/A/1358 *FC Pyunik Yerevan v. L., AFC Rapid Bucaresti & FIFA*.

for any loss or damage caused thereby. The same principle applies in the FIFA regulations and article 17 FIFA RSTP provides the general guidelines for the calculation of the possible compensation in the case of termination of employment contracts without just cause. However, the criteria applied by FIFA and CAS, to calculate the compensation due, have changed over the years.

(A) The evolution of the CAS and FIFA jurisprudence on the calculation of compensation following termination without just cause

At first, FIFA carefully avoided giving a clear formula for the calculation of the amount due as compensation for unilateral breach of contract without just cause, and instead left such duty to the discretion of the adjudicating body. As a result, the case law of FIFA and CAS identified the relevant criteria on a case-by-case basis, adopting different methods of calculations, which caused uncertainty and ultimately resulted in the unpredictability of the amount due as compensation in case of breach.

However, over time, some landmark cases have been identified as guidelines to determine the amount of compensation to be paid to the injured party.

I. The Mexès case: the relevance of the transfer offer and the investment made by the former club

In particular, in 2004 the French player Philippe Mexès signed with the Italian club AS Roma while he was under contract with Auxerre, and the French club claimed compensation for unilateral breach of contract. In this landmark case,[140] the Panel calculated the compensation due for the breach taking into account the transfer offer from the player's new club and the investment made by the former club in the player: "*En conclusion, prenant comme point de départ du préjudice le coût de la prolongation du contrat de EUR 2'289'644 et la perte de gain de l'AJ Auxerre résultant du transfert frustré de M. Mexès d'un montant minimum de EUR 4'500'000, puis procédant à une appréciation sur la base des critères objectifs énoncés ci-dessus, la Formation fixe le montant du dommage de l'AJ Auxerre, dû par M. Mexès, à EUR 7'000'000, indemnité de formation comprise*".

II. The Webster case: the residual value of the contract

A different approach was adopted in the landmark "Webster case", whereby the move of the Scottish international Andy Webster from Heart of Midlothian to Wigan was disputed by the Scottish club. In this case, the CAS applied the so-called "residual value of the contract".[141]

[140] CAS 2005/A/902-903 *AJ Auxerre c. Philippe Mexès & AS Roma*.
[141] CAS 2007/A/1298, 1299 & 1300 *Wigan Athletic FC v/ Heart of Midlothian*.

In particular, it considered that it is in the interest of the football world that the method of calculation of the compensation is as predictable as possible. Therefore, the Panel concluded that, in the event of unilateral termination of the contract by the club, the player would have been entitled to receive the remainder of the salary agreed under the employment contract; thus, in the same way, because of the unilateral termination perpetrated by the player, the club was awarded a similar amount of money from the player.

This decision had a major impact on the football system and has been questioned under different aspects.

Firstly, the application of the residual value approach to clubs leads to the relevant club being awarded double compensation: as a matter of fact, when the player unilaterally terminates the contract and leaves the club, the club no longer has to pay remuneration to the player.

Moreover, by strictly applying the approach adopted by CAS in the Webster case, it would have been possible for players (and clubs interested in such players) to predict the amount due as compensation for the unilateral termination of the employment contract.

As observed by the DRC, limiting the compensation for breach of contract to the residual value of the contract would have undermined the principle of maintenance of contractual stability, reducing to a mere formula the legitimate right of the damaged party to receive compensation. In other words, by allowing a party to walk out of its or his contractual obligations by paying the remaining value of the relevant contract to the other party would, in the Chamber's view, render the principle of contractual stability meaningless.[142]

III. The Matuzalém case: the positive interest (restitution in integrum)

A few months later, the CAS addressed the matter again and clarified that the remaining value of the contract was not the only criterion to be considered in the calculation of the amount due as compensation for the unilateral termination of a player: subsequent CAS cases focused on the loss suffered by the club i.e. the cost to replace the player or his market value.

In particular, in the well-known "Matuzalém case"[143] – originated when the player Francelino da Silva Matuzalém terminated his contract with Shakhtar Donetsk to join Real Zaragoza – the Panel deviated from the approach adopted in the Webster case, and applied the so-called "principle of positive interest". Such principle is similar to the concept of *restitutio in integrum*, known in a number of legal systems worldwide, which aims at bringing the injured party back to the original state it would have been in, if no breach had occurred. By applying this principle, Matuzalém and his new club were ordered to pay compensation

[142] DRC 15 May 2009, no. 59738.

[143] CAS 2008/A/1519. CAS 2008/A/1519 – FC Shakhtar Donetsk v/ Mr. Matuzalem Francelino da Silva & Real Zaragoza SAD & FIFA

in the amount of 12 million euros, which included the player's wages and his transfer value.

The Panel reached such conclusion by considering that according to the wording of article 17, the judging authority has the specific duty to calculate the damages suffered by the injured party on a case-by-case basis, taking into account all the elements of the case, including the "sport specificity" and "any other objective criteria" mentioned under article 17. As a result, in addition to the residual value of the employment contract, extra damages could have been claimed.

Following the decision in the Matuzalém case, the principle of positive interest has become the predominant stance adopted by CAS jurisprudence and it has been applied in multiple cases.[144] In particular, a famous case is one involving Morgan De Sanctis, the Italian goalkeeper who tried to terminate his contract with Udinese to move to Sevilla. At the end of the proceedings,[145] the Panel confirmed the findings of the Matuzalém case and calculated the relevant compensation due by the player to Udinese for the breach considering also the costs incurred by the club for two replacement goalkeepers.

However, the principle of positive interest consistently adopted by CAS has been criticised by some stakeholders, and in particular by players' unions,[146] which have contested the wide discretion of the judging authorities and the excessive compensation amounts resulting from the inclusion of the players' transfer value in the calculation of the compensation due under article 17 FIFA RSTP: such approach is only beneficial to the contractual stability, and is totally detrimental to the player's free movement rights.

Following these objections, in April 2018 FIFA amended article 17 by inserting tools for calculations that had only previously been present in the jurisprudence of the DRC.

(B) Calculation of the compensation under the current system

The first part of article 17, para. 1 FIFA RSTP reads: "*In all cases, the party in breach shall pay compensation. Subject to the provisions of article 20 and Annexe 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport,*

[144] *Ex plurimis*, CAS 2015/A/4094, *Lassana Diarra v. FC Lokomotiv Moscow*, CAS 2013/A/3411 *Al Gharafa S.C. & M. Bresciano v. Al Nasr S.C. & FIFA*, CAS 2009/A/1880 *FC Sion v. FIFA*, CAS 2009/A/1856-1857 *Club X. v/ A*.

[145] CAS 2010/A/2146 *Morgan de Sanctis v. Udinese Calcio S.p.A.*.

[146] In 2015 FIFPro filed a complaint against FIFA with the European Commission's Directorate - General for Competition, claiming that the transfer market system is anti-competitive, unjustified and illegal. "*To FIFPro and others within the game, it is unacceptable that a player be held responsible to pay at least part of a transfer fee that he had no part negotiating. What it means in effect is that the better the player and the bigger the transfer fee, the higher the cost and risk to the player to break his contract*". (Daniel Geey, *Done Deal*, 49-50, 2019, Bloomsbury Sport).

and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period".

Thus, article 17 FIFA RSTP firstly stipulates that in any case of breach of contract, the defaulting party shall pay compensation. It must be noted that despite the wording of its heading "Consequences of terminating a contract without just cause", according to CAS jurisprudence[147] and to legal literature,[148] the guidelines of article 17 FIFA RSTP may apply not only in cases of termination of a contract without just cause but more generally in the case of any termination of a contract where a breach of contract has occurred.

In addition, the wording of article 17 FIFA RSTP provides for the primacy of the agreement of the contractual parties regarding the calculation mode for compensation for breach of contract.[149] Therefore, the criteria listed under article 17 para. 1 FIFA RSTP apply only subsidiarily, i.e. only in the absence of a specific contractual agreement on the matter. On the contrary, when the contractual agreement provides for a determinable amount of compensation payable by the defaulting party to the injured party, this amount must be applied.

I. The agreement on the compensation due in case of breach of contract

Article 17 para. 1 FIFA RSTP, by virtue of its caveat ("*unless otherwise provided for in the contract*") allows the parties to regulate the consequences of terminating a contract without just cause by agreeing a penalty clause, defined "*as a mutually agreed upon contractual clause that allows the parties to establish in advance in their contract the amount to be paid by either party in the event of unilateral, premature termination without just cause*".[150]

Once the unilateral breach is ascertained, the adjudicating body shall therefore firstly verify whether there is any clause in the employment contract that addresses the consequences of such breach, i.e. a penalty clause.

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[147] CAS 2012/A/2910 *Club Eskisehirspor v. Kris Boyd*, CAS 2012/A/2775 *Al-Gharafa S.C. v. Hakan Yakin & FC Luzern*, CAS 2010/A/2202 *Konyaspor Club Association v. J.*

[148] U. Haas, *Football Disputes between Players and Clubs before the CAS*, in: Bernasconi/Rigozzi (Editors): Sport Governance, Football Disputes, Doping and CAS Arbitration, Berne 2009.

[149] CAS 2009/A/1880 *FC Sion v. Fédération Internationale de Football Association & Al-Ahly Sporting Club* & CAS 2009/A/1881 *E. v. Fédération Internationale de Football Association & Al-Ahly Sporting Club*, CAS 2008/A/1519 *FC Shakhtar Donetsk v Mr. Matuzalem Francelino da Silva & Real Zaragoza SAD & FIFA* & CAS 2008/A/1520 *Mr. Matuzalem Francelino da Silva & Real Zaragoza SAD v FC Shakhtar Donetsk*.

[150] CAS 2013/A/3411 *Al Gharafa S.C. & Mark Bresciano v. Al Nasr S.C. & Fédération. Internationale de Football Association*.

In general terms, a penalty clause is a contractual provision which places an obligation upon the party who has breached the contract to provide compensation to the party aggrieved by the breach.

According to CAS jurisprudence, a penalty clause has two different purposes, as stated in the award issued in the case CAS 2013/A/3418 ("*Marítimo da Madeira – Futebol SAD v. Clube Atlético Mineiro*"): "*on one hand, it facilitates the liquidation and compensation of the damages that the non-performance of the obligation could be caused on the creditor, who will not need to prove the existence of any damage ("effect répressif" of the penalty clause); and, on the other hand, it is a means to put pressure to the debtor in order to foster the compliance of his obligation (in terrorem), under the threat of having to pay to the creditor a penalty in case of non performance of the said obligation ("effect préventif" of the penalty clause)*".

The mere definition used by the parties is not sufficient to define the contractual provision as a penalty clause: as clarified by CAS in the case CAS 2014/A/3555 ("*FC Vojvodina v. Almami Samori Da Silva Moreiralegal*") "c*onsequences of a clause defined by the parties as a "penalty clause" should be used in order to determine the nature thereof and not only the definition used by the parties, also because the legal consequences may indicate the true intention of the parties in respect of the specific clause*".

Symmetrically, the absence of a specific qualification of the relevant clause as a "penalty clause" or the absence of a specific quantification of the amount for the penalty do not affect the application of such a clause. The fact that the parties do not explicitly use the words "penalty clause" to name the compensation established under the contract, and do not provide a fixed amount for the penalty, does not change the nature of this clause.[151] Therefore, when a penalty clause has been contractually agreed, the assessment of the true nature and the effects of such clause requires a specific analysis.

FIFA has adopted a consistent approach to the validity of penalty clauses. In particular, the FIFA PSC held that "*penalty clauses may be freely entered into by the contractual parties and may be considered acceptable, in the event that the pertinent written clause meets certain criteria such as proportionality and reasonableness. In this respect, the Single Judge highlighted that in order to determine as to whether a penalty clause is to be considered acceptable, the specific circumstances of the relevant case brought before the deciding body shall also be taken into consideration*".[152] However, in must be noted that the FIFA RSTP do not foresee a specific regime for penalty clauses applicable to football-related disputes: as a result, the material law applicable in each specific case will play a key role in order to identify the applicable legal framework, as per article 2 of the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber". On this basis,

[151] CAS 2013/A/3418 *Marítimo da Madeira – Futebol SAD v. Clube Atlético Mineiro*.
[152] FIFA PSC decision no. OP06190786-e.

Swiss law plays an essential role, given that most of the cases decided by FIFA and CAS are regulated by the laws of Switzerland because of the express choice of the parties, or under the application of articles R45 and R58 of the Code of Sports-related Arbitration. Under Swiss law, penalty clauses are regulated under articles 160 to 163 of the Swiss Code of Obligations (SCO) and their formulation is subject to two different limits, foreseen under paragraphs 2 and 3 of articles163 SCO. Articles 163 para. 2 SCO provides for a "limit of validity": "*The penalty may not be claimed where its purpose is to reinforce an unlawful or immoral undertaking or, unless otherwise agreed, where performance has been prevented by circumstances beyond the debtor's control*", whereas articles 163 para. 3 SCO provides for a "limit of excess": "*At its discretion, the court may reduce penalties that it considers excessive*".

a) The validity of penalty clauses

A great number of FIFA and CAS decisions have dealt with penalty clause issues in football-related contracts, especially with regard to their validity and excessiveness.

In order for a penalty clause to be valid under Swiss law, the following elements needs to be specified: a) the parties bound by the contractual penalty; b) the kind of penalty that has been determined; c) the conditions triggering the obligation to pay the contractual penalty; and d) the amount of the contractual penalty.[153]

In addition, the DRC has often sustained that only reciprocal penalties can be taken into account.[154] The reciprocity is a key factor for assessing the validity and enforceability of a penalty clause: however, it must be noted that reciprocity does not only mean that the contract must determine the consequences of a breach for each party, but it also requires reciprocity in the calculations stipulated in the contract.[155] In case of non-reciprocal penalty clauses, the DRC has eventually applied the criteria provided by article 17 FIFA RSTP.[156]

Despite the consistent approach of the DRC, CAS has taken a different stance on this matter.

In particular, according to the view adopted by CAS, non-reciprocal penalties shall not be considered as invalid *per se:* as specified in the case CAS 2013/A/3411 ("*Al Gharafa S.C. & Mark Bresciano v. Al Nasr S.C. & Fédération Internationale de Football Association*") "*Swiss law does not require "penalty clauses" to be "reciprocal" in order to be valid*" and non-reciprocal penalties may simply reflect the different damages suffered by the parties. In the case CAS 2015/A/3999 & CAS 2015/A/4000, the Panel stated:

[153] G. Couchepin, *La clause pénale*, Zürich, 2008.
[154] DRC 7 February 2014, no. 0214233, DRC, 4 October 2013, no. 10131238, DRC 10 June 2004, no. 64133.
[155] DRC, 27 November 2014, no. 1114067.
[156] DRC, 7 February 2014, no. 0214233.

"*The non-amortised transfer fee paid for by a club to acquire the services of the player is usually included in such calculation* [of compensation] *as this is in principle indeed a damage incurred by such club, whereas the transfer fee paid for by the club would in principle not be taken into account in the calculation of the compensation if it were the club to terminate the employment contract without just cause, as the player does not incur any damages in this respect. This is not a consequence of the behaviour of the parties, but is simply a consequence of the different type of damages incurred by clubs and players in disputes regarding breach of contract. Speciûc circumstances put aside, the damage of a club in case of a unilateral and premature termination of an employment contract by a player is therefore generally higher than the damage of a player in case of a unilateral and premature termination by a club*".[157] Thus, according to the CAS, there are specific circumstances that may justify a non-reciprocal penalty clause, and this circumstance alone cannot entail the invalidity of a penalty clause. The lack of reciprocity may however be taken into consideration when analysing the excessiveness of a penalty clause.

b) Excessive contractual penalty clauses

A frequent issue in football-related disputes arises in cases where a contractual penalty is foreseen in the contract and one of the parties argues that such penalty is excessive. In this regard, article 163 paragraph 1 SCO states that parties are, in principle, free to determine the amount of the contractual penalty; however, the court may reduce at its discretion any penalty if it is considered as excessive. Such assessment shall be done *ex post*, i.e. at the moment of the breach.[158]

The possibility for the judicial body to reduce the amount of a penalty may undermine the very rationale behind penalties, which is to dissuade the contracting parties from breaching the contract. However, it must be underlined that the deciding body is only entitled to reduce the excessiveness of the penalty:[159] this means that instead of reducing the penalty to an amount that the Panel deems fair, the Panel should rather reduce the penalty only to the extent that it is no longer excessive, preventing the penalty to constitute a confiscatory measure, which could be seen as an inadmissible impediment to the debtor's financial future.[160] As a matter of fact, the Judge must observe a degree of deference as the parties are free to determine the amount of the contractual penalty and as the principle of freedom of contract commands that the Judge abides by the parties' agreement. Therefore, the Judge must only intervene when the stipulated amount

[157] CAS 2015/A/3999 *Al Ittihad Club v. Diego de Souza Andrade* & CAS 2015/A/4000 *Diego de Souza Andrade v. Al Ittihad Club & Fédération Internationale de Football Association*.
[158] CAS 2013/A/3205 *Marítimo da Madeira Futebol SAD v. AEP Paphos*.
[159] STF 133 III 201, at. 5.2.
[160] CAS 2015/A/4057, *Maritimo da Madeira Futebol SAD v. Al-Ahli Sports Club*.

is so high that it unreasonably and flagrantly exceeds the amount admissible with regard to the sense of justice and equity.[161]

Unsurprisingly, there is no specific definition of what makes a penalty "excessive", being an assessment strictly connected with the specific circumstance of each singular case.

The CAS case law provides a number of decisions related to this issue: in CAS 2011/O/2397, the Panel observed that "*Swiss jurisprudence has identified the criteria that the Judge may use to determine that a penalty is excessive. In this respect, SYBOZ, GILLIÉRON & BRACONI refer to these criteria as follows (op. cit. page 126): ... the interest if the creditor in the execution, the seriousness of the breach or the violation of the main commitment, the financial situation of the parties ATF 63 II 245, the economic dependence of the debtor ATF 51 II 162, the experience in business of the parties ATF 133 III 43 JT 2007 I 226, the nature and duration of the contract ATF 133 III 43 JT 2007 I 226, ATF 95 II 532 JT 1971 I 40 (prohibition of competition occurred close to the term at the moment of the violation), the circumstance that the penalty is due once or on the contrary at each new infraction AT 68 II 169 JT 1943 I 99, the evident disproportion between the damage caused and the stipulated penalty ATF 52 II 223 JT 1926 I 422, between the effective or probable damages and those foreseen by the parties ATF 103 II 129 JT 1978 I 150, but not the absence of damage itself ATF 40 II 471 , not only the damage that is effectively caused but also the risk of damage to which the creditor was exposed ATF 133 III 43 JT 20070 I 226*".

In CAS 2011/A/2593 ("*Clube Nautico Capibaribe v. FIFA & SC Braga SAD*") the Panel stated: *"Under Swiss Law, the predominant view vis-à-vis Art. 163, para 3 of the SCO is that the Court will use its discretion, if the relationship between the amount of the penalty agreed upon on the one hand and the interest of the creditor worthy of protection on the other hand is grossly disproportionate".* A similar conclusion was reached in CAS 2015/A/3999 ("*Al Itthiad Club v. Diego de Souza Andrade*"): "*a penalty is abusive when its amount is unreasonable and clearly exceeds the admissible amount in consideration of justice and equity* […] *penalty clauses may not be deemed automatically as abusive just because they exceed the costs of damages suffered by the creditor: indeed, including a punishment aspect, the penalty does not have to meet exactly the amount of damage*".

In general, the stance adopted by the CAS jurisprudence is that a reduction of the penalty under article 163 para. 3 SCO is justified when there is a significant disproportion between the agreed amount and the interest of the creditor to maintain the claim, measured concretely at the moment that the contractual violation took place. To judge the excessive character of the contractual penalty, one must not

[161] STF 133 III 20.

decide abstractly, but, on the contrary, take into consideration all the circumstances of the case in hand.[162]

The CAS case law identified several relevant circumstances to be taken into account for this purpose: interest of the creditor in the execution of the obligation, the experience of the parties, the evident disproportion between the effective damage and the amount of the penalty, the nature and duration of the contract, the degree of fault and intentional failure to execute the main obligation, the financial situation and potential interdependency between the parties, as well as the lack of reciprocity.[163]

Another interesting issue is whether, in addition to the penalty in case of non-performance agreed, the injured party is also entitled to a default interest rate on the outstanding amounts. According to the FIFA jurisprudence, as a general rule a contractually agreed penalty for late payment cannot be claimed together with a default interest rate.[164] However, the cumulative application of both the penalty fee and default interest rate can be agreed by the parties, as confirmed by CAS, which held that "*if the contract is clear in determining that both can be awarded complimentary, nothing prevents an adjudicatory body from awarding both*".[165] Once again, the negotiation phase and the wording used in the relevant contractual provisions play an essential role for the protection of the party's rights.

II. The calculation according to the criteria provided by article 17 FIFA RSTP

In the event that parties do not stipulate in the contract the amount of compensation payable for the unilateral termination of the employment contract without just cause, the criteria listed under article 17 FIFA RSTP shall be considered in the calculation of the compensation due for the breach.

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[162] CAS 2008/A/1491 *Christian Letard c. Fédération Congolaise de Football*. See also CAS 2011/A/2656 *Gastón Nicolás Fernández vs FIFA & Club Tigres de la UANL*, CAS 2014/A/3555, CAS 2013/A/3419 *Maritimo da Madeira vs Clube Atlético Mineiro*, CAS 2012/A/2847 *Hammarby Fotboll AB v. Besiktas Futbol Yatirimlari Sanayi ve Ticaret A.S.*, CAS 2012/A/2202 *Konyaspor Club Association v. J.*

[163] CAS 2015/A/4057 *Maritimo da Madeira Futebol SAD v. Al-Ahli Sports Club*, CAS 2012/A/2847 *Hammarby Fotboll AB v. Besiktas Futbol Yatirimlari Sanayi ve Ticaret A.S.*, CAS 2015/A/3999 *Al Ittihad Club v. Diego de Souza Andrade* & CAS 2015/A/4000 *Diego de Souza Andrade v. Al Ittihad Club & Fédération Internationale de Football Association*, CAS 2014/A/3858 *Beijing Guoan FC v. Fédération Internationale de Football Association*, *André Luiz Barreto Silva Lima & Club Esporte Clube Vitória*.

[164] FIFA PSC, 30 January 2012, no. 1121193.

[165] CAS 2014/A/3664 *Al Ittihad Club v. Club de Regatas Vasco da Gama*.

The law of the country

As to the "law of the country concerned", all arrangements, laws and/or collective bargaining agreements that exist at national level in the country where the club is domiciled shall be considered as relevant.[166]

The specificity of sport

The second criterion mentioned under article 17 is the "specificity of sport". Lacking a specific definition under the FIFA regulations, the definitions provided by the jurisprudence shall be considered in order to shed light on such concept.

In the well-known Webster case, the Panel states that "*that the specificity of sport is a reference to the goal of finding particular solutions for the football world which enable those applying the provision to strike a reasonable balance between the needs of contractual stability, on the one hand, and the needs of free movement of players, on the other hand, i.e. to find solutions that foster the good of football by reconciling in a fair manner the various and sometimes contradictory interests of clubs and players. Therefore the Panel shall bear that balance in mind when proceeding to an examination of the other criteria for compensation listed in article 17*".[167]

Furthermore, CAS clarified that by considering the specificity of sport, the adjudicating body shall take into account the specific nature of sport and also the specific sporting circumstances of the case at stake.[168]

A different award, rendered in the case CAS 2007/A/1358 ("*FC Pyunik Yerevan v. L., AFC Rapid Bucaresti & FIFA*") contended that "*the specificity of sport shall be used by a panel to verify that the solution reached is just and fair not only under a strict civil (or common) law point of view, but also taking into due consideration the specific nature and needs of the football world (and of parties being stakeholders in such world) and reaching therefore a decision which can be recognised as being an appropriate evaluation of the interests at stake, and does so fit in the landscape of international football. Therefore, when weighing the specificity of the sport a panel may consider the specific nature of damages that a breach by a player of his employment contract with a club may cause. In particular, a panel may consider that in the world of football, players are the main asset of a club, both in terms of their sporting value in the service for the teams for which they play, but also from a rather economic view, like for instance in*

[166] FIFA Commentary on the Regulations for the Status and Transfer of Players, comment under article 17.

[167] 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*.

[168] CAS 2013/A/3089 *FK Senica, A.S. v. Vladimir Vukajlovic & Fédération. Internationale de Football Association*.

relation of their valuation in the balance sheet of a certain club, if any, their value for merchandising activities or the possible gain which can be made in the event of their transfer to another club. Taking into consideration all of the above, the asset comprised by a player is obviously an aspect which cannot be fully ignored when considering the compensation to be awarded for a breach of contract by a player".

In the well-known case CAS 2008/A/1519-1520 ("*FC Shakhtar Donetsk v Mr. Matuzalem Francelino da Silva & Real Zaragoza SAD & FIFA*"), the Panel stated that "*the amount of damages that may be awarded on the basis of the specificity of sport is clearly subordinated in relation to the other compensable damage heads. In particular, the criteria is not meant to award additional amounts where the facts and circumstances of the case have been taken already sufficiently into account when calculating a specific damage head. Furthermore, the element of the specificity of sport may not be misused to undermine the purpose of art. 17 para. 1, i.e. to determine the amount necessary to put the injured party in the position that the same party would have had if the contract was performed properly. In light of this the assessment of damages that are punitive in character is particularly sensitive. Finally, it follows from this that no compensation is possible for facts and circumstances that are clearly not compensable otherwise (e.g. lost chances, see N 116 et seq.)*". Eventually, in the specific case, the Panel took into consideration the specificity of sport and considered that "*(i) The Player left Shakhtar Donetsk just a few weeks before the start of the qualification rounds of the UEFA Champions League, after the season in which he became captain of Shakhtar Donetsk and was also elected best player of the team"*. As a result, the Panel deemed appropriate to set an additional indemnity amount equal to six months of salary.

In light of all the above, the specificity of sport must be considered as a correcting factor which allows the Panel to take into consideration objective elements which are not envisaged under the other criteria mentioned in article 17 of the RSTP.[169]

Other objective criteria

In relation to the "other objective criteria", article 17 FIFA RSTP specifically lists the elements to consider: remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period.

[169] CAS 2013/A/3411 *Al Gharafa S.C. & Mark Bresciano v. Al Nasr S.C. & Fédération Internationale de Football Association*. Cf. also CAS 2010/A/2145 *Sevilla FC SAD v. Udinese Calcio S.p.A.* and CAS 2010/A/2146 *Morgan De Sanctis v. Udinese Calcio S.p.A.* and CAS 2010/A/2147 *Udinese Calcio S.p.A. v. Morgan De Sanctis & Sevilla FC SAD.*

Remuneration and other benefits

With respect to "the remuneration and other benefits due to the player under the existing contract and/or the new contract", both FIFA and CAS considered the remuneration payable to the player under the existing employment contract for the remaining time of its duration minus the amount earned under the new contract during the overlapping period, in order to mitigate the amount of compensation for breach of contract.[170]

It is very common in an employment relationship between clubs and football players to include bonuses related to the individual performances of the single player (e.g. the number of goals scored) or to the performances of the team (e.g. the achievement of a specific sporting result). Thus, bonuses represent an additional remuneration conditional upon the achievement of future specific sporting results.

From a legal perspective, bonuses constitute conditional clauses, linked to sporting performances: as such, they are regulated under Swiss law by article 151 et seq. of the Swiss Code of Obligations.

Swiss law, like many other civil law systems, protects the legitimate expectations of the parties of a conditional contract by preventing the abuse of right according to the Latin principle *nemo auditur propriam turpitudinem allegans.* In particular, article 156 SCO states "*A condition is deemed fulfilled where one of the parties has prevented its fulfilment by acting in bad faith*".

Therefore, by applying Swiss law, it might be contended that in the event of a club breaching the employment contract without just cause, the club prevents the occurrence of the conditions precedent agreed by the parties for the bonuses to become payable: as such, according to Swiss law, the conditions that trigger the payment of the bonuses shall be deemed as met.

This matter has been discussed several times by CAS,[171] which has identified the requirements that trigger the application of article 156 SCO: the existence of a condition, the fulfilment of the condition is prevented by one of the parties, the reprehensible behaviour of the party preventing the fulfilment of the condition, the violation of the principle of good faith, and a reasonable link between the behaviour of the party and the non-fulfilment of the condition.

In the remarkable case CAS 2012/A/2874 ("*Grzegorz Rasiak v. AEL Limassol*"), the Panel ascertained the existence of the above mentioned requirements and awarded the bonuses requested by the player: "*Should the Club not have terminated the Employment Contracts, the Player would likely have played a number of matches in the 2011/2012 season and considering that the Club won the championship in this season it is also likely that the*

[170] DRC, 13 July 2017 no. 07170099, DRC 10 December 2009, no. 129641, CAS 2008/A/1519 *FC Shakhtar Donetsk v/ Mr. Matuzalem Francelino da Silva & Real Zaragoza SAD & FIFA.*

[171] CAS 2012/A/3012 *Club Atlético Boca Juniors v. Sport Club Corinthians Paulista*, CAS 2009/A/1756 *FC Metz v. Galatasaray SK*, CAS 2008/A/1589 *MKE Ankaragücü Spor Külübü v. J.*

Club would have won quite some points in these matches. In the opinion of the majority of the Panel, by requesting the same amount for the 2011/2012 season as he received over the 2010/2011 season, the Player sufficiently substantiated that such claim is reasonable. By breaching the Employment Contracts, the Club clearly acted in bad faith towards the Player and the majority of the Panel considers it obvious that should the breach not have occurred, the condition for receiving match bonuses would likely have been fulfilled by the Players". However, in this regard, it must be noted that in general FIFA and CAS tend not to take into account bonuses in the calculation of compensation.

In the same case CAS 2012/A/2874, the player also claimed the payment of fringe benefits provided in the contract, such as housing allowance and flight tickets owed to him until the expected date of contractual termination. The Panel accepted such claim only in relation to the expenses already paid, given that such benefits are not salary but are intended to cover actual and real expenses of the player. In this regard, it is worth to emphasise that the burden to prove the actual payment of such expenses lies on the claimant.

Time remaining on the existing contract

As to the "time remaining on the existing contract up to a maximum of five years", it shall be remembered that according to article 18 para. 2 FIFA RSTP, the minimum length of an employment contract is from the date of its entry into force until the end of the season, while the maximum length is five years (three years for minor players). Contracts that exceed five years shall only be permitted if consistent with national laws. However, article 17 FIFA RSTP states that for the purposes of calculating the compensation due in case of breach of contract, the maximum period to take into account is five years. Thus, in light of this specific wording, if the parties have agreed to sign a contract exceeding five years, in the event of a termination without just cause, only the period up to the fifth year would be relevant when establishing the compensation due.[172]

Fees and expenses paid or incurred

As to the "the fees and expenses paid or incurred by the former club (amortised over the term of the contract)", the jurisprudence of both FIFA and CAS has interpreted this criterion as related to the transfer compensation and fees previously paid by the former club, amortised over the entire employment contract's duration.[173] As a result, in the event that the transfer compensation paid by the

[172] FIFA Commentary on the Regulations for the Status and Transfer of Players, comment under article 18.

[173] DRC 2 November 2007, no. 117623, CAS 2008/A/1519 – *FC Shakhtar Donetsk (Ukraine) v Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) & FIFA*.

former club has already been amortised over the duration of the employment contract, this amount cannot be claimed as part of the financial compensation for the breach of contract without just cause.

The protected period

Finally, the last criterion specified by article 17, para. 1 FIFA RSTP is "whether the contractual breach falls within a protected period".

The protected period is specifically defined in the FIFA RSTP as 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 birthday of the professional.

In light of the specific inclusion of this criterion under article 17, para. 1 FIFA RSTP, whether the contractual breach falls within a protected period or not shall be taken into account in the calculation of the compensation. Such conclusion was questioned by CAS in the Matuzalem case, given that sporting sanctions shall also be imposed on any player found to be in breach of contract during the protected period, as provided by article 17, para. 3 FIFA RSTP (see below).

In particular, the Panel sustained that it is an open issue whether the breach within a protected period may also be taken into account when assessing the compensation due, since the same facts and circumstances would possibly be taken into account twice by the judging body, to the detriment of the player.[174]

On the contrary, a more recent decision of the DRC confirmed that whether the contractual breach falls within a protected period or not is of relevance for the purposes of both paragraph 1 and paragraph 3 of article 17 FIFA RSTP.[175]

Other relevant circumstances

Although article 17 para. 1 FIFA RSTP indicates specific criteria for the calculation of the compensation payable to the injured party, according to the interpretation adopted by CAS the judging authority is not necessarily required to evaluate and give weight to any and all of the factors listed therein.[176] Depending on the particular circumstances of each case and on the submissions of the parties, any of those factors may be relevant or irrelevant to the final decision, influencing or not the discretionary assessment of the compensation due.

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[174] CAS 2008/A/1519 – *FC Shakhtar Donetsk (Ukraine) v Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) & FIFA* and CAS 2008/A/1520 – *Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) v FC Shakhtar Donetsk (Ukraine) & FIFA*.

[175] DRC 7 September 2011, no. 9111901.

[176] CAS 2009/A/1880 *FC Sion v. Fédération Internationale de Football Association & Al-Ahly Sporting Club*.

In the calculation of the compensation due for breach of contract, the list of criteria specifically indicated by article 17 is not exhaustive and the adjudicatory body may consider further circumstances that appear relevant in the specific case. However, as clearly specified by CAS, for compensation to be due in such instances there must be the logical nexus between the breach and loss claimed.[177]

Within these boundaries, FIFA and CAS case law has identified other relevant circumstances, such as the agent fees,[178] the loss of a possible transfer,[179] the replacement costs,[180] the player's bad faith in regard to the conclusion of the termination agreement,[181] the player's misbehaviour,[182] the willingness to find an amicable solution to the dispute,[183] the fact that the performance of the employment contract, although fully valid and enforceable, had not started,[184] and the attitude of the player to mitigate his/her damages (which reflects the duty to mitigate damages according to Swiss law, as per article 337c para 1 of the Swiss Code of Obligations).[185]

In relation to the general obligation of the player to mitigate the damages, an interesting contrast is worth noting in relation to the different opinions of FIFA and CAS on the relevance of whether or not the player found a new club in a reasonable period of time. In particular, in a specific dispute, the DRC reduced the amount due as compensation to a player on the grounds that the player had six registration periods to find a new employer in order to mitigate the damage caused due to the breach of contract.[186] In appeal, CAS criticised such approach, considering that clubs are generally not particularly interested in signing a player that is involved in a contractual dispute with his former club. As a result, the Panel did not consider such circumstance as relevant within the calculation of the compensation due to the player: "*the Panel considers the Player's argumentation as to the fact that a player involved in a contractual dispute regarding breach of contract normally encounters difficulties in finding a new club, especially*

[177] CAS 2010/A/2145 *Sevilla FC SAD v. Udinese Calcio S.p.A.* and CAS 2010/A/2146 *Morgan De Sanctis v. Udinese Calcio S.p.A.* and CAS 2010/A/2147 *Udinese Calcio S.p.A. v. Morgan De Sanctis & Sevilla FC SAD*.

[178] DRC 2 November 2007, no. 117623, CAS 2005/A/902 *Philippe Mexès & AS Roma c. AJ Auxerre* & CAS 2005/A/903 *AJ Auxerre c. Philippe Mexès & AS Roma*.

[179] CAS 2009/A/1881 *E. v. Fédération Internationale de Football Association & Al-Ahly Sporting Club*.

[180] CAS 2008/A/1519 – FC Shakhtar Donetsk (Ukraine) v Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) & FIFA and CAS 2008/A/1520 – Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) v FC Shakhtar Donetsk (Ukraine) & FIFA.

[181] DRC 22 June 2007, no. 67675.

[182] DRC 27 February 2013, no. 02131190, DRC 13 October 2010, no. 10102536, DRC 18 March 2010, no. 310585, DRC 23 February 2007, no. 27835, DRC 12 January 2007, no. 17820, DRC 21 February 2006, no. 26332.

[183] DRC 28 June 2013, no. 0613151a, DRC 22 June 2007, no. 67675.

[184] DRC 20 July 2012, no. 7121848.

[185] DRC 13 October 2016, no. 10161150, DRC 29 November 2013, no. 11133071, DRC 13 October 2010, no. 10102536, CAS 2014/A/3684, CAS 2014/A/3693.

[186] DRC 24 April 2015, no. 04151124.

if the respective proceedings are still pending. If a player signed a contract with a new club and FIFA or CAS finally decided that the player did not have just cause to terminate his contract prematurely, the new club would be jointly and severally liable. For this reason, clubs are generally not particularly interested in signing a player that is involved in a contractual dispute with his former club. As a result, a player is prevented from mitigating his damages".[187]

Interestingly, the DRC has also analysed the possibility to consider as relevant criterion for the calculation of compensation under article 17 FIFA RSTP, the lack of profit coming from stadium ticket revenues and the damage towards sponsors,[188] which in the specific case were not awarded because the claimant did not prove the existence of such damage.

The additional guidelines codified by FIFA in 2018

In 2018, FIFA added a new part to article 17, para. 1 FIFA RSTP, which codified additional guidelines for the calculation of the compensation that were previously adopted in the jurisprudence of the DRC. In particular, the second part of article 17 para. 1 FIFA RSTP now reads: "*Bearing in mind the aforementioned principles, compensation due to a player shall be calculated as follows*:

i. *in case the player did not sign any new contract following the termination of his previous contract, as a general rule, the compensation shall be equal to the residual value of the contract that was prematurely terminated;*
ii. *in case the player signed a new contract by the time of the decision, the value of the new contract for the period corresponding to the time remaining on the prematurely terminated contract shall be deducted from the residual value of the contract that was terminated early (the "Mitigated Compensation"). Furthermore, and subject to the early termination of the contract being due to overdue payables, in addition to the Mitigated Compensation, the player shall be entitled to an amount corresponding to three monthly salaries (the "Additional Compensation"). In case of egregious circumstances, the Additional Compensation may be increased up to a maximum of six monthly salaries. The overall compensation may never exceed the rest value of the prematurely terminated contract.*
iii. *Collective bargaining agreements validly negotiated by employers' and employees' representatives at domestic level in accordance with national law may deviate from the principles stipulated in the points i. and ii. above. The terms of such an agreement shall prevail*".

Interestingly, this provision only regards the calculation of compensation due to a player for breach of contract without just cause by the club, whereas the situation in which compensation is due to a club has not been addressed. It must

[187] CAS 2012/A/3033 A. v. FC OFI Crete.
[188] DRC 10 December 2009, no. 129641.

be noted that clubs now have elements to assess the financial impact of breaching a contract with a player: nonetheless, sporting sanctions ex article 17, para. 3 FIFA RSTP may still be imposed in addition to the payment of compensation, when the breach occurs during the protected period. This may act as a sufficient deterrent then, even if a club is comfortable with the amount of compensation that may be calculated according to the criteria provided under article 17, para. 1 FIFA RSTP.

The provision makes a distinction between players remaining unemployed following the unilateral termination of the contract without just cause and those having found a new club. The decisive moment in time for such assessment is the day of the decision. If a player does not sign a new contract following the termination of his/her previous contract, the former club will have to pay compensation equal to the residual value of the contract that was prematurely terminated. However, according to the same provision, if the player does find new employment, then the value of the new contract will be taken into account for the purposes of reducing the amount of compensation due by the former club. This is what is termed "Mitigated Compensation". When the termination is due to overdue payables, in addition to the Mitigated Compensation, the player shall be also entitled to additional compensation varying from three to six monthly salaries. In any event, the overall compensation may never exceed the outstanding value of the prematurely terminated contract.

By inserting these provisions under article 17, FIFA has likely considered that by applying the Mitigated Compensation principle, in the event that the new contract signed by the player provides for a salary that is equal to or higher than the salary provided for in the contract breached, the former club would have been subject to no consequence at all. The insertion of a punitive factor was therefore necessary in order to sanction the unilateral breach.

In any case, domestic collective bargaining agreements may deviate from such principles. In this respect, it must be noted that within the previous legal framework, the case law of the CAS provided the possibility for the parties to an employment agreement to expressly derogate from the general principle of mitigation of loss.[189] The new second part of article 17 para. 1 FIFA RSTP expressly provides the possibility to deviate from such principle only to domestic collective bargaining agreements: however, in the view of the authors, the agreement of the parties aimed at derogating from the principle of mitigation of loss shall be considered valid and binding in light of the caveat provided by the first part of article 17 para. 1 FIFA RSTP ("*and unless otherwise provided for in the contract*"), which makes the parties' will prevail over the criteria provided by the regulations for the calculation of the compensation due.

It must also be noted that according to article 17 para. 1 lit. ii) FIFA RSTP, in case of "egregious circumstances", the Additional Compensation may be increased up to a maximum of six-monthly salaries. On this regard, the

[189] CAS 2014/A/3640 *V. v. Football Club X.*

FIFA RSTP does not specify what shall be considered as "egregious circumstances" and therefore the delimitation of such concept is left to the jurisprudence. In this respect, in a decision passed on 15 November 2018,[190] the DRC noted "*it can be established with a reasonable degree of certainty, that the club was in possession of the player's passport before the termination of the contract, that the club remained silent to the player's request for the return of said document and that, thus, the player remained unemployed and was unable to leave Country D for almost a month due to the club's behavior. The allegations of the player of "inhumane working conditions" also remained uncontested.* […] *In view of the foregoing, and on the basis of the information and documentation on file, the Chamber deemed that the threshold of egregious circumstances is met in the matter at hand and therefore decided to award the Claimant additional compensation corresponding to six monthly salaries, i.e. USD 31,440, in accordance with the above-mentioned provision*".

In addition, in a recent unpublished decision passed on April 2019, the DRC concluded that "*on the basis of the fact that the player was de-registered by the club for an indefinite period and such without any valid reason, the Chamber deemed that the threshold of egregious circumstances would be met in the matter at hand*".

A first delimitation of the notion of "egregious circumstances" under article 17 para. 1 lit. ii) FIFA RSTP has therefore been adopted.

6.4.1.2 Sporting sanctions

In addition to the compensation due by the defaulting party, and in light of the essential role and the paramount importance given by the FIFA RSTP to the maintenance of contractual stability, FIFA considered it appropriate to provide for a further deterrent for clubs and players to unilaterally terminate their contracts without just cause. As a result, FIFA inserted this deterrent in the FIFA RSTP in the form of sporting sanctions.[191]

In particular, article 17 FIFA RSTP states that in addition to the obligation to pay compensation, sporting sanctions shall also be imposed on the party found to be in breach of contract during the protected period, which is at the beginning of the relevant contractual relationship.

It must be stressed that the premature unilateral termination of a contract without just cause is always inadmissible, regardless of the moment at which it occurs. The relevance of the protected period is limited to the consequences of the breach: if the breach occurred during the protected period, then compensation will become due and sporting sanctions might be imposed. On the contrary, if the

[190] DRC 15 November 2018, no. 11181176.

[191] O. Ongaro, *Maintenance of contractual stability between professional football players and clubs – the FIFA regulations on the Status and Transfer of Players and the relevant case law of the dispute resolution chamber*, in *Contractual Stability in football*, SLPC, 2011, 35.

breach occurred after the expiration of the protected period, only compensation will become payable, and disciplinary measures on the player might be imposed.

As explained above, the FIFA RSTP defines the protected period as the 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 birthday of the professional. Furthermore, pursuant to article 17, the protected period starts again when, while renewing the contract, the duration of the previous contract is extended.

Therefore, in case of breach of contract, the adjudicatory body shall ascertain whether or not the breach falls within the protected period, in order to assess whether or not sporting sanctions shall be imposed on the defaulting party.

If the unilateral breach falls outside the protected period, sporting sanctions do not apply. Disciplinary measures may however be imposed on the player for failure to give notice of termination within 15 days of the last official match of the season, in case of unilateral termination for sporting just cause.

If the unilateral breach falls within the protected period, sporting sanctions are applicable: their application is an expression of an *ex-officio* power of the DRC and therefore it is not necessary for the injured party to request their application. In the case CAS 2015/A/4220 ("*Club Samsunspor v. Aminu Umar & FIFA*") the Panel confirmed that "*the prerogative to impose the sporting sanctions provided for in Article 17 para. 4 RSTP entirely lies with FIFA, respectively the DRC, which implicates that it is of no relevance whether a player or a club has requested the imposition of sporting sanctions. As such, and in principle, the DRC has full authority to impose ex officio a ban on a club to register any new players for two entire and consecutive registration periods, based on the fact that a club breached an employment contract during the protected period. The Sole Arbitrator, therefore, concludes that the DRC had the authority to impose a sporting sanction, as per Article 17 para. 4 RSTP, on the Appellant, even though the Player had at no stage during the proceedings before the DRC requested to pronounce such sanction. In fact, the possible imposition of sporting sanctions on a club concerns the vertical relationship between FIFA and its indirect members, rather than the horizontal relation between the two parties to the contractual dispute. It is FIFA's own interest to apply measures aiming at securing the respect of its regulations, in casu the maintenance of contractual stability between professional football players and clubs. Actually, CAS has even gone that far as to state that it is not up to the claimant to request sporting sanctions to be imposed during proceedings before the DRC. The only party entitled to consider such measure is, therefore, FIFA respectively the DRC*".[192]

[192] See also CAS 2014/A/3707 *Emirates Football Club Company v. Hassan Tir, Raja Club and FIFA*.

On this point, it must be noted that on one side, the application of article 17, para. 3 FIFA RSTP is compulsory, and parties are not allowed to exclude sporting sanctions by means of a contract;[193] on the other side, even if the wording of article 17 FIFA RSTP indicates that in case of termination of a contract without just cause during the protected period the imposition of sporting sanctions on the player or the club respectively is mandatory, the jurisprudence of the DRC has consistently considered it to have discretion with respect to the imposition of sporting sanctions.[194]

This position adopted by the DRC is questionable, given that if the intention of the regulator was to give the competent body the discretion to impose a sporting sanction, it would have employed the word "may" and not "shall". However, over time, this stance has been generally accepted and also confirmed by CAS, despite a stricter approach to the matter.

The CAS jurisprudence has acknowledged that there is a well-accepted and consistent practice of the DRC not to automatically apply a sanction as per art. 17 para. 3 FIFA RSTP. As clarified by the Panel in the case CAS 2007/A/1358 ("*FC Pyunik Yerevan v. L., AFC Rapid Bucaresti & FIFA*"): "*FIFA observed that it is stable, consistent practice of FIFA and of the DRC in particular, to decide on a case by case basis whether to sanction a player or not. Even though it is fair to say that the circumstances behind the decisions filed by FIFA to demonstrate such practice differ from case to case, the Panel is satisfied that there is a well accepted and consistent practice of the DRC not to apply automatically a sanction as per art. 17 para. 3 of the FIFA Regulations. The Panel is therefore inclined to follow such an interpretation of the rationale of art. 17 para. 3 of the FIFA Regulations which may be considered contrary to the literal interpretation, but appears to be consolidated practice and represents the real meaning of the provision as it is interpreted, executed and followed within FIFA*".

In a different case, CAS 2015/A/3953 & 3954 ("*Stade Brestois 29 & John Jairo Culma v. Hapoel Kiryat Shmona FC & FIFA*"), the Panel reached a different conclusion in relation to the interpretation of art. 17, para. 3 FIFA RSTP: "*a literal interpretation of said provision implies the duty of the competent body to impose sporting sanctions on a player who has breached his contract during the protected period: "shall" is obviously different from "may". Consequently, if the intention of the RSTP was to give the competent body the discretion to impose a sporting sanction, it would have employed the word "may" and not "shall". FIFA and CAS jurisprudence on this particular article 17.3 may be considered not fully consistent, mainly since the decisions are often rendered on a case by case basis. The consistent line however is that if the wording of a provision is clear, one needs clear and strong arguments to deviate from it*".

[193] CAS 2009/A/1909 *RCD Mallorca SAD & A. v. FIFA & UMM Salal SC*.
[194] DRC 2 November 2007, no. 1171309, DRC 2 November 2007, no. 1171309.

In light of the above, and taking into account that the case law is not fully consistent on this point, it must be concluded that the interpretation of article 17, para. 3 FIFA RSTP adopted by CAS is more literal – and therefore stricter than FIFA's one. However, CAS itself acknowledges that in presence of strong arguments, not imposing sporting sanctions may be justified.

In light of the discretional power of the adjudicatory, it is essential to identify the relevant criteria for the imposition of sporting sanctions. In relation to breaches perpetrated by players, the case law of the DRC has taken into account several circumstances, such as the age of the player,[195] a lengthy absence of the player from his/her club without authorisation,[196] and the player entering into more than one contract with different clubs covering the same period.[197]

As to the *quantum* of the sanction, article 17 para. 3 FIFA RSTP states that players found to be in breach of contract during the protected period shall be sanctioned with a four-month restriction on playing in official matches. Such sanction shall however be increased to six months in the case of "aggravating circumstances". There is no guidance on what conduct would constitute an aggravating factor: the FIFA RSTP do not provide any definition of it, and the case law has imposed the stricter sanction in only a few cases, for failure to give notice and for repeated offence.[198] Thus, the boundaries of the concept of "aggravating circumstance" are still uncertain and depend on the assessment that the adjudicatory body performs on a case-by-case basis.

Regardless of whether the sporting sanction imposed is four or six months, the sanction shall remain suspended for the period between the last official match of the season and the first official match of the next season.

As stated above, the imposition of sporting sanctions is not mandatory: on this point it must be clarified that the discretion of the adjudicatory body, however, concerns only whether or not a sporting sanction shall be imposed, but not the *quantum* of the sanction, which is specifically indicated under article 17 FIFA RSTP.[199]

6.5 The liability of the new club

In order to strengthen the contractual stability between players and clubs in the world of international football and avoid situations where a club interested in signing a specific player encourages this player to breach their existing contract, the FIFA RSTP establishes a specific liability for the new club for which the player registers after the contractual breach. In particular, in the event that a player unilaterally breaches the contract with his/her current club and subsequently enters into an employment contract with a new club, article 17 para. 2 and 4 FIFA RSTP applies.

[195] DRC 4 February 2005, no. 25820.
[196] DRC 23 March 2006, no. 36460.
[197] DRC 27 November 2014, no. 1114239.
[198] CAS 2008/A/1448 *S. & Zamalek SC v. PAOK FC & FIFA*, DRC 2 November 2007, no. 117923.
[199] DRC 10 August 2007, no. 871283, DRC 30 May 2006, no. 56653.

In particular, article 17, para. 2 FIFA RSTP states that if a professional is required to pay compensation for unilateral breach of contract, the professional and his/her new club shall be jointly and severally liable for the payment.

The purpose of joint liability provided by article 17, para. 2 FIFA RSTP is multiple: first and foremost, the party suffering from the breach obtains an additional guarantee that the compensation for the breach will be paid; in addition, such provision relieves the financial and sporting burden placed on the player so as not to hinder his football career; furthermore, it ensures contractual stability in football and finally, it prevents the "unjust enrichment" that otherwise the new club would have obtained from the player's breach.

The question of whether such joint liability is legitimate, was extensively addressed by the Swiss Federal Tribunal in the decision SFT 4A_32/2016: "*Art. 17 para. 2 RSTP establishes a joint liability with regard to the payment of compensation for breach of contract without just cause between the professional player and his new club. This provision establishes a passive joint liability between the author of the contractual violation and the one who has profited from said violation, irrespective of any involvement on the part of the latter in the contractual breach. […]. The very rule of passive joint liability, which FIFA has created to the benefit of the former club and at the expense of the new club has certainly not remained uncontested […] and has indeed been set aside in a case where the former club had parted ways with a player who had not honoured its contractual obligations […]; however, it does not necessarily violate any fundamental principle of substantive law to the extent that it would no longer be compatible with the juridical order and the system of decisive values. To argue otherwise would be difficult, besides, as Swiss law knows roughly similar rules, as the Respondents have pointed out in their respective briefs. Therefore, nothing would command an immediate intervention of the Federal Tribunal in a field which, first and foremost, has to do with sports politics and where the competent bodies of world football are better equipped than itself to intervene efficiently, in a calm manner. The alleged excessive nature of the joint liability imposed on the new club is equally not proven. First of all, the new club cannot ignore its liability for the acts of a third party and the consequences that it might incur on its financial situation; this should lead the latter to do all in its power in order to escape from such joint liability. For instance, it should enquire by all means about the legal situation of the player it wishes to contract with, without relying blindly on the statements of the latter. Equally, it should, if necessary, conclude an employment contract upon the suspensive condition that would allow it to clarify the situation. Secondly, the joint debt is individualized as it corresponds to the compensation, calculated on the basis of the criteria listed in art. 17 para. 1 RSTP, which the player who terminated the employment contract without just cause will have to pay to his former club. It will, furthermore, be determined if the parties to the contract in*

question, as it is often the case, used the possibility mentioned in art. 17 para. 2 RSTP to stipulate the amount of compensation that the player would have to pay. Finally, the new club should be in a position to defend itself against the former club's allegations by putting forward the reasons for which the joint liability should not be applicable due, for instance, to the fact that the player had a valid reason justifying the premature termination of the employment contract (cf. award 4A_304/2013 quoted hereinbefore point. 3)".

In this respect, it must be noted that as a general rule the new club is responsible, together with the player, for paying compensation to the former club, regardless of any involvement or inducement to breach the contract.[200]

As stated in CAS 2013/A/3149 ("*Avaí FC v. FIFA & Bursaspor Club Association & Marcelo Rodrigues*") the automatic nature of the new club's joint liability is aimed at "*avoiding any debate and difficulties of proof regarding the possible involvement of the new club in the player's decision to terminate his former contract*".

However, in some cases, and under specific circumstances, the new club has not been considered jointly and severally liable to pay compensation to the former club. In one specific case, the DRC dispensed the new club from the obligation given that the contract with the player had been signed prior to the contract that was breached by the player.[201] In a different case, CAS decided that a club signing an employment contract with a player who had unilaterally terminated his employment contract with his previous club without just cause, was not jointly and severally liable to pay damages since the employment contract was signed after the expiry date of the contract breached by the player.[202]

In CAS 2017/A/4977 ("*Smouha SC v. Ismaily SC & Aziz Abdul & Club Asante Kotoko FC & FIFA*"), the Panel confirmed that a fault of the acquiring club is not necessarily required in order for the automatic joint liability to be applied. However, the Panel clarified that, in order to validly apply article 17, para. 2 FIFA RSTP in a particular case, the adjudicatory body needs to ascertain the presence of at least one legitimate justification. In that specific case, the Panel decided that no justification was present, given that the new club did not "profit" from the alleged contractual violation of the player, having duly paid the transfer fee to the player's former club.[203] As such, unlike a situation where the acquiring club would

[200] DRC 30 November 2007, no. 117294. See also FIFA Commentary on the Regulations for the Status and Transfer of Players, comment under article 17.

[201] DRC 15 May 2009, no. 59674.

[202] CAS 2013/A/3149 *Avaí FC v. FIFA & Bursaspor Club Association & Marcelo Rodrigues*.

[203] In the specific case, club Asante Kotoko FC accepted the terms offered by the club Ismaily SC for the transfer of the player, and the latter agreed the terms of his employment with the club Ismaily SC. However, the player was eventually transferred by club Asante Kotoko FC to Smouha SC against the payment of a transfer fee, and the player and Smouha SC entered into an employment contract for a period of three years. Thus, club Ismaily SC lodged a claim against the player for breach of contract with the FIFA DRC and called Smouha and Asante Kotoko as respondents, arguing that they induced the player to breach his employment contract with Ismaily SC.

not have to pay a transfer fee after a breach of contract by the player, but would be able to transfer the player for a transfer fee in the future, there was no "unjust enrichment".

According to article 17, para. 4 FIFA RSTP, clubs are also subject to the imposition of sporting sanctions, whenever they are found to be in breach of contract or found to have induced a player to breach a contract during the protected period.

The sanction set out for clubs consists of a ban from registering new players for two entire and consecutive registration periods. It must be noted that, contrary to what is established for players, there are no more severe sanctions for clubs in case of "aggravating factors". However, given that FIFA does not always impose sporting sanctions in cases of breach within the protected period, any factor -and its gravity- is relevant in the decision-making of the adjudicatory body. In particular, the adjudicatory body can take into account several elements, such as the reason behind the termination of the contract (e.g. injury of the player)[204] and any other circumstance deemed appropriate in the specific case.

In the cases CAS 2017/A/5056 ("*Ittihad FC v. James Troisi & FIFA*") and CAS 2017/A/5069 ("*James Troisi v. Ittihad FC*"), the Panel clarified that "*the mere fact that the Club was held liable for breaching four employment contracts with players between December 2014 and November 2016 is a very serious aggravating factor, which in addition to the mandatory prerequisite of breaching the employment relationship within the 'protected period', may legitimately lead the FIFA DRC to impose sporting sanctions on the Club*".

As to the *quantum* of the sporting sanction to be imposed, the same principles provided for players apply to clubs: the DRC has a certain scope of discretion as to the imposition of the sporting sanction, but no discretion as to the extent of the sanction.[205]

Sporting sanctions are applicable not only to clubs that breach employment contracts during the protected period but also to any club found to have induced a player to breach his/her current contract during the protected period.

On this point, art. 17, para. 4 FIFA RSTP states that it shall be presumed, unless established to the contrary, that any club signing a professional who has terminated the employment contract without just cause has induced that professional to commit a breach.[206] Thus, a reversed burden of proof applies in this case and therefore the new club bears the responsibility to prove that it should not be held responsible for having induced the player to breach its contract with his/her former club.

The CAS, in the case CAS 2007/A/1358 ("*FC Pyunik Yerevan v. L., AFC Rapid Bucaresti & FIFA*") defined the "inducement" as "*an influence that*

[204] DRC 25 September 2014, no. 0914107.
[205] DRC 29 August 2009, no. 89733.
[206] DRC 16 April 2009, no. 49194.

causes and encourages a conduct" and, in other case,[207] indirectly listed some circumstance to be taken into account in establishing if the new club has induced, influenced or encouraged the player to terminate the contract with his/her former club: among them, the financial situation of the new club at the time the offer was made, the offer made to the player, the financial value of this offer, the sporting level of the new club and the new club's own active role in the events. As a result, by referring (also) to these criteria, the new club has to prove that it did not have an active role in the player's decision to terminate his/her previous contract.[208] Lacking a specific or plausible explanation for its possible non-involvement in the player's decision, the new club shall be considered liable for inducement.

Finally, it must be noted that pursuant to art. 17 para. 5 FIFA RSTP not only clubs, but any person subject to the FIFA Statutes and regulations – such as club officials – who act 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, in accordance with the disciplinary sanctions provided for in the FIFA Disciplinary Code.

6.6 Buy-out clause v. Release clause

Parties sometimes insert in the employment contract clauses that allow the player to terminate the contract upon the payment of a pre-determined amount. In particular, by agreeing upon a buy-out clause, the parties to an employment contract agree to give the player the right to terminate their employment relationship at any moment by paying a pre-determined amount. As a result, the player can unilaterally terminate the employment contract even during the protected period and no sporting sanctions may be imposed on him as a result of such premature termination.[209]

On this point, it must be emphasised that, by exercising the buy-out clause, the player is only exercising a contractual right, and therefore no breach occurs. As confirmed by the CAS in the case CAS 2013/A/3411 ("*Al Gharafa S.C. & Mark Bresciano v. Al Nasr S.C. & FIFA*"), "*the parties, while entering into a contract, may agree that at a certain (or at any) moment one of the parties (normally, the player) may terminate the contract, by simple notice and by paying a stipulated amount. In other words, one of the parties (ordinarily, the club) accepts in advance that the contract may be terminated: as a result, when the contract is effectively terminated, such termination can be deemed to be based on the parties' (prior) consent. Therefore, no breach occurs, and the party terminating the contract is not liable for any sporting sanction. It is*

[207] CAS 2013/A/3091 *FC Nantes v. FIFA & Al Nasr Sports Club*, CAS 2013/A/3093 *Al Nasr Sports Club v. Ismaël Bangoura & FC Nantes*, DRC 15 March 2013, no. 03131032, DRC 27 August 2009, no. 89733, DRC 23 March 2006, no. 36460.

[208] CAS 2008/A/1448 *S. & Zamalek SC v. PAOK FC & FIFA*.

[209] FIFA Commentary, explanation under article 17.

only bound to pay the stipulated amount – which represents the "consideration" (or "price") for the termination".

It must be noted that although the party entitled to 'buy out' the contract is the player, in practice, it is his/her new club that pays the amount via the player.

The DRC generally only takes reciprocal clauses into account. However, albeit not reciprocal, buy-out clause are considered valid and binding as long as there are no doubts with regard to the clear description of the "buy-out clause".[210]

A buy-out clause is different to a release clause. A release clause is an undertaking from a club to accept an offer for the player if the club receives an offer over a certain amount.[211] If the minimum amount set out in the contract is offered by a potential purchasing club, the player is entitled to negotiate with that club and, in the event that the player agrees to his/her transfer to the purchasing club, the former club is due to transfer the player against the pre-determined transfer compensation. Thus, no uniliteral termination of the employment contract occurs.

6.7 Relegation Clause

Relegation clauses are widely used in employment contracts, with the aim to protect clubs from wage burdens as a result of relegation, which would supersede the club's financial capability.

Relegation clauses may, however, benefit players too: as a matter of fact, by accepting the insertion of a relegation clause in their employment contract, players protect their sports career and prevent the possibility of being obliged to play in lower level competitions in the event of relegation of their current club. In fact, their employment opportunities and market values would be reduced by playing in lower divisions during their short-term careers.[212]

According to the DRC case law, relegation clauses are to be considered valid as long as they don't have a potestative nature.

The general principle is that the parties to an employment contract may agree that the anticipated termination of a short-term employment contract is subject to the fulfillment of a condition, as long as such condition is not of a potestative nature. As confirmed by the DRC, "*The condition of the relegation of a club is certainly not a potestative condition, since such relegation is dependent on other circumstances than the will of a party to the employment contract. In fact, it has to be presumed that the will of clubs and players is always to avoid relegation. The fulfillment of the condition of relegation is thus solely depending on sporting circumstances. In other words, the condition of relegation is a casual condition, and not a potestative condition*".[213]

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[210] DRC 4 October 2013, no. 10131238.

[211] CAS 2008/A/1519 *FC Shakhtar Donetsk v Mr. Matuzalem Francelino da Silva & Real Zaragoza SAD & FIFA*.

[212] CAS 2008/A/1447 *E. v Diyarbakirspor*.

[213] DRC 10 August 2007, no. 87677.

The CAS jurisprudence has confirmed the stance adopted by the DRC. In the case CAS 2016/A/4549 ("*Aris Limassol FC v. Carl Lombé*") the Panel specified that "*there are two different types of relegation clauses: on the one hand, there are relegation clauses stating that the contractual relationship of the parties automatically end in the case of relegation of the club, or give both parties the right to terminate the employment contract in case of relegation. From these kinds of relegation clauses do not only benefit clubs but also the players. That is to say, players themselves also could find it desirable to include such a clause in their employment contracts in order to protect their sports career, in that they would not be obliged to play in lower level competition in the case of relegation of their actual club. Therefore, these clauses can be deemed as a valid way to protect mutual interests of both parties of the contract* […] *On the other hand, there are relegation clauses which do not automatically lead to the termination of the contractual relationship in case of relegation but only give one party the opportunity to terminate the employment contract without any regulation of compensation for the other party. These kind of clauses bear the risk that they contain an unbalanced right to the discretion of one party only without having any interest of any kind for the other party*".

In light of the above, relegation clauses that automatically lead to the termination of the contractual relationship are to be considered valid and binding,[214] whereas relegation clauses that give only one party the opportunity to unilaterally terminate the employment contract, are to be considered as potestative and therefore invalid.[215]

6.8 Probation Period

Probationary periods are defined as periods of time whereby parties to an employment contract are entitled to unilaterally terminate the employment relationship with immediate effect, during a predetermined period. Probation periods are generally accepted in labour law, since they allow both employee and employer to assess their interest in the maintenance of the employment relationship.

However, in light of the principles upon which the FIFA RSTP is based, the stance adopted by DRC is that contractual clauses that establish a probation period are generally not acceptable as they do not respect the spirit of the regulations.[216]

In particular, the DRC observed that probation periods generally are solely in favour of the employer, i.e. the party that commonly has stronger bargaining power. As a result, "*such clause creates a disequilibrium between the rights and the obligations of the player and the club.* […] *As a consequence, the*

[214] DRC 15 March 2013, no. 0313496, DRC 26 October 2012, no. 10121653, DRC 10 May 2012, no. 5121238, 5121239, DRC 18 June 2009, no. 69311.
[215] DRC 10 May 2012, no. 5121238, 5121239.
[216] F. De Weger, *The Jurisprudence of the FIFA Dispute Resolution Chamber*, 2016, 203.

DRC decided that such clause has to be qualified as not admissible, respectively, null and void".[217]

In addition, should clubs have the possibility to end employment contracts invoking a probation period, the rules provided by the FIFA RSTP on registration and registration periods would constitute a severe obstacle to players in finding other employment. As a result, a probation period would contravene not only the clear provision of article 13 FIFA RSTP, but also the general principle of maintenance of the contractual stability. As a result, the DRC declared that probation periods in football related employment contracts are unacceptable.[218]

In a different case, the DRC deemed that "*the possibility granted to the Respondent to prematurely terminate the contract within its first year, without the need to indicate any reasons for it and only based on the fact that such period is to be considered as a probation period, appeared to be of a highly subjective nature, entailing that, de facto, it is left to the complete and utter discretion of the Respondent whether or not it was willing to continue the contractual relationship. In view of the foregoing, the Chamber was of the opinion that art. 2 of the contract invoked by the Respondent in order to put an end to the contract was clearly potestative and that, consequently, the respective argumentation of the Respondent could not be upheld by the DRC*".[219]

In light of all the above, it must be concluded that FIFA questions the validity of clauses that create a *disequilibrium* between the legal rights and obligations of a player and a club, especially when such clauses jeopardise the possibility for the player to properly develop his/her career.[220] As a result, clauses that set out a probation period are not admissible in the employment contract of football players and, as such, such clauses have to be qualified as null and void.[221]

6.9 Termination after Period of Notice

The validity of a clause which gives one party the right to unilaterally terminate the employment contract by granting a pre-determined period of notice, is controversial.

The DRC has analysed such matter by applying the general principle according to which, unilateral potestative clauses in favour of one party, are not acceptable.

As a result, if only the club has the right to terminate the contract at its discretion, the clause is generally not valid.[222]

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[217] DRC 12 January 2006, no. 16695.
[218] DRC 17 August 2006, no. 86833.
[219] DRC 26 October 2012, no. 101211653.
[220] DRC 27 April 2006, no. 46102.
[221] DRC 12 January 2006, no. 16695.
[222] DRC 27 February 2014, no. 02142790, DRC 15 June 2011, no. 611286, DRC 3 October 2008, no. 10895.

On the contrary, if the clause provides a reciprocal right for both parties to terminate the relevant contract granting a specific period of notice, such clause may be considered valid, as long as it provides for an appropriate amount of compensation to the other party.[223] In this regard, the DRC clarified that the amount of such compensation must be suitable: a relatively insignificant amount of compensation would entail that, *de facto*, it is left to the complete and utter discretion of the club whether or not it is willing to continue the contractual relationship with the player.[224] Thus, if the clause agreed by the parties is reciprocal and provides for an appropriate compensation to the counter party, it shall be considered as a valid and binding contractual clause, being in compliance with the general principle according to which an employment contract between a player and a club should only be terminated on expiry of the contract or by mutual agreement.[225]

7. Dispute Resolution

Domestic football regulations normally provide the obligation for the members of the relevant association to insert a dispute resolution clause in their employment contracts, referring any possible dispute to judicial bodies internal to the association itself. However, in order to identify the adjudicatory body competent to assess a specific dispute regarding employment contracts, the dispute resolution system provided by each association shall be considered together with the dispute resolution system provided by FIFA, and in particular the criteria provided by FIFA to establish the jurisdiction of its judicial bodies.

7.1 The jurisdiction of FIFA over disputes regarding employment agreements

The analysis of the jurisdiction of FIFA over employment-related disputes must start with the analysis of the FIFA Statutes.

In particular art. 59, para. 2 of the FIFA Statutes states that recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations.

In addition, art. 59, para. 3 obliges national associations to establish in their regulations a prohibition for their members to take disputes affecting leagues, members of leagues, clubs, members of clubs, players, officials and other association officials to ordinary courts of law, unless the FIFA regulations or binding legal provisions specifically provide for the recourse to ordinary courts of law.

As a result, the regulatory framework applicable both nationally and internationally to football-related disputes prohibits associations, clubs, players, coaches and licensed match agents from having recourse to the ordinary courts

[223] DRC 21 November 2006, no. 116218.
[224] DRC 31 October 2013, no. 10132005.
[225] DRC 23 February 2007, no. 27958.

unless specifically provided for in the FIFA regulations. Sanctions may be imposed on the association, club, player, coach or match agent that seeks to bring a claim before ordinary national court contravening the FIFA Statutes.

The prohibition on recourse to ordinary courts is, however, not absolute. As a matter of fact, FIFA provides two relevant exceptions to this general rule: insolvency proceedings and employment-related disputes. As to the latter – relevant for the purposes of the present contribution – the exception is provided by article 22 of the FIFA RSTP, which defines the competence of FIFA "*Without prejudice to the right of any player or club to seek redress before a civil court for employment-related disputes*". Such provision was one of the requirements requested by the European Commission during the discussions on the FIFA transfer rules in 2001, which ultimately led to the implementation of the FIFA RSTP within FIFA's regulatory framework in September 2001.

Pursuant to such provision, parties may decide to divert from the competence of ordinary courts if there is no compulsory jurisdiction in favour of civil courts and instead refer the matter to national or international sports decision-making bodies.[226] Conversely, parties may also agree on the exclusive jurisdiction of the competent ordinary civil court: in this event, the sporting judicial body would be prevented from deciding the case.[227] However, as clarified in the FIFA DRC decision no. 18-02527 passed on 22 November 2019, "*one of the basic conditions that needs to be met in order to establish that another organ than the DRC is competent to settle an employment-related dispute between a club and a player of an international dimension is that the jurisdiction of the relevant national arbitration tribunal or national court derives from a clear reference in the employment contract*". In the specific case, the DRC recalled the dispute resolution clause provided by the relevant agreement, which established that "*all controversies which might arise from the application, interpretation, validity, execution and/or termination of the present agreement shall be resolve by the ordinary judge competent to adjudicate cases of that value and in that territory*". According to the DRC, such provision did not constitute a clear jurisdiction clause in favour of one specific court, being drafted in a generic manner and failing to mention the relevant country. Consequently, the DRC understood that "*the parties actually never clearly and undisputedly agreed upon a specific jurisdiction*".

It must be noted that in the event that parties had already referred a case to ordinary civil courts, the recourse to sporting judicial body becomes inadmissible, according to the *res judicata* principle, according to which a decision-making body is not in a position to deal with a claim in the event that a different competent deciding body has already dealt with and decided the same matter.

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[226] FIFA Commentary on the Regulations for the Status and Transfer of Players, comment under article 22.

[227] DRC 16 October 2014, no. 10143276.

The application of such legal principle must be analysed *ex officio* by the deciding body, which shall assess whether the two cases have the same parties, same object and same cause.[228] Such stance has been applied in a rigorous manner by the DRC, in order to avoid the so-called "forum shopping".[229]

Finally, it is worth emphasising that several successive editions of the FIFA RSTP have been implemented by FIFA since 2001. In this respect, the principle *tempus regit actum* applies, according to which substantive aspects are governed by the regulations in force at the time of the relevant facts, while procedural matters are governed by the rules in force at the time when the procedural action occurs.

Questions relating to jurisdiction are procedural issues as they pertain to the procedure rather than the nature of the obligations arising from a legal relationship: as a result, any matter related to the jurisdiction of the DRC needs to be assessed in compliance with the rules in force at the moment when the procedural action occurs.

7.2 The competence of the FIFA DRC over employment-related disputes

Pursuant to the definition provided by FIFA's website,[230] "*the Dispute Resolution Chamber (DRC) is FIFA's deciding body that provides arbitration and dispute resolution on the basis of equal representation of players and clubs and an independent chairman. The DRC adjudicates on a regular basis in the presence of a varying composition of members*". In this regard, it must be clarified that contrary to the inaccurate wording of this definition, FIFA does not provide arbitration proceedings.

As confirmed by the Panel in the case CAS 2012/O/2867 "*The Claimant has correctly pointed out that the FIFA bodies – in application of the FIFA Regulations – do not issue arbitral awards. They (only) assume jurisdictional functions as so-called association tribunals. Decisions by these association tribunals must be distinguished from arbitral awards. The latter are final and binding and are issued on the basis of an arbitration agreement the purpose of which is to exclude, in principle, permanently any recourse to state courts. Proceedings before association tribunals, however, only temporarily exclude recourse to state courts. Once the internal remedies of the association are exhausted, the decision of the association tribunal can be appealed (with full power of review) before state courts (e.g. according to art. 75 Swiss Civil Code – 'CC') or – in case of an arbitration agreement – before an arbitral tribunal".*

[228] DRC 16 November 2012, no. 11121309. On the *res judicata* principle, see also DRC 23 July 2015 no. 07151614 and DRC 27 November 2014, no. 11142430.

[229] DRC 16 April 2009, no. 49024, DRC 3 July 2008, no. 78662, DRC 2 November 2007, no. 117309, DRC 21 February 2006, no. 26267.

[230] Available here: www.fifa.com/governance/dispute-resolution-system/index.html (September 2019).

Having clarified the above, it must be noted that the competence of the DRC over employment-related disputes is defined by the combined provisions of articles 22 and 24 of the FIFA RSTP.

According to article 24, para. 1 FIFA RSTP, the DRC is competent to adjudicate on any of the cases described under article 22 lit. a), b), d) and e) FIFA RSTP with the exception of disputes concerning the issuance of an ITC.

For the purposes of the present contribution, article 22, lit. a) and b) FIFA RSTP are relevant. In particular, such provisions read: "*Without prejudice to the right of any player or club to seek redress before a civil court for employment-related disputes, FIFA is competent to hear: a) disputes between clubs and players in relation to the maintenance of contractual stability (articles 13-18) where there has been an ITC request and a claim from an interested party in relation to said ITC request, in particular regarding the issue of the ITC, sporting sanctions or compensation for breach of contract; b) employment-related disputes between a club and a player of an international dimension; the aforementioned parties may, however, explicitly opt in writing for such disputes to be decided by an independent arbitration tribunal that has been established at national level within the framework of the association and/or a collective bargaining agreement. Any such arbitration clause must be included either directly in the contract or in a collective bargaining agreement applicable on the parties. The independent national arbitration tribunal must guarantee fair proceedings and respect the principle of equal representation of players and clubs*".

Thus, the DRC is competent to decide disputes related to the maintenance of contractual stability between professionals and employment-related disputes between a club and a player of an international dimension.

7.2.1 The maintenance of contractual stability: article 22, lit. a) of the FIFA RSTP

Article 22, lit. a) FIFA RSTP refers to disputes between clubs and players in relation to the maintenance of contractual stability where there has been an ITC request and a claim from an interested party in relation to said ITC request.

It must be noted that such provision applies only to international disputes in light of the reference to the issuance of an ITC: FIFA is competent whenever a player signs for a club affiliated to another association as a result of an employment-related dispute, and the new association asks for the ITC to be issued.[231]

The national or international nature of the dispute is determined by the registration of the player following the termination of the contract: if the new club of the player belongs to the same association of the former club, the dispute shall be decided domestically, whereas if the new club belongs to a different association,

[231] FIFA Commentary on the Regulations for the Status and Transfer of Players, comment under article 22.

and therefore an ITC request is necessary to register the player, the DRC is competent to hear the dispute, even if the parties share the same nationality.

7.2.2 Employment-related disputes between a club and a player of an international dimension: article 22, lit. b) of the FIFA RSTP

According to article 22, lit. b), the DRC is also competent to hear employment-related disputes between a club and a player of an international dimension, unless an independent arbitration tribunal has been established at national level.

In relation to this provision, three aspects need to be clarified: the concept of "employment-related disputes", the "international dimension" and the "possibility to refer the dispute to an independent arbitral tribunal established at national level".

As to the definition of "employment-related disputes", the FIFA jurisprudence tends to restrict such concept to disputes strictly concerning employment relationships between clubs and players.

In this regard, it is worth mentioning that the DRC normally denies its jurisdiction over disputes regarding image rights,[232] unless this constitutes part of the actual employment relationship.[233]

As specified by the DRC "*As a general rule, if there are separate agreements, the DRC tends to consider an agreement on image rights as non-employment related, as a result of which it would fall outside its scope of competence on the basis of art. 22 of the Regulations. However, such conclusion might be different if specific elements of the separate agreement suggest that it was in fact meant to be part of the actual employment relationship*".[234]

The same conclusion was confirmed by CAS in the case CAS 2015/A/4039 ("*Nashat Akram v. Dalian Aerbin Football Club*"), whereby the Panel concluded: "…*if it is apparent from the facts and evidence that although the parties signed two contracts in the form of an "Employment Contract" and an "Image Rights Agreement", their intention ab initio, and understanding throughout the validity of these contracts, was to have them linked and to operate in pari passu as documents governing the employment relationship between the player and the employer/club, and that the third party mentioned in the image right agreement was merely brought in as a payment vehicle that would allow the employer to minimize the tax impact, one should consider that FIFA is therefore competent to hear any and all employment related disputes arising out of the club's employment relationship with the player in accordance with article 22 (b) of the FIFA RSTP*".

[232] DRC 13 December 2013, no. 12132433, DRC 25 August 2006, no. 86613, DRC 12 March 2009, no. 39274.
[233] DRC 10 February 2015, no. 02151030, DRC, DRC 17 January 2014, no. 114396, DRC 30 August 2013, no. 08133402, DRC 13 December 2013, no. 12131045.
[234] DRC 7 July 2015, no. 07151087.

Considering the restrictive approach adopted by FIFA in relation to the definition of "employment-related disputes", the existence of an employment relationship between the club and the player is essential in order to establish the jurisdiction of the DRC.

In this respect, it must also be noted that article 2 para. 2 of the FIFA RSTP states that employment contracts between a professional player and a club shall be concluded in writing: thus, the presence of a written employment contract between the parties is essential in establishing the existence of an employment relationship which is subject to the competence of the DRC.

In a few cases, even in the absence of a valid employment contract, the DRC has accepted claims based on the mere factual relationship between the parties.[235] Such cases are, however, the exception: normally, the existence of a valid and binding employment contract results is essential for the DRC to assess a claim.

As to the "international dimension" of the dispute, the FIFA commentary states: "*The international dimension is represented by the fact that the player concerned is a foreigner in the country concerned. In these cases, there is no need for an ITC request. The jurisdiction of FIFA is automatically established. These disputes obviously also fall within the remit of the DRC. On the other hand, disputes between a player who has the nationality of the country to which the club is affiliated and this club fall under the exclusive jurisdiction of national sports tribunals (or of civil courts, as the case may be) if the player registers for a club in the same association*".[236]

The CAS in the case CAS 2016/A/4441 ("*Jhonny van Beukering v. Pelita Bandung Raya & FIFA*") confirmed that, "*As a general rule, the international dimension is represented by the fact that the player concerned is not a national of the country of the association with which the relevant club is affiliated. When both parties have the same nationality, however, the dispute must be considered to be of a national or internal nature, with the consequence being that the rules and regulations of the association concerned must be applied to the matter and the deciding bodies in accordance with the relevant provisions are to rule on the issue. If FIFA's deciding body would deal with such an internal matter, the internal competence of a FIFA member association would be violated*".

These principles of delimitation between the competence of FIFA and the competence of the associations are crucial for the reciprocal recognition of the organisations and the autonomy of FIFA and the member associations.[237]

In case the player holds a dual nationality, including of the country where the counter-party club has its seat, it is of utmost importance to analyse at the

[235] DRC 26 October 2006, no. 1061318, DRC 12 October 2006, no. 1061118.

[236] FIFA Commentary on the Regulations for the Status and Transfer of Players, comment under article 22.

[237] DRC 25 April 2014, no. 04143063.

moment of the registration of the player which passport was indicated by the parties in the contract. Therefore, if a player who holds a double nationality signs a contract as a national of the same country of the club, the DRC will not be competent due to the lack of the international dimension required by article 22, lit. b) FIFA RSTP.

According to article 22, lit. b) FIFA RSTP, an employment-related dispute of an international dimension may also be submitted to an independent arbitration tribunal that has been established at national level within the framework of the association and/or a collective bargaining agreement, provided that such tribunal guarantees fair proceedings and respects the principle of equal representation of players and clubs.

With regard to the standards to be imposed on an independent arbitration tribunal guaranteeing fair proceedings, reference has to be made to the FIFA Circular no. 1010 dated 20 December 2005, which establishes the minimum procedural standards that need to be met by the domestic arbitration tribunal in order to be considered "independent" and "duly constituted": the equal influence of the parties over the appointment of arbitrators, the possibility for the parties to reject the arbitrators if there is a legitimate doubt about their independence, a fair hearing, the possibility for each party to examine and comment on the allegations filed by the other party, and the principle of equal treatment.

A party that contests the competence of the domestic arbitral tribunal bears the burden to prove the existence of the above-mentioned conditions.

However, the existence of a domestic arbitral tribunal that meets the above-mentioned requirements is not sufficient to supersede the DRC's jurisdiction: as a matter of fact, it is essential that the parties included in the employment contract a clear reference to the competence of the national arbitration tribunal.[238] Reference must be made through a clear[239] and specific[240] arbitration clause: according to the DRC, a reference to a collective bargaining agreement that refers any dispute to a national arbitration tribunal is not valid.[241]

A reference in the employment contract to the competence of the national arbitration tribunal has been essential since 2016, when the wording of article 22 was modified: the 2014 edition provided for FIFA jurisdiction in "*b) employment related disputes between a club and a Player of an international dimension, unless an independent arbitral tribunal ... has been established at national level ...* ", while under the 2016 version of the FIFA RSTP, in "*b) employment related disputes ... of an international dimension ... the parties may ... explicitly opt in ·writing/or such dispute to be decided by an independent arbitral tribunal ... at national level*". The current edition reflects the wording of the 2016 edition, and therefore a specific reference needs to be provided in the

[238] DRC 30 November 2017, no. 1602079, DRC 2 November 2007, no. 2117.
[239] DRC 27 February 2014, no. 02142682.
[240] DRC 6 March 2013, no. 031322423.
[241] DRC 17 January 2014, no. 01143276.

employment contract in order to validly refer the dispute to the domestic arbitral tribunal.

The requirement of a clear reference to the domestic arbitral tribunal in the employment contract is provided by the DRC for the sake of players: in particular, players need to be aware at the moment of signing an employment contract that the parties shall be submitting potential disputes related to their employment relationship to a domestic arbitration tribunal.[242] Thus, lacking such explicit reference in the employment contract, the DRC is accordingly competent to decide the relevant dispute. However, the existence of a specific arbitration clause in the employment contract does not make the DRC incompetent *per se*: even if the contract at the basis of the dispute includes a valid and clear arbitration clause in favour of a national dispute resolution, parties must actually invoke the arbitration clause and object to FIFA's competence,[243] otherwise the DRC is competent to hear the case.

As a result, in case of an employment-related dispute between a club and a player of an international dimension, normally the DRC is competent. As an exception, if the parties have clearly elected a national forum and the latter is an independent arbitration tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs, only then, the national body may become competent.

It must also be clarified that, only parties belonging to the same association are entitled to address their disputes to the internal arbitral tribunal established within the association.

In this respect, it must be noted that parties to a dispute may belong to different associations when the breach occurred but they may belong to the same association at the moment of the claim being lodged. In this scenario, the jurisdiction of the domestic arbitral tribunal may be questionable. In assessing this issue, the DRC has clarified that the relevant moment in the assessment of the jurisdiction is when the event giving rise to the dispute took place: as a result, in an emblematic case the DRC decided that despite the fact that the player and his former club belonged to the same association when the claim was lodged, the dispute felt outside of the jurisdiction of the domestic arbitral tribunal since the parties belonged to different associations when the contractual breach occurred.[244]

8. Conclusions

The content of an employment contract is always a compromise between the conflicting interests of two parties: bargaining power, knowledge of the applicable regulations and therefore awareness of the risks involved determine which interests prevail.

[242] FIFA Commentary on the Regulations for the Status and Transfer of Players, comment under article 22.

[243] DRC 31 October 2013, no. 10131629, DRC 10 June 2004, no. 64357.

[244] DRC 30 November 2017, no. 1602079.

The football industry has been continuously growing and, since the Bosman ruling and the subsequent liberalisation of the players' transfer market and the entry into force of the FIFA RSTP, the balance of power between clubs and players has changed. Nonetheless, the vast majority of players still represent the "weaker party" in employment relationships and the FIFA RSTP unfortunately do not offer an incisive protection for them. Such protection must therefore be reinforced by an accurate and detail-oriented drafting of the relevant employment contract.

In addition, in the last twenty years football has been becoming more and more of a global business, and the legal and regulatory issues related to employment relationships often intersect several areas of law over different jurisdictions. Employment contracts in football reflect such complexity and therefore practitioners involved in the football industry need to have a flexible approach and an inter-disciplinary understanding of the legal issues that might arise when drafting an employment contract in order to get the job done.

As a matter of fact, a well-drafted employment contract is essential in order to prevent possible disputes and to protect the rights of the parties involved. To this end, the negotiations phase plays an essential role. From the very beginning of this phase, parties need to pay the utmost attention to the applicable rules and to their conduct: not only have the duty to act in good faith during negotiations in order to avoid the liability for *culpa in contrahendo* acknowledged by the DRC and the CAS, but the drafting of so-called "pre-contracts" might result in valid and binding employment contracts when they provide the essential elements of the employment relationship, namely the parties to the contract and their obligations, the duration, the remuneration and the signature of both parties.

In addition to these essential elements, the best practice suggests to also define the accessory elements of the contract which, although not required for the validity of the agreement, are often extremely important in practice. Such elements include taxation issues, methods of payment, exploitation of image rights, and the extension and termination of the contractual relationship.

Furthermore, when negotiating and drafting an employment contract, parties must be aware of the specific limits imposed on their contractual freedom, not only by the applicable regulations, but also by FIFA and CAS case law. In particular, these limits include the prohibition to make an employment contract conditional upon the player's passing of medical examinations or the issuance of the ITC or visa/work permit, the limits to the duration of the employment contract, the prohibition of probation periods, and the invalidity of potestative clauses in relation to unilateral termination, to name only a few.

In addition, parties must take into account the specific legal framework applicable in the country where the employment relationship is going to take place. As a matter of fact, domestic laws and collective bargaining agreements shall be considered in addition to the legal framework provided by FIFA and by the relevant national association.

The negotiation and drafting of employment contracts in football is therefore not an easy task: the constant changes in the regulatory and legal frameworks in which clubs and players operate, together with the ever-changing landscape of football practices adopted by the stakeholders in response to these changes, represent a permanent challenge for practitioners. Understanding the rules is therefore the first essential step when facing issues related to the employment relationships between clubs and football players, which now apply on a global scale as a result of the increasing mobility of players.

TRANSFER AGREEMENTS PURSUANT TO THE FIFA PSC DECISIONS AND THE CAS JURISPRUDENCE

by *Josep F. Vandellós Alamilla*[*]

1. General aspects of transfer agreements

1.1 Introduction

Every single football fan in the world understands what a transfer of a football player is. On the surface, a transfer appears to be a fairly uncomplicated process, which simply involves the movement of a player from club A to club B. However, behind the scenes the process can be complicated and presupposes the alignment of multiple interests of different parties (clubs, players, intermediaries) and all the work is done with the imminent pressure of deadlines marked by the transfer window in each national football association. Consequently, the underlying process of an international transfer from a legal perspective becomes considerably complex.

To begin with, it would be pertinent to mention that in spite of the explicit reference in the title of the FIFA Regulations on the Status and Transfer of Players (ed. 2020)[1] (the "RSTP"), there is no concrete definition of a transfer agreement.[2] What we know, is that the material scope of the RSTP is limited to laying down the rules governing the transfer of players between clubs belonging to different associations, and therefore, to transfers having an international dimension. Moreover,

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[1] The 2020 Edition of the FIFA Regulations on the Status and Transfer of Players is available at: www.fifa.com/about-fifa/who-we-are/legal/rules-and-regulations/documents/.

[2] In CAS 2008/A/1519-1520 (Matuzalem – unpublished award) the Panel made the following interesting remark: "*In doing so, the Panel only acknowledges the economic reality in the world of football, i.e. that services provided by a plater are traded and sought after on the market, are attributed economic value and are – according to art. 17 FIFA Regulations – worth legal protection. The Panel is eager to point out that the sole object of this approach are the services provided by a player and not the human being as such*".

through Circular 1679 of 1 July 2019,[3] FIFA has included for the first time in the regulations, a definition of "*International transfer*" and "*national transfer*". According to these new definitions, an international transfer is "*the movement of the registration of a player from one association to another association*", while a national transfer is "*the change of a player from playing for one club at an association to playing for a new and different club within the same association*".

Arguably, the norm is mainly focused on regulating the "*transfer of the registration*" of the player, or what I call *the administrative or external dimension* of the transfer, rather than the underlying transaction between the parties involved, or – likewise in my own terms – *the private dimension or internal dimension* of the transfer.

In other words, aspects such as transfer fees, sell-on clauses, buy-back clauses and many others are nowhere to be found in the RSTP and the lack of a specific regulation of the transaction itself, can generate some degree of uncertainty with regards to the correct identification of the substantial applicable law, particularly when it comes to role of Swiss law[4] to those matters not included in the RSTP. Recent decisions show that it might be relevant.[5] The same problematic exists in the case of football coaches[6] and has been the subject of intense debates.

In practice, the FIFA PSC avoids as a general rule, relying upon dispositions of national laws, deciding by default on the basis of *general legal principles of law*,[7] such as *pacta sunt servanda*, and where existing, the *well-established jurisprudence of the PSC*, while always remarking that the FIFA regulations prevail over any national law chosen by the parties.[8]

Keeping these introductory considerations in mind, before diving deeper into the realm of transfers having an international dimension, it is necessary to identify the essential elements of a transfer.

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[3] Circular 1679 is available at: https://resources.fifa.com/image/upload/1679-amendments-june-and-october-2019.pdf?cloudid=yhpcqh0syjuzaccv1yrz.

[4] Swiss law constitutes the *additional law* complementing the RSTP before the CAS according to article with article 57 para. 2 of the FIFA Statutes, which are available at: https://resources.fifa.com/image/upload/the-fifa-statutes-2018.pdf?cloudid=whhncbdzio03cuhmwfxa.

[5] See the Decision of the Single Judge of the PSC of 5 June 2018 (ref. 06180108-e) para. 2, 6 where in lack of dispositions in the RSTP regarding the interpretation of contracts, the Single Judge explicitly refers to Swiss law for such purpose. Available at: https://resources.fifa.com/mm/document/affederation/administration/03/01/17/38/06180108-e.pdf.

[6] For a detailed study on the issues around the applicable law see J. F. Vandellos, "*Football Coach-related disputes. A critical analysis of the Players' Status Committee Decisions and CAS Awards*", Chapter 2, Ed. Michele Colucci (2019).

[7] See the Decision of the Single Judge of the PSC of 8 August 2018 (ref. 08181951-e). Available at: https://resources.fifa.com/mm/document/affederation/administration/03/01/97/84/08181951-e.pdf.

[8] Decision of the Single Judge of the PSC of 26 April 2016 (ref. 08181951-e) para. 8, 9. Available at: https://resources.fifa.com/mm/document/affederation/administration/02/84/84/92/04161527-e.pdf.

1.2 Essential elements of transfer agreements

In lack of a specific definition of transfer agreement, in order to delineate its nature, one must necessarily look at:

(i) *the parties involved in transfers* and their role,
(ii) *the structure of transfers* and finally,
(iii) *the procedure followed to transfer football players from one club to another*.

While looking at a transfer from *the parties' perspective*, we confront with the previously anticipated *private or internal dimension* of the transfer. The private dimension strictly concerns the contractual relationships between the parties to the transfer. First, *the releasing club*, with whom the football player has an ongoing employment relationship. Second, *the engaging club*, with whom the player will sign a new employment contract and continue his sporting career. And third, *the football player* who is being transferred between clubs belonging to different associations and whose consent will be crucial.

The private dimension of the transfer will necessarily involve the interplay of three different and (to the extent the parties decide) independent transactions[9] ("*negotii"*) which will form *the structure of the transfer agreement*:

a) *The agreement between the former club and the new club*:[10] the two clubs will essentially have to agree upon the transfer of the player and establish the terms and conditions (i.e. whether there is a transfer fee or not; whether the transfer has a permanent or temporary character; whether there are certain conditions to which the transfer might be subject to, e.g. passing of medical examinations, the consent of the player etc.).
b) *The agreement between the former club and the player*: the releasing club and the player will have to *terminate or suspend* (depending on the character of the transfer) their employment relationship by mutual agreement and also establish the possible terms of the termination or suspension.
c) *The agreement between the player and the new club*: the engaging club and the player will have to enter into a new employment relationship.

The principle of contractual freedom necessitates that the parties have complete freedom to establish the terms of the three transactions mentioned above (*let. a, b and c*) and also to determine the interdependence of the relationship between them.

By way of example, they are free to decide that the parties to the transfer agreement are solely the clubs. Alternatively, they can include the player as a party to the transfer agreement. The structure chosen for the contract will

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[9] See *CAS 2011/A/2356 SS Lazio SpA v. CA Vélez Sarsfield & FIFA,* award of 28 September 2011 on the notion of transfer agreement for the purposes of the solidarity contribution mechanism. Available at: https://jurisprudence.tas-cas.org/Shared%20Documents/2356.pdf.

[10] *Former club* and *new club* are the terminology used by the FIFA Regulations on the Status and Transfer of Players. See definitions 2 and 4.

eventually determine the *essential elements* for its validity such as, for instance, the concurrence of consent of all parties including the player's or, only of the clubs.

Thus, when only the two clubs are parties to the transfer agreement, it would be prudent to subject the validity of the transfer (*let. a) above*) to the subsequent agreement between the player and the new club i.e. to the employment contract (*let. c) above*). Likewise, it would be advisable to condition the termination of the employment contract between the former club and the player (*let. b) above*) to the receipt of the transfer fee or the successful passing of the medical examination (*let. a) above*) amongst many other possibilities to be explored in this chapter.

The transfer of a football player from one club to another at the international level is accordingly, a complex *sui generis* institution of football law that differs from the classical *assignment of employees* existing in employment law usually conducted through authorized job placement agencies.

The existing FIFA decisions and CAS jurisprudence offer valuable insight in understanding the diverse mechanics indicated before and identifying the *essential elements* of transfer agreements in football.

For example, in the *Decision of the Single Judge of the PSC of 14 January 2015 (ref. 01150088-e)*[11] the Single Judge concluded that the transfer agreement between two clubs was valid and binding because it contained *the essential elements*; which for the Single Judge consisted of *(a)* the agreement between the clubs to transfer the player against the payment of a transfer fee; and *(b)* the signature of the transfer agreement by the parties, which is nothing but the external manifestation of the agreement.

"*9. The Single Judge thus analysed the wording of the agreement 1 and concluded that the Claimant and the Respondent agreed upon the essential aspects, namely the transfer of the player to the Respondent in return for the amount stipulated, as well as the fact that the latter agreement was duly signed by the parties*".

According to the Single Judge, in the above-mentioned case, the *essential elements* are the agreement between the clubs to transfer the player (i.e. the *object of contract*) in return of a fee (i.e. *the consideration*) and ultimately, the ability of the parties to prove its existence (i.e. *the consent*).

The *Decision of the Single Judge of the PSC of 6 March 2018 (ref. 03180237-e)*[12] refines the criteria highlighting that *in order for a transfer agreement to be considered valid and binding, apart from the signature of all parties involved, it should contain the essentialia negotii of a legal agreement, such as the parties to the contract and their role in the transfer*

[11] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/87/76/17/01150088-e.pdf.

[12] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/98/90/47/03180237-e.pdf.

of the player, the date of the transfer, whether the transfer was made on a loan or definitive basis, and the eventual compensation payable by the buying party to the selling party, if any.

Similarly, in the context of a loan agreement *Decision of the Single Judge of the PSC of 27 September 2017 (ref. 09171332-e)*[13] the Single Judge considered that the clubs involved in the dispute had agreed upon the *essential aspects*, namely the loan transfer of the player to the Respondent in return for the amount stipulated, as well as – in this case – the fact that the agreement had been duly signed by the parties.

With regards to the consent requirement, in a different dispute, i.c. *CAS 2010/A/2144 Real Betis v. PSV Eindhoven*[14] *award of 10 December 2010*, the discussion revolved around the relevance of the *consent of the player* as a *conditio sine qua non* for the validity of the transfer agreement.

This CAS award strengthens the notion that the underlying transactions behind a transfer agreement are, as a general rule, independent of each other unless the parties establish otherwise. Hence, according to the Panel, the consent of the player is indeed "*a key element for any successful transfer*" but, strictly speaking, not essential for the validity of the transfer agreement. The only consent needed for the validity of a transfer agreement is the consent of the parties to it, which in this case were the clubs, not the player.

The facts of the case stated above were the following: the player (on loan with Real Betis) refused to sign the employment contract with the Spanish club after the latter had exercised an option right inserted in the loan agreement, to transfer the player from PSV on a permanent basis. The Panel concluded that the player's refusal to sign the employment contract could not absolve Real Betis from the contractual obligations it had towards PSV, and consequently, ordered the Spanish club to pay PSV damages in accordance with the *principle of restitution* and the very specific circumstances of this case and the arguments below:

"55. If Betis were keen on securing the Player on a permanent basis through exercising the Option, it was bound to safeguard itself against the risk of the Player refusing to sign with it. This is a duty which the Panel remarks cannot override Betis' obligations towards PSV under the Loan Agreement.

56. The Panel stresses that the Player's refusal to sign the Proposed Employment Contract does not relieve Betis from its contractual obligations towards PSV". [Emphasis added]

A similar situation was examined in the *Decision of the Single Judge of the PSC of 24 November 2017 (ref. 1115277-e)*.[15] The Single Judge had to

[13] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/93/84/73/09171332-e.pdf.

[14] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/2144.pdf.

[15] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/85/22/74/1115277-e.pdf.

determine whether a transfer agreement for the player had been concluded between the Claimant and the Respondent. By way of the transfer agreement, the Respondent *promised* the Claimant *to permanently buy the sporting services of the player*. However, the player refused to sign the employment contract with the Respondent. Consequently, the Respondent declined to make payment of the agreed transfer fee, considering that the transfer was a preliminary agreement which was not final and binding.

The Single Judge remarked that the agreement was not subject to any condition in order to become binding between the clubs, let alone to the consent of the player, and therefore, decided that the parties had entered into a valid agreement, obliging the Respondent to pay the established transfer fee.

The award in the matter CAS 2010/A/2098 *Sevilla FC v. RC Lens* of 29 November 2010,[16] better illustrates the essential structure of a transfer agreement in the context of a definitive transfer:

"3. In the world of professional football the term 'sale' is used in an inaccurate way. Clubs, in fact, do not have property rights in, or equivalent title to, the player, which could be transferred from one entity to another. The 'sale' of a player, therefore, is not an agreement affecting a club's title to a player, transferred from one entity to another against the payment of a purchase price. The transfer consented by the seller, and the price paid in exchange, do not directly consider a property right, but are part of a transaction affecting the employment relation existing between a club and a player, always requiring the consent of the 'transferred' player and of the clubs involved. Through the 'sale', then, the parties express their consent to the transfer of the right to benefit from the player's performance, as defined in the employment agreement, which, in turn, is the pre-condition to obtain the administrative registration of the player with a federation in order to allow the new club to field him". [Emphasis added]

Hence, as underlined above by the Panel, transfer agreements also have an *administrative or external dimension* that goes in parallel with the private sphere and is to some extend external to the will of the parties.

The administrative dimension to which the award refers, constitutes in essence the scrutiny or control of the transaction from a regulatory point of view. This control is conducted (*in the case of international transfers*) via FIFA on the one hand, through the applicable regulations and on the other hand, through the so-called Transfer Matching System (the TMS)[17] and the delivery of the International Transfer Certificate (the ITC).[18] In other words, for the transfer to be effectively completed and to allow the player to play for a new club, FIFA

[16] Available at http://jurisprudence.tas-cas.org/Shared%20Documents/2098.pdf.

[17] A web-based data information system through which all international transfers of football players must be conducted. See definition 13 and Annexes 3 and 3a of the FIFA Regulations on the Status and Transfer of Players and Circular 1679.

[18] See article 9 of the FIFA Regulations on the Status and Transfer of Players.

(with the cooperation of the National Associations and the clubs) will have to clear the transfer.

It is from this regulatory perspective that, O. Ongaro, adroitly defined the notion of transfers of players in a recently published article in the following terms:[19]

"*Actually, when we commonly speak about the transfer of a player, technically it would be more precise and accurate to speak about the transfer of a players' registration*".[20]

It is important to underline that this external dimension of transfer agreements, is essentially what FIFA refers to and regulates through the RSTP as it is patent in various decisions. For instance, in the *Decision of the Single Judge of the PSC of 22 November 2016 (ref. 11160824-e)*,[21] the Single Judge remarked: "*12. Furthermore, the Single Judge was keen to underline that it is evident from the various provisions referred to above, but also from the entire registration process described not only in art. 8 of Annexe 3 of the Regulations, but also in art. 5 to 10 of the latter, that the Regulations envisage and govern the actual and physical move of a player between clubs belonging to different associations, respectively the transfer of his registration between different associations. The ITC is, in this respect, the actual illustration of such basic and fundamental principle*". *[Emphasis added]*

The administrative nature of transfers manifests in article 9 of the RSTP ("International Transfer Certificate") and in the FIFA Commentary on the Regulations for the Status and Transfer of Players ("The commentary") that refers explicitly to the "*Transfer of registration*" (see art. 5 para. 3).

Tellingly, article 23 of the edition 2017 of the FIFA Disciplinary Code, in force until 15 July 2019[22] included a definition of "*Transfer ban*" which specified that: "*A transfer ban prevents a club from registering any player during the period in question*", and therefore, it did not prevent a club from transferring a player from the private dimension, but strictly forbade his or her registration during the period of the sanction affecting only its administrative dimension. The new edition of the Disciplinary Code maintains the *transfer ban* as one of the disciplinary measures that may be imposed on legal persons only (see Article 6.3.a) although its definition has been removed. However, the meaning of *transfer*

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[19] See O. Ongaro and M. Cavaliero, "*Dispute Resolution at the Federation International de Football Association and its judicial bodies"* Football Legal no. 4, December 2015, 56. O. Ongaro is the former FIFA's Director of Football Regulatory and was appointed Deputy Chairman of the FIFA Dispute Resolution Chamber on 1 January 2020.

[20] FIFA Circular 1679 of 1 July 2019 includes a definition of Registration in the Definitions section of the RSTP.

[21] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/90/40/73/11160824-e.pdf.

[22] See the FIFA announcement in the following link: www.fifa.com/about-fifa/who-we-are/news/fifa-introduces-innovative-approach-with-launch-of-new-disciplinary-code and the new FIFA Disciplinary Code in www.fifa.com/governance/disciplinary/index.html.

ban remains the same and distils from other references in the RSTP such as Articles 12bis.7 ("*The execution of the registration ban (...)*"), 17.4 or 24bis.2 *inter alia*.

A detailed explanation of this concept is found in the *CAS award 2005/A/808 Club Hannover 96 v. FC Varteks, of 22 May 2006*:[23]

"*18. The combination of these provisions shows that the system of transfers under FIFA regulations is based on the assumption that a transfer only takes place when the player has been actually registered with a national association and admitted to play for one of its clubs. This is confirmed by the scholars, according to whom the transfer is to be defined as the move of a player from a club to another club and his qualification for the new club by the national federation (ZEN-RUFFINEN P., Droit du Sport, Zurich 2002, n° 709). Therefore, every transfer necessarily requires the player's qualification by the national federation for the new club (ZEN-RUFFINEN, op. cit., n° 712). This definition is applicable not only for football, but for most of team sports (ZEN-RUFFINEN, op. cit., n° 709*)." [Emphasis added]

In conclusion, from an internal perspective the *essential elements*[24] of a transfer agreement are identical to the essential elements for the validity any other contract, that is, the concurrence of *object, cause and consent*. The lack of these essential elements can impact the validity of the transfer.[25]

However, an effective transfer under the RSTP will presuppose the administrative validation of the registration of the transfer between the associations to which the clubs belong and therefore, the pacific alignment of the *internal* and the *external dimensions*. Failure to register the transfer will impede the new club to benefit from the services of the player but as it will be seen below, it will not necessarily affect the validity of the transfer agreement.

1.3 Difference between definitive transfers and temporary transfers

In brief, the main difference lies in the temporary nature of loans as opposed to the definitive nature of permanent transfers.

Thus, from a *regulatory point of view* (i.e. the administrative dimension) whereas in the case of a full transfer the registration of the player is transferred on a permanent basis; in the case of a loan, the registration is transferred temporarily. Clubs must indicate the nature of the transfer when creating instructions in the TMS.[26]

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[23] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/808.pdf.

[24] See also the Decision of the Single Judge of the PSC of 23 October 2012 (ref. 1012094). Available at: https://resources.fifa.com/mm/document/affederation/administration/02/33/98/37/1012094_english.pdf.

[25] Decision of the Single Judge of the PSC of 30 January 2012 (ref. 01121019_fr). Available at: https://resources.fifa.com/mm/document/affederation/administration/02/29/20/07/01121019_english.pdf.

[26] Cf. Article 4.3 Annex 3 of the RSTP.

According to the definition provided in the Commentary[27] *the loan of a player by one club to another constitutes a transfer for a predetermined period of time*. In the sense of the regulations, loans are consequently also considered to be transfers.[28] A club benefiting from a player transferred on a loan basis cannot transfer him to a third club without the written authorization of the club that released the player.[29]

Instead, from a *private perspective*, structuring the transfer as a loan or as permanent will have a myriad of different implications which would need to be addressed in detail in each transfer agreement. All of these issues are analyzed in the following sub-chapters.

However, despite the manifest differences between both types of transfers, there have been cases where the ambiguity of the agreement and/or the ill-intention of the parties involved, has resulted in a dispute regarding the true nature of the agreement.

1.3.1 Cases of ambiguity

In a case before the PSC, one of the parties contended that – *"All transfers are definite unless specified otherwise*" to establish that the agreement it had signed with another club was a final transfer and not a loan. The two clubs had entered into a so-called "*Private Agreement*" whereby the player was transferred from one club to another and the two parties had a disagreement regarding the real nature of the transfer. The dispute led to *the Decision of the PSC of 15 August 2012 (ref. 08123475)*.[30] After analyzing the arguments of the parties and the documents in the file, the Single Judge decided that the "*Private Agreement*" had to be considered a final transfer for the following reasons:

- *The time span of four years of the employment contract between the player and the new club is unusually long for a transfer on a loan basis.*
- *The agreement did not provide for the obligation of the player to come back to the club of origin after the expiration of the period of contract.*
- *The agreement included a sell-on clause, which would only make sense in the context of an agreement for the definite transfer of a player.*
- *The mention in the ITC to a "special loan convention" referred to a document which had been signed by the Claimant club and the player to which the Respondent club was not a party. The document therefore, could*

[27] See the Commentary to article 10 "*Loan of Professionals"*, section 1. "*Definition*". 16.
[28] See Decision of the Single Judge of the PSC of 8 August 2018 (ref. 08181951-e) para. 21, 11. Available at: https://resources.fifa.com/mm/document/affederation/administration/03/01/97/84/08181951-e.pdf.
[29] Article 10 para. 3 of the FIFA RSTP (ed. 2018).
[30] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/29/20/67/08123475_english.pdf.

– *not demonstrate that the Respondent had accepted the player on loan a basis.*

Similarly, in CAS 2012/A/*2733 Stichting Heracles Almelo v. FC Flora Tallinn*, award of 27 November 2012,[31] the Estonian club FC Flora Tallin transferred a player to Heracles securing a sell-on clause of 15% for a potential future transfer. Heracles then transferred the player to another Dutch club on the basis of a so-called "*secondment agreement*" for which it received 380.000 Euro as "*secondment fee*" and refused to pay the 15% share to Flora who presented a claim in front of the FIFA Players' Status Committee (the "PSC"). The claim was admitted which determined Heracles to escalate the matter to the CAS by way of appeal.

When confronted with the ambiguity of the document and the difficulty to determine the real intention of the parties,[32] the Sole Arbitrator, in accordance with the applicable law (i.e. Swiss law), had to rely upon more objective criteria and interpreted the contract according to the requirements of good faith (the "*reasonable man interpretation*") or, what he called "*the overall circumstances test*" which in this case consisted of answering the following fundamental question: *"What would have been different, if the transfer was to be a final transfer and not a loan?"*

To this effect, "*the overall circumstances test*" was completed with some more questions, the answers to which helped him conclude that the veritable intention of the clubs was to transfer the player on a permanent basis:

– *What is its title "(although the Sole Arbitrator notes that different weight may be attached to these different circumstances, and what a document is called is of lower weight when considering its express terms; the terms that one might expect to see in a loan agreement, but have been omitted; along with what the overall effect of the agreement has on the parties; rather than just what it is labeled)"?*
– *What is the term of the agreement compared to the remainder of the player's contract with the first club?*[33]
– *Who pays his basic wages?*
– *Who pays bonuses?*
– *Has the player signed a pre-contract agreement with the second club?*
– *Does the second club have any option to acquire the player at the end of the agreement?*
– *Who insures the player?*
– *Who is responsible for any medical cover/treatment?*
– *How much is paid by the second club to the first?*
– *Is the fee more than a reimbursement of the wages?*

[31] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/2733.pdf.
[32] See article 18 of the CO.
[33] See to this effect the Decision of the Single Judge of the PSC of 10 November 2017. Available at: https://resources.fifa.com/mm/document/affederation/administration/02/96/98/00/11170343-e.pdf.

After addressing the above-mentioned questions and applying the test to the specific facts of the case, the Sole Arbitrator concluded that any *reasonable man*, would see no difference if the transfer were to be a final transfer instead of a loan and therefore, confirmed the obligation of the Dutch club to pay the sell-on clause.

Significant are also the following (i) *Decision of the Single Judge of the PSC of 23 September 2014* (*ref. 09142911*)[34] where the transaction seemed to be structured as a loan with an option to permanently transfer the player, but the parties had antagonistic positions in relation to the payment of the established amounts; (ii) *Arbitrage TAS 2007/A/1338 SASP Le Havre Athletic Club c. AS Vita Club de Kinshasa,*[35] *sentence du 8 avril 2008* confirming that the nature of a loan must be proven; and (iii) *Decision of the Single Judge of the PSC of 27 July 2016* (*ref. 07161596-e*)[36] regarding the ambiguous nature of a transfer agreement in the context of a dispute revolving around economic rights deriving from a sell-on clause.

1.3.2 Cases of simulation

1.3.2.1 Permanent transfer disguised as a loan

In CAS 2007/A/1219 *Club Sekondi Hasaacas FC v. Club Borussia Monchengladbach,* award of 9 July 2007,[37] the German club attempted to circumvent the obligation to pay 15% of a future transfer to the Ghanian club, Sekondi, by loaning out (instead of transferring on a definitive basis) a player to 1. FC Nürnberg. The period of loan coincided with the remaining period of the employment contract that the player had with Borussia Monchengladbach.

The Panel asked itself about the real nature and the real intentions of Borussia Monchengladbach and 1. FC Nürnberg in connection with the loan agreement and whether the transfer of the player could really be qualified as temporary, concluding that the deal was in reality, of a permanent nature and that consequently, Sekondi was entitled to 15% of the net profit realized by the German club from the player's transfer to 1. FC Nürnberg.

"*2. When the transfer of the Player in loan is, in many ways and in particular from an economical point of view, very much equivalent to a final transfer: the former club received a fairly substantial fee, the Player was transferred up until the expiry of his contract with the former club and the former club did not have any obligations towards the Player during the loan period and, finally, the Player moved to another club, the new agreement*

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[34] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/84/44/38/09142911.pdf.

[35] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/1338.pdf.

[36] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/86/56/35/07161596-e.pdf.

[37] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/1219.pdf.

entered into being denominated "transfer agreement", there would have been no difference if the transfer was to be a final transfer and not a loan".

Conversely, in the *Decision of the Single Judge of the PSC of 10 November 2017* (*ref. 11170343-e*)[38] the Single Judge rejected the allegations raised by the claimant club according to which the loan of the player to a third club was a scheme implemented by the respondent with the purpose to circumvent the sell-on clause in the initial transfer.

1.3.2.2 Loan disguised as a permanent transfer

In the CAS award 2014/A/3508 *FC Lokomotiv v. FUR & FC Nika,* award of 23 March 2015[39] the dispute revolved around the veritable *legal nature of the permanent transfer* of the player from FC Lokomotiv to FC SKA.

The player was apparently transferred on a permanent and free basis from FC Lokomotiv to FC SKA. However, after the period spent in FC SKA he returned to FC Lokomotiv and was subsequently transferred by FC Lokomotiv to FC Spartak Moscow for a substantial amount. FC Nika (the player's former club) requested FC Lokomotiv the payment of its share of economic rights, but FC Lokomotiv refused to do so contending that FC Nika lost its economic rights as a result the permanent nature of the transfer to FC SKA.

The question the Panel had to answer was therefore, *whether the transfer between FC Lokomotiv and FC SKA was of permanent nature or instead it was a simulated loan*,[40] structured in order to circumvent the limit of five loaned players as laid down in the regulations of the RFU.[41]

Considering the overall circumstances of the case, the Panel eventually found that indeed the transfer agreement between FC Lokomotiv and FC SKA "*must be considered as a simulated act*"[42] and that the transfer of the player to FC Spartak had to be considered to be the first transfer triggering the right of FC Nika to receive the amount stipulated in the sell-on clause.

The Panel referred to the following circumstances to affirm the existence of a simulated loan:[43]

"194. In the present dispute, the Panel notes that, notwithstanding the fact that the Player's transfer from FC Lokomotiv to FC SKA was formalised as a permanent transfer, there are certain events and circumstances that indicate that the transfer was in reality a loan. These circumstances are:

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[38] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/96/98/00/11170343-e.pdf.

[39] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/3508.pdf.

[40] According to the jurisprudence of the Federal Tribunal, "*a simulation exists if both parties agree on the fact that the reciprocal declarations shall produce a legal effect which does not correspond to their will, as they want whether to feign and agreement or to hide, by means of the apparent contract, the contract really wanted by the parties*". (ATF 123 IV 61).

[41] See para. 181, 30.

[42] See para. 201, 33.

[43] See para. 194, 32.

- *The fact that FC Lokomotiv and FC Nika agreed upon a sell-on clause in the Transfer Contract, indicates that both clubs had some idea of the true value of the Player;*
- *The Player was transferred to FC SKA in June 2006 without compensation, while in December 2005 FC Lokomotiv paid USD 300.000 to FC Nika for the transfer of the Player to FC Lokomotiv*;
- *FC Lokomotiv paid to FC Nika in 2008, i.e. two years after the alleged permanent transfer by which FC Nika's rights of the Transfer Contract were allegedly extinguished, the amount of USD 250.000 in accordance with the Transfer Contract;*
- *FC Lokomotiv clearly had a close relationship with FC SKA, since before the transfer of the Player, FC Lokomotiv had already loaned two players that season to FC SKA;*
- *The Player returned to FC Lokomotiv one day after termination of his employment agreement with FC SKA, without any consideration or negotiation by the Player or FC Lokomotiv.*

The Panel eventually found that FC Lokomotiv and FC Ska had entered into a permanent transfer scheme (*i.e. the public act*) at the request of the FC Lokomotiv in order to conceal the existence of a loan agreement (i*.e. the real transaction*). The simulated act was accordingly left without effect, and the transfer was considered to be of temporary nature, thereby depriving FC Nika of its right to claim the amount owed to it.

See also the *Decision of the Dispute Resolution Chamber of 30 June 2017* (*ref. 06171326-e*),[44] confirmed in full by the *CAS in the affair 2018/A/5553, award of 6 March 2019.*[45] In this case, a loan transaction was essentially disguised as a permanent transfer by the insertion of a buy-back obligation in the favour of the former club.

1.4 Conditions applicable to transfer agreements

A *condition* is a *future and uncertain* event upon the occurrence of which the parties ascribe the formation, modification, effects or termination of a contract or an obligation of the contract. The *condition* can affect the agreement as a whole (e.g. if the player and the club do not sign an employment contract, the transfer agreement becomes void) or instead, it can affect only an obligation within the transfer agreement (e.g. if the new club qualifies for the European Champions League the transfer fee will increase by X amount). The possibilities (always within the limits of the law) are practically endless.

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[44] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/95/03/14/06171326-e.pdf.

[45] Award unpublished at the moment of writing this sub-chapter (May 2019). The author acted for the player.

In Swiss civil law, contracts or obligations subject to conditions are regulated in articles 151 to article 157 of the Code des Obligations (CO)[46] and these can concern any subject matter unless it is unlawful or immoral.[47] The regulation of conditions is similar across different jurisdictions with a continental civil law system and encompasses in general, the obligation of the parties to safeguard the fulfillment of the condition until it is expected to occur, establishing also the consequences when one of the parties acting in bad faith prevents its fulfillment i.e. the condition can be deemed fulfilled.

From an academic point of view, there are different ways to categorize conditions,[48] but for the purpose of this chapter, attention will be placed on *two types of conditions* which are often seen in transfer agreements (i.e. private dimension) of football players:

– *Condition precedent*.[49] That is, when the validity of a contract or the acquisition of a certain right is made dependent on the occurrence of an event that is not certain to happen. (e.g. If the player is transferred to a third club, the club of origin will retain 50% of the transfer fee obtained by the new club). The obligation to pay the share on the future transfer fee is only due if the player is transferred to another club against the payment of a fee. Till the occurrence of the event, the right exists but its effectivity is pending.
– *Condition subsequent*.[50] That is, when the termination of a contract or the loss of a right that already exists and is effective, is made dependent on the occurrence of a future event (e.g. the loan agreement signed between Club A and Club B will automatically terminate if the player does not pass the medical examinations). If the event occurs, the obligation (valid until to that moment in time) ceases to exist ("*ex nunc" – from now on*).

As part of the protection of contractual stability, the RSTP prohibits clubs from making the validity of employment contracts contingent on certain conditions[51] such as, the successful passing of the medical examinations or other requirements of administrative nature. However, this limitation in the RSTP does not extend to transfer agreements, which consequently, can be, as a general rule, subject to fulfillment of conditions as part of the principle of contractual freedom of the parties.

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[46] The English version of the CO is available at: www.admin.ch/opc/en/classified-compilation/19110009/201704010000/220.pdf

[47] See art. 157 CO.

[48] Positive and negative conditions. Potestative or contingent conditions. Impossible, illicit or immoral conditions.

[49] See art. 151 CO.

[50] See art. 154 CO.

[51] Title IV. Maintenance of contractual stability between professionals and clubs - Article 18 Special provisions relating to contracts between professionals and clubs - Para. "*4. The validity of a contract may not be subject to a successful medical examination and/or the gran of a work permit*".

In this regard, one of the most complete awards dissecting the legal nature of condition precedents in the context of transfer disputes and under the incidence of Swiss law is the *CAS 2014/A/3647 Sporting Clube de Portugal SAD v. SASP OGC Nice Cote d'Azur & CAS 2014/A/3648 SASP OGC Nice Cote d'Azur v. Sporting Clube de Portugal SAD, of 11 May 2015*.[52]

Below are the most common conditions to which transfer agreements are made subject to and the approach of the jurisprudence towards them. It is important to remark that conditions are not presumed and therefore they must be included in the transfer agreement in a clear manner in order to avoid future conflicts.

1.4.1 The player's consent/the signing of an employment contract

The validity of a transfer agreement signed between the releasing club and the engaging club can (*and in my view, should always*) be conditioned to the consent of the player which ultimately should crystalize in the employment contract with the new club. However, the interdependence between the transfer agreement and the employment contract will depend ultimately upon the covenants agreed between all parties.

The player's consent to the transfer can nevertheless be explicit or tacit; it can emerge directly from the transfer agreement by making him co-sign it; or it can be expressed in an offer; or in a document whereby the parties suspend or terminate the employment contract; or in certain cases, it can even be deduced from the behavior of the parties. There are no pre-established rules or formulas, but obtaining the consent of the player will always give certainty to both clubs and the player himself, avoiding confusion and conflict at a later stage if things go south.

A) The consent of the player in the context of a loan agreement:
CAS 2013/A/3314 Villarreal CF SAD v. SS Lazio Roma S.p.A.,[53] *award of 7 March 2014:*
"*A loan contract is in principle only concluded between the two clubs. The co-signing of the loan agreement by the player merely entails him/her not needing to enter into a separate agreement with the club of origin, whereas the effects of the employment contract are temporarily suspended. This also has the result of assuring the destination club that the previous employment contract is suspended. A loan contract can only be deemed to be a tripartite agreement if it establishes the terms of the loan and employment*".

The risks for clubs are evident. The fact that there are multiple avenues to structure a transfer renders the consent of the player a crucial element to avoid pitfalls. E.g. As seen earlier in *CAS 2010/A/2144 Real Betis v. PSV Eindhoven*[54]

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[52] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/3647,%203648.pdf.
[53] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/3314.pdf.
[54] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/2144.pdf.

award of 10 December 2010, the consent of the player is a key element for a successful transfer. Therefore, a club looking to exercise the option to make a loan transfer permanent, could end up having to pay a substantial transfer fee without having previously secured the employment agreement with the player.

From the player's perspective, signing the loan agreement without making its validity dependent on the conclusion/existence of the employment contract with the new club entails likewise the risk of remaining in a legal limbo where neither club is obliged to take him. Likewise, there has been instances where the player has terminated his contract with the new club during the loan, and found himself in a difficult situation where the player's club of origin is not obliged to take him back because the suspension of the employment contract remains valid.

B) The consent of the player in the context of a permanent transfer agreement: in the *Decision of the Single Judge of the PSC of 27 July 2016 (ref. 0716605-e)*,[55] the releasing club submitted a claim against the new club requesting the payment of the transfer fee of EUR 5.500.000 for the permanent transfer of the player. The new club alleged that considering the absence of an employment contract with the player, the transfer agreement had become null and void according to article 8 of the transfer agreement which conditioned the effectiveness of the agreement to the entering of a valid employment contract with the player.

The claimant however, considered that the offer[56] that had been signed by the new club and the player contained all the *essentialia negotii* and thus, was a binding employment contract. The claimant further contended that the respondent was prevented from invoking the condition precedent provided in article 8. The Single Judge concluded that the offer lacked the *essential elements* to be considered as a valid employment contract and was not convinced in view of the circumstances, that the player had accepted it. An important consideration was the fact that the offer mentioned "*is [was] pending the payments terms conditions*" and that it was also subject to the passing of the medical examination by the player.

See also *Decision of the Single Judge of the PSC of 26 March 2015 (ref. 03153109)*[57] on the independence between the transfer agreement and the employment contract (para. 14 "(…) *two different and independent legal instruments*").

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[55] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/85/97/76/0716605-e.pdf.

[56] For more on the legal concept of "*offer*" see the CAS 2016/A/4721 *Royal Standard de Liège v. FC Porto (Player C.)*, award of 19 May 2017. Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/4721.pdf.

[57] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/79/34/18/03153109.pdf.

1.4.2 The payment of the transfer fee

The award in CAS 2011/A/2451 *RC Recreativo de Huelva SAD v. Trabzonspor SK*[58] is the perfect example of how the validity of a transfer agreement can indeed be made dependent on the payment of a transfer fee and the potential consequences of failing to pay the transfer fee. According to this award, "*2. (...). The payment of the transfer sum after the agreed specific time of payment allows the creditor club to consider the transfer "invalid" due to the non-payment of the transfer sum in due time*".

In the referred case, the parties agreed that the transfer fee of 1.000.000 USD was to be paid before 23:59 pm on Friday 31 August 2007. The payment however, arrived only on 4 September and the Turkish club -in a highly questionable decision- considered the transfer invalid which prevented them at a later stage from requesting the payment of the transfer fee or damages from the Spanish club who had already secured the employment contract with the same football player.

Against this very specific factual background, the Panel suggested that the Turkish club should have opted instead to act against the player and the Spanish club in pursuance of article 17 RSTP:

"*20. The Panel wishes to emphasise that as it considered the transfer agreement to be invalid, it follows that the Player's contract with the Respondent was still valid. The fact that the Player decided to leave the Respondent and to move to play with the Appellant, notwithstanding that the transfer agreement no longer existed, does not – per se – establish any right of compensation between the two clubs. In such circumstances, the Respondent should have pursued a claim against the Player under Article 17 of the FIFA Regulations on the Status and Transfer of Players for unilateral breach of contract without just cause*".

1.4.3 The passing of medical examinations

The jurisprudence of CAS and the FIFA decisions are exhaustive in this regard and leave no doubts as to the legitimacy of subjecting the effects of a transfer agreement (i.e. permanent or loan) to the passing of medical examinations by the player. The prohibition laid down article 18 para. 4 of the RSTP affects only employment contracts between players and clubs and not transfer agreements.

According to CAS 2010/A/2317 *SC Fotbal Club Timisoara SA v. FC Slovan Liberec* & CAS 2011/A/2323 *FC Slovan Liberec v. SC Fotbal Club Timisoara*[59] it is customary in the world of football for the purchasing club to take the responsibility for carrying out a medical test on any new player.

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[58] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/2451.pdf.

[59] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/2317,%202323.pdf.

In CAS 2013/A/3314 *Villarreal CF SAD v. SS Lazio Roma S.p.A.*,[60] award of 7 March 2014 and its supporting *Decision of the Single Judge of the PSC of 19 March 2013 (ref. 03131648)*[61] both clubs disputed the results of the medical results conducted on the player. Lazio maintained that that the player suffered from hypertension and was unfit to practice professional football, and used this circumstance to withdraw from the loan agreement entered with Villarreal; Villarreal instead claimed that the player was in peak physical condition and that the medical examinations were maliciously biased.

Eventually, the panel decided in accordance with the provisions in the loan agreement establishing that the medical examinations had to be conducted by Lazio's doctors "*(...) whose opinion is the only relevant one for the purposes of the agreement. Villarreal's doctors may have come to a different conclusion, but – as stated by the Decision – "it is not up to [Villarreal] to decide on which basis [Lazio] deems that a player is fit to practice professional football" (p. 7)*".

The jurisprudence also remarks that any type of abuse needs to be prevented. The medical examinations need consequently, firstly, to be conducted, and secondly, to be conducted *in good faith*, under pain of *the condition* being considered fulfilled regardless of the result.

Also, according to the *Decision of the Single Judge of the PSC of 26 August 2014 (ref. 0814771*),[62] whether the employment contract between *the player and the new club* was already signed at the moment the results of the medical examinations invalidated or rendered the transfer agreement void is also irrelevant. The transfer agreement is from that perspective, independent from the employment contract:

"*14. Finally, and as to the arguments put forward by the Claimant in accordance with the player's employment contract signed between the player and the Respondent, the Single Judge underlined that whereas a transfer agreement and an employment contract are evidently linked, these two agreements must still be considered as separate agreements, governed by separate sets of rules. The fact that the player signed an employment contract with the Respondent prior to the medical examination may have implications for the player vis-aÌ-vis the Respondent, but, in the Single Judge's view, does not, in the present matter, have any influence on the contractual relation between the Claimant and the Respondent*".

In this same line CAS 2008/A/1593 Kuwait Sporting Club v. Z. & FIFA, award of 30 December 2008[63] remarks the independence of the employment

[60] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/3314.pdf.

[61] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/25/91/68/03131648_english.pdf.

[62] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/66/51/31/0814771_english.pdf.

[63] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/1593.pdf.

contract when summarizing that "2. *A club cannot justify the termination of an employment contract by relying on an illegal successful medical examination clause contained in the same employment contract or in a loan agreement, to which a player is not party and which is completely autonomous and independent from the employment contract*". [emphasis added]

Finally, it goes without saying that if the medical problems are found or manifest after the transfer is performed and deemed valid for all purposes by the clubs, then the new club will be deprived of any right to terminate the transfer agreement for any injury or medical condition found thereafter. In the Decisión del Juez Único de la Comisión del Estatuto del Jugador de 20 de noviembre de 2014 (ref. 1114513)[64] the new club refused to pay the transfer fee to the former club, alleging that the player suffered from epilepsy and accused the former club of having omitted to disclose this information. The Single Judge dismissed the arguments of the new club, remarking that it was the responsibility of the new club to verify and confirm the medical condition of the player when it decided to transfer him.

Other important decisions revolving around medical examinations and transfer agreements are*: Decision of the Bureau of the PSC of 19 March 2014 (ref. 0314620);*[65] *Decision of the Single Judge of the PSC of 19 March 2013 (ref. 0814077);*[66] and CAS 2016/A/4588 *FC Internazionale Milano v. Sunderland AFC* & CAS 2016/A/4589 *Sunderland AFC v. FC Internazionale Milano*.[67]

1.4.4 The issuance of the ITC

Article. 9 of the RSTP establishes that "*The ITC shall be issued free of charge without any conditions or time limit*". Accordingly, any condition placed upon the issuance of the ITC are deemed null and void. The prohibition affects both clubs and national associations who are also prevented from charging expenses or demanding any payments.[68] The jurisprudence in this regard is well-established and unambiguous.[69-70-71]

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[64] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/84/32/38/1114513.pdf.

[65] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/42/50/98/0314620_english.pdf.

[66] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/80/46/27/0814077.pdf.

[67] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/4588,%204589.pdf.

[68] See the commentary to article 9 "*International Transfer Certificate*", para. 3, 29.

[69] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/42/50/86/0713134_english.pdf.

[70] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/71/13/11/03151681_english.pdf.

[71] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/42/50/86/0713134_english.pdf.

There is however, no legal impediment to condition the validity of a transfer agreement (*private dimension*) to the issuance of the ITC or the registration of the player (*administrative dimension*). In the *Decision of the Bureau of the PSC of 19 March 2014 (ref. 0314776),*[72] the clubs conditioned the validity of the transfer agreement to the fulfillment of various conditions:

"*a. The signing of an employment contract between Club O and the player.*
b. The issue of the player's International Transfer Certificate by the country P football association.
c. The approval by the new club's Football Association of the contract between Club O and the player.
If any of three conditions have not been met, then this agreement shall be automatically terminated and ineffective".

The transfer eventually failed due to the non-completion of the relevant transfer instruction in the TMS in a timely manner by the Respondent club (new club). The Bureau recalled that in accordance with art 3 par. 1 of Annexe 3a of the Regulations the new club of a professional is responsible to submit all applications to register the player in question and responsible to insert the relevant documents in the TMS, being the only one who could have influenced the fulfilment of the conditions included in the transfer agreement.

"*12. (...) As a result, the Bureau concluded that, taking into account that the Respondent had undisputedly only started uploading several mandatory documents in TMS in the last minutes of the last day of the relevant registration period so that ultimately, the upload in question could not be finalized before midnight and the relevant transfer was declined by the system, the Respondent had acted with negligence and was therefore to be considered the sole responsible of the non-completion of the transfer instruction*". [Emphasis added]

The Bureau considered that the Claimant could not be disadvantaged by the non-execution of the agreement by the Respondent and had to be treated as if the conditions included in the agreement had been fulfilled, concluding that the Claimant was entitled to receive the agreed transfer fee of EUR 1.000.000 plus 5% interest p.a. on the said amount.

The case made its way up to the CAS leading to the CAS 2014/A/3647 *Sporting Clube de Portugal SAD v. SASP OGC Nice Cote d'Azur* & CAS 2014/A/3648 SASP *OGC Nice Cote d'Azur v. Sporting Clube de Portugal SAD*, *of 11 May 2015*.[73] This award offers valuable legal insights of *condition precedents* under Swiss law, in particular, the understanding of *negative and positive obligations* of the parties to safeguard the prospect of the fulfillment of the condition under article 152 CO, and the meaning and consequences of *bad faith* under article 156 CO. The CAS partially admitted the Appeal of Nice, and

[72] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/42/51/22/0314776_english.pdf.
[73] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/3647,%203648.pdf.

although it confirmed the FIFA decision, it reduced the compensation for damages, considering the Portuguese club acted also with certain degree of negligence.

Instead, the *Decision of the Single Judge of the PSC of 20 November 2016 (ref. 11160349-e)*[74] opted for a different solution. In this case the clubs explicitly subjected the validity of the transfer agreement to "*the release by Football Federation of country I of the registration as professional player of the Player*". On the same day of the transfer agreement, the releasing club and the player terminated their employment contract by mutual consent. The new club however, failed to register the player apparently due to the existence of a quota limit for foreign players and asserted that because of such reason it never signed the employment contract with the player and entered the counter-instruction in the TMS. The former club considered that the new club had breached the transfer agreement and claimed for the payment of the transfer fee.

The Single Judge concluded that "*(...) it remained undisputed by the parties that the player was never registered with the Respondent. Consequently, he concluded that the triggering element of the suspensive condition was met, resulting in the ineffectiveness of the transfer agreement and, therefore, the Single Judge decided to reject the Claimant's claim*". (para. 10).

Without knowing other specific details of the case than the elements in the decision, one cannot help but wonder if the new club acted negligently by not considering the existence of quotas for foreign players and the difficulties of transferring such players, and thereby prevented with its behavior, the normal fulfillment of the condition precedent as it happened in the previous case.

Other relevant cases related to transfer agreements, the delivery of the ITC and the registration process of a player are the *Decision of the Single Judge of the PSC of 26 August 2014 (ref. 0814295)*[75] touching upon possible damages caused by a delay in the issuance of the ITC; CAS 2015/A/4027 Udinese Calcio S.p.A v. Osterreichischer Fussball-Verband (OFB)[76] on the standing to sue and the standing to be sued against decisions regarding the ITC; *Decision of the Single Judge of the PSC of 23 October 2012 (ref. 1012094)*[77] regarding the obligation of the new club to register the player before his national association.

See also the FIFA Players' Status Committee decision of 25 September 2019 concerning the transfer of the late Emiliano Sala from FC Nantes to Cardiff City FC (available at: https://resources.fifa.com/image/upload/player-emiliano-sala.pdf?cloudid=zz1mucunt6ydvrzqrqdw).

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[74] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/90/78/30/11160349-e.pdf.

[75] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/79/34/09/0814295.pdf.

[76] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/4027.pdf.

[77] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/33/98/37/1012094_english.pdf.

1.4.5 Sporting performances

Transfer agreements may also be made contingent on the sporting performance of the player. This mechanism is often seen in loan agreements that include an obligation of the new club to transfer a player on a definitive basis, who for instance, participates in a certain number of matches, scores a number of goals or, as in C*AS 2016/A/4588 FC Internazionale Milano v. Sunderland AFC & CAS 2016/A/4589 Sunderland AFC v. FC Internazionale Milano*[78] helps the club get promoted to the English Premier League. Lastly, nothing would impede to subject the validity of the transfer agreement for instance, to the issuance of bank guarantees by the new club.[79]

1.5 The form of transfer agreements

The RSTP imposes the explicit obligation to have loan agreements in written form[80] and although there is no such mention with regards to definitive transfers, the same obligation applies to these -*mutatis mutandis*- as a consequence of article 8 para. 2 Annexe 3[81] of the RSTP and the instruction to new clubs creating an ITC for a professional player to upload the relevant transfer agreement. The obligation in Annexe 3 is a clear manifestation of the earlier mentioned predominant administrative dimension in the regulation of transfers of players.

Nevertheless, there are also cases where the existence of an agreement (from a *private dimension*) can be proven by means other than the signature. The written form of the transfer agreement is therefore, not a condition *ad validitatem* between the parties. In CAS 2006/A/1194 *Ittihad Club of Saudi Arabia v. Vitória S/A* & CAS 2006/A/1195 *Vitória S/A v. Ittihad Club of Saudi Arabia*, award of 7 August 2007,[82] the Panel concluded that: "*1. The exchange of correspondence by fax between the Parties relating to a transfer agreement can establish overwhelmingly the Parties' intention to conclude an agreement in the precise terms of the Contract despite the lack of one signature*".

Conversely, this was not the case in the *Decisión del Juez Único de la Comisión del Estatuto del Jugador de 24 de abril de 2012 (ref. 412182)*[83] where the Single Judge decided that in light of the *principle of legal certainty*, he could not consider as binding, the unsigned documentation that had been exchanged by e-mail between the parties (i.e. "*Cesion de derechos*" and "*Precontrato de Cesion de Derechos*") for the transfer of the player.

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[78] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/4588,%204589.pdf.

[79] See Sub-chapter 4.6.

[80] See Articles 10 of the FIFA RSTP. The obligation to have a written contract extends also to football players (see article 2).

[81] Amongst the documents that new clubs are required to upload in the TMS there is: "*A copy of the transfer or loan agreement concluded between the new club and the former club, if applicable*" [emphasis added].

[82] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/1194,%201995.pdf.

[83] Available at: https://resources.fifa.com/mm/document/affederation/administration/clubvsclub/412182.pdf.

1.6 The importance of the Transfer Matching System (TMS) in transfer agreements

Quoting the Single Judge of the PSC, "*for the sake of legal security it is not possible to have one reality in the agreements concluded between clubs and another one in TMS*".[84] And precisely because of this, according to article 6 par 3 of Annexe 3 RSTP, FIFA may use any documentation or evidence generated by or contained in TMS in order to investigate and properly assess the facts in dispute.

This sub-chapter therefore, centers the attention on how the parties to a dispute with respect to a transfer agreement can benefit from the information it contains. From this perspective, the TMS is a crucial tool which can help provide legal certainty and transparency in:[85]

– Finding out whether a transfer agreement has been concluded or not. See the *Decision of the Single Judge of the PSC of 15 August 2012 (ref. 8121243)*.[86] In some cases, where the information is not available on the TMS because, for instance, the transfer triggering the sell-on clause was domestic, the PSC can also pronounce a separate decision ordering the respondent club to produce a copy of the transfer agreement. See for instance the *Decision of the Single Judge of the PSC of 8 August 2018 (ref. 08180386-e)*:[87]

  "*9. On account of the above as well as the jurisprudence of Players' Status Committee in matters such as the one at stake, the Single Judge decided that the Respondent must send to FIFA a copy of the agreement which was signed by and between the Respondent and Club F over the transfer of the player.*

  10. The Single Judge highlighted that after receipt of the requested relevant documentation from the Respondent, he will consider and decide on the question as to whether the Claimant is entitled to the contractual 10% sell-on fee and, in the affirmative, to decide on the relevant amount".

– Finding out and/or verifying the amount of a transfer fee when the respondent club refuses to disclose the transfer agreement or simply does not reply to

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[84] See Decision of the Single Judge of the PSC of 24 September 2014 para. 21 Available at: https://resources.fifa.com/mm/document/affederation/administration/02/84/44/38/09142911.pdf.

[85] The implementation through the FIFA Circular 1679 of 1 July 2019, of a compulsory *electronic player registration system* at a national level linked with the FIFA Connect System through its automated programming interface ("API") will serve increasing security and legal certainty to international transfers. *Through the FIFA Connect System API, the electronic player registration system must provide all registration information for all players from the age of 12 and, in particular, must assign each player a FIFA ID*.

[86] Available at: https://resources.fifa.com/mm/document/affederation/administration/clubvsclub/8121243.pdf.

[87] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/99/93/49/08180386-e.pdf.

the claim. See the *Decision of the Single Judge of the PSC of 5 June 2013 (ref. 06131154)*.[88]

– Finding out whether condition precedent to which the transfer is subject has been fulfilled:
  – The request/delivery of an ITC took place). See the *Decision of the Single Judge of the PSC of 26 March 2015 (ref. 03153109*).[89]
  – The signature of an employment contract). See the *Decision of the Single Judge of the PSC of 6 March 2018 (ref. 03180426*).[90]
– Determining the consequences of uploading a mistaken instruction. See the *Decision of the Bureau of the PSC of 19 March 2014 (ref. 0314776)*[91] and *CAS 2014/A/3647 Sporting Clube de Portugal SAD v. SASP OGC Nice Cote d'Azur & CAS 2014/A/3648 SASP OGC Nice Cote d'Azur v. Sporting Clube de Portugal SAD, of 11 May 2015*.[92]
– Determining the real nature of a transfer agreement as being permanent or temporary. See the *Decision of the Single Judge of the PSC of 23 September 2014 (ref. 09142911)*.[93]

1.7 Powers of representation of club officials

I am always reluctant when a club invokes the lack of power of representation of one of its club officials to engage on behalf of the club. the PSC decisions demonstrate that these kinds of arguments are usually rejected.

For example, in a dispute regarding the right of the claimant to receive a share of the future transfer of a player, the respondent club alleged in its defense that the person signing the transfer agreement had no power to act on its behalf, and consequently the transfer agreement had to be considered invalid. In the decision of the Single Judge of the PSC of 26 April 2016 *(ref. 04161041-es)*[94] the Single Judge rejected from the outset this argument on the basis of the principle of *bona fide*:

"*12. No obstante lo anterior, el Juez Único tomó nota del argumento esgrimido por el demandado, de acuerdo con el cual el contrato en cuestión parece*

[88] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/57/84/44/06131154_english.pdf.
[89] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/79/34/18/03153109.pdf.
[90] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/96/98/27/03180426-e.pdf.
[91] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/42/51/22/0314776_english.pdf.
[92] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/3647,%203648.pdf.
[93] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/84/44/38/09142911.pdf.
[94] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/85/85/20/04161041-es.pdf.

haber sido firmado por una persona que no era ni el presidente ni el gerente del demandado, y que por tanto el mismo no era válido.
13. En este sentido, el Juez Único entendió que tal argumentación no puede ser acogida debido al hecho de que, de conformidad con el principio de buena fe o bona fide, presente en la celebración de todo tipo de contratos, el demandante estaba autorizado para creer de buena fe que la persona con la que firmaba el contrato estaba legalmente autorizada para firmarlo en nombre de la parte demandada".

However, there are also cases where a new management takes command of the club and finds out agreements entered into by former officials which might not have been properly signed. Something similar occurred in the *Decision of the Single Judge of the PSC of 22 November 2016 (ref. 11160021-fr)*[95] where one of the club's former officials signed an annex to a transfer agreement in detriment of the club, one year after he had resigned from his duties as administrator. The respondent club argued that it had never been informed by the claimant that the respective official had not longer powers of representation and that it had acted in good faith. After the analysis of the circumstances of the case, and in particular considering that the former administrator signed the annex without mentioning his condition or capacities and the time elapsed between the conclusion of the transfer agreement and the annex (i.e. 4 years), it was the responsibility of the respondent to verify the capacity of the former administrator of the claimant club:
"*14. Compte tenu de ce qui précède, le juge unique de la Commission du Statut du Joueur a jugé l'avenant non valable dans la mesure où il avait été signé par une personne n'ayant pas la qualité pour agir au nom du demandeur et a ainsi décidé que seule la convention était légalement valable entre les parties*".

See other decisions: *Decision of the Single Judge of the PSC of 23 April 2013 (ref. 0413564);*[96] *Decision of the Single Judge of the PSC of 26 March 2015 (ref. 03153109)*[97] and *Decision of the Single Judge of the PSC of 8 August 2018 (ref. 08181951-e*).[98]

See also articles 32 et seq. CO for a more detailed study of the *powers of representation* under Swiss civil law.

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[95] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/87/87/97/11160021-fr.pdf.
[96] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/25/90/91/0413564_english.pdf.
[97] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/79/34/18/03153109.pdf.
[98] Available at: https://resources.fifa.com/mm/document/affederation/administration/03/01/97/84/08181951-e.pdf.

1.8 Different interpretation of the same transfer agreement

It is not uncommon in the context of international transfers of football players for transfer agreements to be concluded simultaneously in the languages of both clubs involved. Unless the contract predetermines the prevalence of one of the languages in case of divergences or ambiguities, the solution as to which version must prevail can be problematic and the deciding bodies will have to make use of the interpretation rules of contracts in order to determine the real intention of the parties.

In *CAS 2016/A/4790 Genoa Cricket and Football Club S.p.A. v. Danubio Fútbol Club de Uruguay,*[99] *award of 6 June 2017*, both clubs entered into a transfer agreement in Italian and Spanish without indicating which one should prevail in case of conflict. The stakes were significantly high since an additional transfer fee of 500.000 Euros was claimed by the Uruguayan club for the player's match appearances while he was on loan with a third club.

Eventually the Panel, using the interpretation rules of contracts in article 18 CO, dismissed the arguments of Genoa:

"*82. Being faced with the situation that the content of the clause is clearly incongruous and that both interpretations are mutually exclusive, having considered both parties' views and the different drafts and the Transfer Agreement in two different languages at length, in particular the Italian version, and following a good faith interpretation, the Panel finds that the mutually agreed intention of the parties was that games played for "other European A or B league clubs" also count in determining whether the conditions of clause 6 are satisfied*". [Emphasis added]

1.9 Third Party Influence: Agreements that restrict the independence of clubs[100]

Under the title of "*Third-party influence on clubs*", article 18bis of the RSTP prohibits clubs to enter into contracts enabling "*the counter club/counter clubs, and vice versa,*[101] *or any third party to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams*". The scope of the provision is very broad from both, the subjective and the objective point of view and this can generate some degree of uncertainty amongst stakeholders as one will see.

This general prohibition constitutes a restriction to the contractual freedom of the parties that aims at protecting the *independence, the policies and the*

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[99] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/4790.pdf.

[100] TPO agreements under article 18ter RSTP are explained in the dedicated chapter of this book.

[101] The reference to "*vice versa*" was introduced for the first time in the edition of the RSTP that came into force on 1 April 2015 in order to extend the subjective scope of the prohibition to both the "*influencing*" and the "influenced" parties.

performance of teams when it comes to the club's relationship with their football players. The infringement of the *third-party influence* by clubs is a violation of the regulation likely to be sanctioned by the FIFA Disciplinary Committee as indicated by the article itself, but the agreements between the parties remain, in principle, perfectly valid from a purely contractual point of view deploying effects *inter partes* as remarked in *Decision of the Single Judge of the PSC of 10 March 2015 (ref. 03151681)*.[102]

To this regard, the article distinguishes between two different kinds of illegal influence that clubs, former club(s) or third-parties might attempt to exert:

– *Influence over employment-related matters.*
– *Influence over transfer-related matters.*

The prohibition is addressed to clubs only, therefore they are the ones responsible to make sure that the club itself does not acquire the possibility to influence with respect to another club and that no other club or third party acquires the possibility of influencing them. Cambreleig[103] refers to this double scope of the article as *the active stance* (i.e. a club pretending to influence another) and *the passive stance* of clubs (i.e. a club allowing someone else to influence it).

The *influence* must be likely to produce an *effective and real* impact upon the *independence, the policies or the performances* of the teams of the new club. However, it is fundamental to retain that a breach of the article is committed just by the mere fact that an agreement containing a clause contrary to article 18bis has been signed, irrespective of whether or not the influence effectively materialized.

According to recommendations addressed to clubs in the form of Q&A that were published in the ECA Legal Bulletin no. 2 of 2012,[104] "*The main consequence [of article 18bis]*[105] *is that clubs must not grant any third party the right to decide about the consent to a transfer of a player. The decision must remain at the club's discretion in full*". Clubs – continues the article – "*must be extremely careful about what kind of clauses could be in violation of the provisions*".

The FIFA Disciplinary Committee has not hesitated to monitor and sanction possible violations.[106] But it is the leading CAS award in the

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[102] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/71/13/11/03151681_english.pdf.

[103] For an in-depth and comprehensive analysis of article 18 bis see J. Cambreleng Contreras, "*A pragmatic view into the FIFA Judicial Bodies' Jurisprudence on Third-Party Influence*", Football Legal #11, June 2019.

[104] Available at: www.ecaeurope.com/media/2725/eca-legal-bulletin-2-2012.pdf.

[105] The article is written before the adoption by FIFA of circular 1464 of 22 December 2014, prohibiting TPO which led to the subsequent amendment of the RSTP and the introduction of article 18 ter "*Third-party ownership of players' economic rights*".

[106] www.fifa.com/governance/news/y=2018/m=4/news=latest-decisions-of-the-fifa-disciplinary-committee.html.

2017/A/5463 Sevilla CF c. FIFA[107] *of 15 November 2018*, that delves deep into article 18bis RSTP and offers invaluable guidance to understand its notion and limits.[108]

In January 2015, i.e. a year and a half after the transfer of the player Geoffrey Kondogbia from Sevilla CF to AS Monaco, the FIFA TMS Department contacted the Spanish club requesting information regarding an alleged agreement with a company that would seem to allow third parties to interfere in the clubs' independence or policies regarding transfers, specifically underlining that if that would be the case, then it would constitute a violation of article 18bis of the Regulation.

Despite the club denied any wrongdoing, the FIFA Disciplinary Committee sanctioned the club with a fine and a warning. After the FIFA Appeal Committee rejected in full the appeal, the Spanish club escalated the dispute to the CAS essentially arguing the contravention by article 18bis of the fundamental freedoms under EU law and EU competition law; and the lack of a clear definition of the concept of *influence in the independence, policies or performances of a club* that could not be held against him.

The position of FIFA as to the understanding of article 18bis is worth reading:

"*55. Para la Apelada, el art. 18bis del RETJ está fundamentado en la especificidad del deporte, sirviendo para garantizar la incertidumbre de los resultados, evitar conflictos de interés y preservar el equilibrio competitivo entre los clubes. El art. 18bis del RETJ prohíbe la posibilidad de que cualquier persona o entidad obtenga la capacidad de influir a los clubes en asuntos laborales y sobre transferencias relacionados con la independencia, la política o la actuación de los equipos del club. La Apelada considera que, de este modo, se logra separar la legitima inversión de terceros en el futbol, de la inversión de terceros con el fin de obtener la capacidad de influencia sobre clubes de futbol. Por ello, lo que prohíbe el art. 18bis es la mera posibilidad de influir en dichos asuntos por parte de cualquier tercero, sea parte en el contrato en cuestión, o no*". [Emphasis added]

Firstly, the Panel dismissed from the outset the allegations of Sevilla CF regarding the incompatibility of the Article 18 bis with EU law considering the restrictions imposed by the disposition are proportionate and justified to attain a legitimate objective. To this effect the Panel referred to the TAS award in the matter TAS 2016/A/4490 RFC Seraing c. FIFA[109] (award subsequently validated by the Swiss Federal Tribunal).[110] Remarkably, with regards to the allegations over the lack of clarity of the disposition, the Panel agreed with the appellant that

[107] Award unpublished.

[108] The Sevilla case was explained in-depth during the FIFA Football Law Annual Review 2018 (the event was broadcasted live and is available on demand in the FIFA Youtube channel.

[109] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/4490.pdf.

[110] Available at: www.swissarbitrationdecisions.com/atf-4a-260-2017?search=seraing.

the wording of the article could have been drafted better, although it concluded that the prohibited conduct which is targeted by article 18bis is clear:

"*90. (...) Por lo tanto, en opinión de la Formación Arbitral, se incurrirá en tal prohibición en la medida en que el citado contrato confiera a un tercero una capacidad real de producir efecto, condicionar o afectar al comportamiento o la conducta de un club sobre tales asuntos (laborales y/o de transferencias), de forma que el club vea restringida su independencia o autonomía, quedando así condicionada su política deportiva o su capacidad de dirección de tales asuntos y/o sobre la actuación o el desempeño de sus equipos de fútbol*".

"*91. (...) El club incurrirá en la conducta prohibida no solo cuando su independencia o política sobre tales asuntos se haya visto real o efectivamente influenciada por un tercero (i.e. que haya tenido efecto), sino también cuando el contrato otorgue a dicho tercero la posibilidad o capacidad efectiva de influir en tales cuestiones, asuntos y/o facultades del club, con independencia de si en el supuesto de hecho en cuestión dicha influencia se materializa, o no*".

In brief, a violation of article 18bis RSTP exists when the agreement has:[111]

- *Real capacity to produce effects or predominate over the club's independence;*
- *A specific and effective binding content.*
- *No need for the influence to have been exerted.*

The Panel also concluded that given the limitative effects of article 18bis, the prohibition encompassed must be interpreted in a restrictive manner and must extend only to those situations where the capacity to influence is really and effectively given to a third party. In view of the agreements entered between Sevilla CF and the third company, the appeal was therefore, dismissed and the sanction of the FIFA Disciplinary Committee was upheld.

Against this background, one can't help but wonder whether some contractual arrangements such as preferential and option rights or buy-back clauses, which undoubtedly give the beneficiary club a saying over transfer and/or employment-related matters, may in some cases infringe article 18bis or not.

Be that as it may be, and aware of the impossibility to anticipate all possible situations in an ever-evolving market as football, below are some examples of contractual clauses that in the context of transfer agreements and depending on their specific construction and effects are – in my view – likely to infringe the *third-party influence test,* and consequently would be in breach of article 18bis RSTP:[112]

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[111] See presentation during the FIFA Football Law Annual Review 2018.

[112] See more examples of contractual clauses infringing Article 18 bis in J. Cambreleng Contreras, "*A pragmatic view into the FIFA Judicial Bodies' Jurisprudence on Third-Party Influence*", Football Legal #11, June 2019.

a) Influence over employment-related matters:

– A clause prohibiting or subjecting to onerous conditions the right of the new club to include the player in certain matches (e.g. in a direct match against the club of origin). In Spain, these non-compete clauses are commonly known as "*cláusula del miedo*" (*ad terrorem*).
– A clause granting the former club or a third party the right to decide upon the employment conditions with the player (remuneration, duration, the amount of a termination clause etc.).
– A clause granting the former club the right to decide on possible future loans of the player or obliging the loanee club to field the player for a certain number of matches.

b) Influence over transfer-related matters:

– A clause obliging the new club to inform of offers received by third clubs.
– A clause securing a profit for the former club from a future transfer of the player.
– A clause obliging the new club to transfer the player when receiving an offer from a third club for a certain amount, or due to the relegation or promotion of the team.
– A clause prohibiting or conditioning the club to transfer the player unless being allowed by a third party or the former club.
– A clause prohibiting the new club to transfer the player to any club of the same national league as the former club or competitor.
– A clause obliging the new club to substantially increase the amount of transfer fee depending on the potential future club of the player.
– A clause obliging the new club to conduct the future transfer of the player through a particular intermediary.
– A clause entitling a third-party (e.g. intermediary) to decide upon the recruitment of players.
– A clause giving preference to a certain club in front of other clubs to transfer the players from another club.
– A clause subjecting the loan of the player to the authorization of the former club (n.b. this would not be the case in sub-loan agreements, where the consent of the former club is explicitly required by the Article 10.3 of the RSTP).
– A clause granting the former club a pre-emption right over the transferred player under pain of financial penalties.

As a final remark, article 18bis is binding at the national level and therefore it must be included without modification in the association's regulations.[113]

[113] Cf. art. 1.3 lett. A) RSTP.

1.10 Conclusion

Transfer agreements are a complex *sui generis institution of football law* which differs from the classical assignment of employees in labour law, usually conducted through the intermediation of authorized job placement agencies.

- Transfer agreements have a two-fold dimension, private and administrative. The scope of the RSTP is essentially focused in regulating the administrative dimension rather than the private aspects of transfers. This circumstance can generate difficulties in identifying the applicable substantive law to the contract.
- *The private dimension* constitutes the underlying transactions in any transfer agreement: (i) The contract between the former club and the new club; (ii) The contract between the former club and the player; (iii) The contract between the player and the new club.
- The parties are free to structure the transfer agreement and decide upon issues such as the number of parties, the object of the contract and the obligations between them. The structure of the agreement will eventually identify what the essential elements of its validity are.
- The parties are therefore, at liberty to subject the validity of transfer agreements to the fulfillment of conditions such as the successful passing of medical examinations by the player, the payment of the transfer fee, the delivery of the ITC *inter alia.*
- *The administrative dimension* is the control of transfer agreements from a regulatory point of view. At the international level, this control is conducted via FIFA on the one hand, through the applicable regulations and on the other hand, through the TMS and the delivery of the ITC. The TMS plays a crucial role in providing legal certainty and transparency to transfer agreements.
- A successful and effective transfer will necessarily require the alignment of the *internal* and the *external dimensions*. That is, the validity of the agreement from a private perspective, through the concurrence of the essential elements; and the administrative validation of the registration of the transfer between the associations to which the clubs belong, through the issuance of the ITC.
- The broad scope of article 18bis generates some legal uncertainty as to which clauses might infringe the prohibition to influence. The current jurisprudence tells us that a violation of Article 18 bis occurs when a contractual clause gives a club or a third-party (1) *real capacity to produce effects or predominate over the club's independence;* (2) *has a specific and effective binding content; while* (3) *not being necessary for the influence to have been exerted.*

2. Definitive transfer agreements

2.1 Introduction

We have seen that the international transfer of football players on a definitive basis involves, on the one hand, the concurrence of various transactions between the former club, the new club and the player; and on the other hand, the transfer of the registration of the player from one association to another, through the request and delivery of the ITC in accordance with Annexe 3 of the RSTP.

The RSTP is mainly focused on regulating the *administrative dimension* of transfers i.e. establishing the *global and binding rules* according to which a transfer needs to be conducted so that the registration is transferred from one association to the other. There are indeed very few references to the way in which the transaction is to be structured from a private perspective (i.a. the written form of loan agreements in article 10, or the limitations in articles 18 bis and 18 ter). However, it is precisely the private dimension that generates most conflicts between clubs and players.

Permanent transfer agreements have certain specificities which will be presented and analyzed in this sub-chapter through the lenses of the most relevant PSC decisions and CAS awards I selected. The first problem one might confront when transferring a player is whether his/her status as an amateur or professional has any impact on the possibility to conclude a transfer agreement.

2.2 Transfer agreements of amateurs / free agents

There is no impediment for clubs to enter into transfer agreements concerning (i) *amateur players* becoming professionals upon moving to the new club or remaining as amateurs with the new club; or (ii) professional players who have become *free agents* as a result of the structure of the transfer agreement (i.e. termination of the employment contract with the releasing club). The only restriction to this effect in the RSTP[114] is the explicit prohibition to transfer amateur players on a *loan basis*.

In the *Decision of the Single Judge of the PSC of 30 January 2012 (ref. 01121019_fr)*[115] the question for the Single Judge was, whether the transfer agreement concluded between the claimant and the respondent could be considered null and void due to the *amateur status* of the player at the moment of the transfer. The claimant contended that they were informed about the status of the player only upon the presentation of a claim by a third club, requesting payment of training compensation arising from the first registration of the player a professional.

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[114] See article 10 RSTP and the RSTP commentary, 31.

[115] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/29/20/07/01121019_english.pdf.

The claimant considered this circumstance as being unjust and thus, demanded from the respondent the reimbursement of the transfer fee previously paid contending, in essence, that the transfer agreement was null (i.e. due to the lack of cause) because the player was an amateur at the time of the transfer and consequently, free to enter into an employment agreement with any club of his choice. Additionally, the claimant club considered that it had been maliciously induced into committing an error by the respondent club, who had created the appearance of transferring a professional player instead of an amateur.

The Single Judge dismissed the claim concluding that the claimant had not been able to demonstrate that it would have not entered into the transfer agreement with the respondent, should it have known that the player was an amateur, emphasizing to this end, that the validity of the transfer was not conditioned to the player having a professional status at the moment of the transfer:

"14. (…) De même, le juge unique a relevé qu'il n'est nullement avéré que la conclusion du contrat de transfert était conditionnelle au fait que le joueur ait eu le statut de professionnel avec Club N ; il convient à cet égard de noter que le contrat de transfert ne fait aucunement référence au statut du joueur et en particulier ne mentionne pas que le joueur était professionnel avec Club N".

In addition, the Single Judge pointed out that the Claimant should have acted more diligently and requested for information regarding the status of the player to the national association and verified whether the player had indeed signed an employment contract.

Another interesting case is the *CAS 2016/A/4669 Club Botafogo de Futebol e Regatas v. Club Tijuana Xolointzcuintles de Caliente* & *CAS 2016/A/4670 Club Tijuana Xolointzcuintles de Caliente v. Club Botafogo de Futebol e Regatas*, *award of 9 May 2017*.[116]

In the context of the dispute regarding a sell-on clause, the Mexican club Tijuana, argued that the transfer agreement concluded with Botafogo had never come into effect because the Player and the Brazilian club had terminated the employment contract by mutual consent, and consequently, Botafogo "*did not rightfully hold his registration*" at the moment of the transfer, the player being, a free agent.

The Panel, however, decided that Tijuana could not "*legitimately use the fact that the Player was hired as a free agent as an excuse to avoid its obligations under the Transfer Agreement*". The fact that the termination of the employment contract between Botafogo and the player was a condition for the validity of the transfer was an important indicator that the parties intended to conduct the transfer in that precise manner.

In order to avoid potential misunderstandings with regards to the status of the player, the parties need to deploy some degree of diligence and always

[116] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/4669,%204670.pdf.

request for the player's passport from the football association where the player is registered and if necessary, subject the effectiveness of the transfer to a condition precedent.[117] Similarly, the status of the player will have no impact on the possibility of the club of origin to agree with the new club upon a sell-on clause in case of a potential future transfer to a third club.

2.3 Sell-on clause

Sell-on clauses are commonly (but not necessarily) used in transfer agreements between clubs[118] involving a "*fairly unknown player from a small league to a top league*"[119] with the expectation that the market value of the player will increase and clubs will be able to share the profits of a future transfer. The club of origin will therefore, be more prone to accept a smaller transfer fee in the hope of making a bigger profit. Although in the vast majority of cases, sell-on clauses are found in permanent transfer agreements, these clauses can also be inserted in loan agreements, granting the club where the player is loaned a share of a potential future transfer.[120]

From a strictly legal standpoint, they have the structure of a *condition precedent* according to which, the validity of a right (i.e. share on a potential transfer fee) is subject to the happening of a future and uncertain event: *if the player is transferred to a third club in the future against the payment of a transfer fee* (i.e. fulfilment of the condition) then, the club of origin is entitled to a percentage of the said transfer fee.

In the interim (the period of pendency), the parties must act in good faith and in a loyal way to one another, avoiding any situation that could prevent the fulfillment of the condition (i.e. the transfer expectation) under pain of the condition being considered accomplished.[121]

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[117] FIFA Circular 1679 of 1 July 2019 and the implementation of the FIFA ID, the FIFA Connect System and the electronic domestic transfer system will facilitate clubs this duty of care.

[118] Up until July 2019, Article 18ter RSTP restricted the right of players to share with his/her club a potential fee arising from a transfer and/or from sell-on clause given the fact they were considered third parties. However, through Circular 1679 of 1 July 2019, FIFA announced new amendments to the RSTP, in particular of Definition 14 of the RSTP, redefining the notion of "*third party*" and expressly excluding from it, the player being transferred.
FIFA Circular 1679 is available at: https://resources.fifa.com/image/upload/1679-amendments-june-and-october-2019.pdf?cloudid=yhpcqh0syjuzaccv1yrz.

[119] See CAS 2007/A/1219 *Club Sekondi Hasaacas FC v. Club Borussia Monchengladbach,* para. 15. Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/1219.pdf.

[120] See Decision of the Single Judge of the PSC of 10 December 2013 (ref. 12131473).
Available at: https://resources.fifa.com/mm/document/affederation/administration/02/42/50/49/12131473_english.pdf.
Available at: https://resources.fifa.com/mm/document/affederation/administration/02/42/50/49/12131473_english.pdf.

[121] See CAS 2009/A/1756 *FC Metz v. Galatasaray SK*, award of 12 October 2009. Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/1756.pdf.

The CAS award in the matter *2010/A/2098 Sevilla FC v. RC Lens*, award of 29 November 2010[122] defined the purpose of sell-on clauses in such an illustrative fashion, that CAS Panels recurrently refer to it as a point of departure in cases involving them:[123]

"20. The Sell-On Clause contains a well-known mechanism in the world of professional football: its purpose is to "protect" a club (the "old club") transferring a player to another club (the "new club") against an unexpected increase, after the transfer, in the market value of the player's services; therefore, the old club receives an additional payment in the event the player is "sold" from the new club to a third club for an amount higher than that one paid by the new club to the old club. In transfer contracts, for that reason, a sell-on clause is combined with the provision defining the transfer fee: overall, the parties divide the consideration to be paid by the new club in two components, i.e. a fixed amount, payable upon the transfer of the player to the new club, and a variable, notional amount, payable to the old club in the event of a subsequent "sale" of the player from the new club to a third club".

Yet, even though the underlying principles behind sell-on clauses are clear, it is very common for clubs to get into disputes involving them. Most disputes concern the interpretation[124] of the clause given their poor or vague drafting. Indeed, considering the high stakes involved and the complete freedom[125] of the parties to define the terms of the clause and establish the triggering elements and conditions,[126] utmost caution will have to be deployed when including them in contracts. Forgetting to expressly include in the final draft of the transfer agreement, a sell-on clause previously agreed through a mutually accepted written offer can entail fatal consequences as evidenced by the *Decision of the Single Judge of the PSC of 8 August 2018 (ref. 08180388-e)*[127] where the Single Judge considered reasonable to assume that the parties finally decided not to include the sell on clause in favour of the claimant.

Therefore, departing from that premise, although it is true that the *rationale* behind sell-on clauses is to the *share the profit of a future transfer* between two clubs, it cannot be considered – as being a general rule – that a

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[122] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/2098.pdf.

[123] See CAS 2017/A/5213 *Genoa Cricket and Football Club v. GNK Dinamo Zagreb*, award of 15 December 2017. http://jurisprudence.tas-cas.org/Shared%20Documents/5213.pdf.

[124] Cf. CAS 2016/A/4379, sell-on clauses must be interpreted according to the general rules of contract interpretation. Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/4379.pdf.

[125] The only restriction the parties have under the regulations concern effects towards third parties (arts. 18 bis and 18 ter RSTP).

[126] See CAS 2009/A/1756 *FC Metz v. Galatasaray SK*, award of 12 October 2009. Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/1756.pdf.

[127] Available at: https://resources.fifa.com/mm/document/affederation/administration/03/01/88/07/08180388-e.pdf.

sell-on clause will only get triggered if there is a profit.[128] It is perfectly possible for clubs to agree upon a sell-on fee that will be payable irrespective of whether the club transferring the player makes a profit on the future transfer. As a matter of fact, if there is no clear agreement to that respect, the amounts already paid by the transferring club to the club of origin cannot be deducted when calculating the sell-on fee.[129] A clearly drafted clause would therefore, decrease the possibility of a future conflict.

Below is a selection of the most common conflicts around the interpretation of sell-on clauses and the answer given by the jurisprudence in each specific case that might offer some direction when navigating choppy waters:

– *Does the validity (or life span) of a sell-on clause extend beyond the first employment contract between the player and the new club, or instead, it expires with the end of the first employment agreement*?

In CAS 2005/A/848 *Sport Club Internacional v. Bayer 04 Leverkusen*, award of 23 February 2006,[130] Bayer 04 refused to pay the sell-on fee to Internacional, alleging that the transfer of the player occurred after the term of the first employment contract. Bayer 04 and the player had prematurely terminated their first employment contract by mutual consent and thereafter, signed a new contract. The Panel rejected the arguments of Bayer 04 and considered the second contract an extension of the first, while remarking that the true intention of the parties was not to limit the "*risks and profits share arrangement*" (i.e. sell-on clause) *to the strict duration of a certain contract*.

Similarly, in CAS 2005/A/896 *Fulham FC (1987) Ltd. v. FC Metz,* award of 16 January 2006[131] the Panel remarked that the sell-on clause did not contain any time limit, the sell-on fee being triggered at a subsequent transfer, and thus, decided that it could not have been the intention of the parties to limit the validity of the sell-on clause to the first employment contract.

See also CAS 2017/A/4940 *FC Lokomotiv Moscow v. Desportivo Brasil Participações Ltda.,* award of 14 July 2017.[132] The signing of the second and consecutive employment contract between the player and Lokomotiv triggered the obligation of the Russian club to acquire 100% of the economic rights from Desportivo. The Panel resorted to the so-called *principle of imputability/accountability of periods of employment* according to which an employment contract is considered uninterrupted if there is a close material and temporal connection.

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[128] See CAS 2014/A/3508. Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/3508.pdf.

[129] See Single Judge of the PSC of 22 April 2015 (ref. 04151084-e). Available at: https://resources.fifa.com/mm/document/affederation/administration/02/85/84/57/04151084-e.pdf.

[130] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/848.pdf.

[131] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/896.pdf.

[132] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/4940.pdf.

Finally, a quite remarkable case is the *Decision of the Single Judge of the PSC of 22 November 2016 (ref. 11160824-e)*.[133] In this decision, the Single Judge relied on the "*strict wording of the clause*" to conclude that the *sell-on fee* to the former club (i.e. the Claimant), became payable despite the player signing with a third club as a *free agent* and with no transfer agreement. The simple delivery of the ITC was considered as the triggering element for the sell-on clause. The Single Judge "*observed that, contrary to the argument raised by the Respondent, the parties did not agree upon a condition whereby the amount should have only been paid if the player would be transferred during the term of his professional contract"* (para. 13). There are however, decisions such as the *Decision of the PSC of 18 March 2013 (ref. 03133212)*[134] which under quite similar circumstances take a contrary position. The PSC considered that the sell-on clause "*did not refer to the situation where the Respondent club and the player would voluntarily agree upon the early termination of the employment contract with mutual consent and the player would, subsequently, join a third club as a free agent* (…)". (Para. 12).

– *What are the effects to the sell-on clause if the player terminates the employment contract with the new club having just cause (e.g. due to non-payment of salaries?*

As mentioned earlier, sell-on clauses are generally structured as a condition precedent. Therefore, the prevention of the condition by one of the parties in bad faith or due to negligence might allow the victim to consider the condition fulfilled and oblige the club at fault to compensate the club of origin. This was precisely, the discussion in CAS 2009/A/1756 *FC Metz v. Galatasaray SK*, award of 12 October 2009.[135]

Instead, where no reprehensible behavior of the parties is appreciated (e.g. a premature termination of the employment by mutual consent) the above cited *Decision of the PSC of 18 March 2013 (ref. 03133212)* and the CAS jurisprudence, like for instance, *CAS 2012/A/3012 Club Atlético Boca Juniors v. Sport Club Corinthians Paulista*, award of 8 May 2014,[136] show that the condition precedent will simply cease to produce effects with no consequences for the new club.

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[133] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/90/40/73/11160824-e.pdf.

[134] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/52/34/13/03133212_english.pdf.

[135] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/1756.pdf.

[136] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/3012.pdf.

– *Is the sell-on clause triggered only by permanent transfers or also in cases of loan agreements*?

In *CAS 2007/A/1219 Club Sekondi Hasaacas FC v. Club Borussia Monchengladbach*, award of 9 July 2007,[137] the Sole Arbitrator concluded that when the sell-on clause does not specify that it is only triggered by a final transfer, it is hard to imagine that the mutual consent of the parties is to exclude a loan transfer, which *de facto*, was in many ways equivalent to a final transfer.[138]

Similarly, in the *Decision of the Single Judge of the PSC of 8 August 2018 (ref. 08181951-e)*,[139] the Single Judge remarked that the parties did not specify as to whether only a definitive transfer of the player would trigger the payment of the sell on clause and consequently, concluded that the loan of the player also triggered the additional payment provided for in the transfer agreement.

Conversely, in the *Decision of the Single Judge of the PSC of 7 May 2014 (ref. 0514303)*,[140] the Single Judge concluded that the reference in the transfer agreement to "*any departure*" of the player as the element triggering for the sell-on fee, could not extend to loan agreements.

– *Form of payment of the sell-on fee to the former club, when the new club transferring the player forward, is paid in installments*?

The bad drafting of the sell-on clause often generates doubts regarding the form of payment. When the parties do not explicitly define whether the sell-on fee will be paid to the former club according to the payment schedule agreed between the transferring club and the third club, the deciding body will be forced to implement contract interpretation rules and try to find out the real intention of the parties.

The case law is rich in this regard and mostly considers that in the absence of any contractual provision providing otherwise, the calendar of payments has to be accounted for and thus, if the transfer fee is received by the selling club on an installment basis, then the payments to the previous club will also be on a *pro rata temporis* basis.[141] The same exact rule will apply to calculate possible interests for late payment[142] of the installments.

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[137] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/1219.pdf.

[138] See also CAS 2014/A/3508 *FC Lokomotiv v. FUR & FC Nika*, para. 181 et sequitur. Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/3508.pdf.

[139] Available at: https://resources.fifa.com/mm/document/affederation/administration/03/01/97/84/08181951-e.pdf.

[140] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/51/99/01/0514303_english.pdf.

[141] See CAS 2012/A/2875 *Helsingborgs IF v. Parma FC S.p.A*, award of 28 February 2013 and *CAS 2013/A/3367 Genoa Cricket and Football Club S.p.A v. Club Athlético Boca Juniors*, award of 14 April 2014. Both awards are available in the CAS database.

[142] See Decision of the Single Judge of the PSC of 22 April 2015 (ref. 04151084-e) para. 27. Available at: https://resources.fifa.com/mm/document/affederation/administration/02/85/84/57/04151084-e.pdf.

The jurisprudence also establishes that the amount of the sell-on fee is to be determined on the basis of the amount actually received by the selling club.

Therefore, if for any reason, the parties decide to reduce the amount of the transfer fee in a subsequent negotiation where the club of origin has no right to intervene, the amount of sell-on fee will be reduced accordingly.[143]

– *Do the effects of a sell-on clause extend beyond the transfer of the player from the second club to a third club?*

In *TAS 2018/A/5912 WAC c. AO CMS, award of 1 July 2019*,[144] the discussion between the parties focused on whether the amount of a sell-on clause inserted in favor of AO CMS in the first transfer agreement with WAC, should extend to the amount received in turn by WAC from a similar sell-on clause inserted by the latter in a subsequent transfer of the player to a third club.

The sell-on clause was drafted in clear terms: "*c. 15% (quinze pour cent) de la plus-value sur le future transfert du joueur. Exemple: si le joueur est transféré dans le future pour un montant de 2.000.000 d'euros (deux millions), le Club AO CMS percevra: 15% de 2.000.000 moins les sommes déjà payées par le club WAC*".

The sequence of transfer agreements was the following:
– 1st transfer agreement from AO CMS to WAC (fixed fee + sell-on clause)
– 2nd transfer agreement from WAC to third club (fixed fee + sell-on clause)
– 3rd transfer agreement from third club to fourth club.

The principle issue the CAS had to decide upon was whether the calculation of the first sell-on clause in favor of AO CMS should extend to the amount received by WAC as a result of the second sell-on clause.

The Sole Arbitrator, confirming the supporting FIFA decision on this point, remarked that the remuneration due to WAC by the third club consisted of two different elements: a fixed amount and a contingent amount depending on whether the third club, would in turn make a profit from a potential subsequent transfer to a fourth club. Consequently, the remuneration due to AO CMS by WAC resulting from the sell-on clause in the first transfer agreement covered the total profit received by WAC for the transfer of the player, i.e. the fixed fee, plus any possible contingent payments for the future transfer of the player reserved in its favor.

The main takeaway form this CAS award is that the parties need to be extremely diligent when drafting such clauses. Hence, if the sell-on clause is to be calculated on the profit made by the new club, then the total profit received by the new club, regardless of its origin (e.g. a sell-on clause in the subsequent transfer,

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[143] See CAS 2016/A/4669 *Club Botafogo de Futebol e Regatas v. Club Tijuana Xolointzcuintles de Caliente & CAS 2016/A/4670 Club Tijuana Xolointzcuintles de Caliente v. Club Botafogo de Futebol e Regatas,* award of 9 May 2017. Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/4669,%204670.pdf.

[144] Unpublished award at the moment of writing this chapter (July 2019).

and/or other contingent payments such as performance based additional fee) needs to be accounted for.

– *Is the sell-on clause subject to any deduction when the new club transfers the player forward*?

It depends on the agreement between the parties, but again, if the clause is drafted clearly it will be easier avoid any confusion when the time for payment comes. The most controversial deduction in practice concerns payments made to intermediaries.

In the *decision of the Single Judge of the PSC of 14 October 2014 (ref. 1014657)*[145] the parties entered into a dispute regarding the amount to be deducted from the transfer compensation given the express clause in the transfer agreement stipulating the right to deduct "*all reasonable costs, which are taxes, compensations and contributions (under the FIFA Regulations)*". The Respondent wanted to deduct corporate income tax and the agent commission, but failed to prove that these amounts were effectively paid, so they could not be accounted for any possible deduction. With regards to agent commission, the Single Judge also remarked that clubs are free to use the services of an intermediary, and if they do so, then it is their responsibility to bear the possible costs of such services. The only cost which eventually was admitted for deduction in order to calculate the sell-on fee was solidarity contribution.

Instead, in the *decision of the Single Judge of the PSC of 22 April 2015 (ref. 04151084-e)*[146] the deduction of the agent fees was admitted after the Respondent club proved that these were effectively disbursed to the agent along with the relevant solidarity contribution. The Respondent provided *clear and convincing documentary evidence* to that effect.

In the already cited *CAS 2005/A/896 Fulham FC (1987) Ltd. v. FC Metz,* award of 16 January 2006,[147] the Panel concluded that "*the words "net fee" [spoke] for themselves*" (par. 51) and that only costs in *direct connection* with the transfer such as agent costs, could be deducted, excluding any expenses associated with the employment of the player (namely, the player's wages, bonuses, insurance i.a.).

Finally, *CAS 2011/A/2508 Club Sportif Sfaxien v. Ashntigold Sporting Club,* award of 17 January 2012,[148] serves also as a good example of how important discharging the *onus probandi* as to the effective payment of the commission to the agent will determine the possibility to later deduct these costs

[145] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/84/32/20/1014657.pdf.
[146] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/85/84/57/04151084-e.pdf.
[147] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/896.pdf.
[148] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/2508.pdf.

from the sell-on fee, regardless of an express provision in the transfer agreement allowing for their deduction.

2.4 Buy-back clauses, option to transfer, and right of first refusal over football players

It is normal for clubs releasing valuable players trying to negotiate preferential rights in transfer agreements to guarantee the right to call the player back if needed. The practice shows that these preferential rights come in different forms, most commonly as buy-back clauses, option rights and/or rights of first refusal. The legal nature of these rights can sometimes be confusing and difficult to understand.

A *buy-back clause* is the right inserted into a transfer agreement whereby the selling club reserves the right to re-acquire (the registration) of the player under pre-established conditions;[149] fundamentally (i) the payment of an already determined transfer fee and, (ii) a period (or periods) during which the buy-back can be executed by the club of origin.

According to D. Geey, "*buy-back clauses in transfer agreements are used primarily to give a selling club the security of being able to repurchase a promising player at a set fee should the player excel in the future*".[150]

The benefits of these clauses for all parties, continues the above author, are multiple:

- *"Selling club as they receive a transfer fee for a player that at present probably isn't getting regular playing time with the possibility of requiring the player if he plays well at a predefined fee;*
- *Buying club who can purchase a player that they otherwise may not have been able to acquire had it not been for the clause. In addition, the buyback figure is usually significantly higher than the original transfer fee; and*
- *Player (who can play regular first team football, probably receive a pay rise and demonstrate their talent);*
- *The buy-back provision is usually based on a number of individual or cumulative triggers including activating the clause:*
- *In defined transfer windows (i.e. the selling club cannot buy back the player for a minimum of two seasons);*
- *Should the original selling club bid a set amount (which could vary depending on the season that the buy-back clause is triggered i.e. Euro2m in the 15-16 windows and Euro2.5m in the 16-17 windows)*".

That said, the jurisprudence evidences that securing the consent of the player to rejoin the club of origin will be a crucial aspect for the effectiveness of buy-back clauses. As in any transfer agreement, the administrative and private

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[149] https://talksport.com/football/409531/barcelona-54m-buy-back-clause-yerry-mina-everton/.

[150] D. Geey, "*Buy-back clauses explained*" Lawinsport.com, 2015, available at: www.lawinsport.com/content/blog/daniel-geey-s-blog/item/football-transfers-buy-back-clauses-explained.

dimension need to be aligned. If the player refuses to give consent, the buy-back clause cannot be successfully exercised, as seen previously in other cases with similar circumstances.[151] The consent of the player can be obtained, or at least encouraged, by making him/her co-sign the transfer agreement while fixing the future employment conditions and including a substantial penalty as a form of deterrent in the event the player has second thoughts, because e.g. he/she has received a better offer to play elsewhere.

In this regard, the *Decision of the Single Judge of the PSC of 29 July 2013 (ref. 07132346)*[152] serves as a good example. In this case, there was a conflict between the right of the claimant club to buy-back the player and the sell-on clause laid down in the transfer agreement. Thus, the respondent club of the player – in spite of the buy-back clause in favour of the claimant – decided to transfer the player to a different club. The discussion consequently, revolved around which clause should get precedence over the other.

"10. In this regard, and after thorough analysis of the relevant clauses, the Single Judge pointed out that the purchase option and the sell-on-clause had to be regarded as being exclusive to one another as it was not possible to trigger both rights at the same time. In view of this, the Single Judge explained that, had the Claimant intended to exercise the purchase option, the sell-on-clause would no longer be applicable since the player would have effectively been transferred back to the Claimant. Equally, in case the Claimant wanted to exercise the sell-on clause, there would be no more room for an application of the purchase option as this would contradict the intent of the sell-on-clause.

The Single Judge concluded, that in view of the particular circumstances, it can be ascertained that the Claimant had *de facto* renounced the plan to reacquire the players' services and pursued primarily his right to receive the sell-on fee. The Single Judge remarked in this same regard, that in any event, the return of the player to his former club would have necessarily required his consent and given that the player opted to sign for a third club, it was manifest that the latter never had any intention to return, rendering the buy-back option of the Claimant ineffective for all purposes.

Just like a buy-back clause, an *option right* to transfer a football player can be defined as an agreement whereby one club retains the right to transfer a player under certain pre-established conditions. From a formal point of view, an option right can be structured as an independent agreement or be a part of a loan agreement. For example, granting the loanee club the right to transform the nature of a transfer from temporary to permanent as seen in the above-mentioned case CAS 2010/A/2144 *Real Betis v. PSV Eindhoven*[153] *award of*

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[151] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/2144.pdf.

[152] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/52/00/10/07132346_english.pdf.

[153] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/2144.pdf.

10 December 2010. Again, at this point, one must remember that it is necessary to condition the validity of the final transfer to obtaining the explicit consent of the player in order to avoid having to pay the transfer fee despite failing to sign the player.

Option rights are different from *rights of first refusal*, in the sense that the right of first refusal would give the beneficiary club the preference to transfer the player over third clubs also interested in the same transfer, and therefore, the right of the beneficiary club would only come into effect in the event the club of origin would agree on the transfer of the player with a third club. Conversely, the option right is a unilateral right which does not depend on the existence of an offer from a third club.

In this precise factual context, in the *Decision of the Single Judge of the PSC of 23 October 2012* (*ref. 1012094*)[154] the parties argued about whether the option right inserted in a so-called "*private agreement*" had been exercised or not by the respondent club. The Single Judge concluded that by the ulterior conclusion of a "*preliminary transfer agreement*" with the Claimant, the Respondent had implied his intention to exercise the option right and transfer the player on a definitive basis. According to the Single Judge, the "*preliminary transfer agreement*" contained all the *essentialia negotii* and was only conditioned to the conclusion of an employment contract between the Respondent and the player, which had also occurred.

Similar to how the club of origin might want to reserve some rights regarding the future of a player, new clubs could also be tempted to use mechanisms such as bridge transfers to circumvent their obligations towards them.

2.5 Bridge transfer agreements

Up until Circular no. 1709 of 13 February 2020, RSTP did not address the concept of bridge transfers. The new definition 24, para. 2 of article 5 and article 5bis, introduced in the March 2020 edition of the RSTP explicitly define bridge transfers and prohibit any club or player to be involved in a bridge transfer considering it as a general rule, an illegitimate practice, although not invalid.

"*24. Bridge transfer: any two consecutive transfers, national or international, of the same player connected to each other and comprising a registration of that player with the middle club to circumvent the application of the relevant regulations or laws and/or defraud another person or entity*".

According to new para. 2 of article 5, "*A player may only be registered with a club for the purpose of playing organized football*".

Furthermore, as explained in article 5bis, parties are presumed to have been involved in a bridge transfer if 2 consecutive transfers of the same player occur within a period of 16 weeks. The parties involved in such transfers will bear

[154] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/33/98/37/1012094_english.pdf.

the burden of proof to overturn the presumption established in the article and will potentially face disciplinary consequences if they fail to do so. However, as mentioned before, despite the possibility to incur disciplinary responsibilities, the transfer agreement will in principle, survive.

But going back in time, it is interesting to remember that a year before the release of the *CAS 2014/A/3536 Racing Club Asociación Civil v. Fédération Internationale de Football Association (FIFA), award of 5 May 2015*;[155] A. Reck (the acting lawyer of the Appellant) proposed a definition of bridge transfer in a comprehensive article about this trending topic, published in Football Legal:[156] "*A bridge transfer is a transfer conducted not directly from the club of origin to the club of destination, but indirectly through an interposed third club (the bridge), where the player is transferred first, for no apparent sporting reason. The definition also applies to BOSMAN moves, where a free agent registers himself at a club for no sporting reason and then gets transferred from there to another club to play*".

According to Reck, the crucial aspect to detect the existence of a bridge transfer is the intervention of a middle club to which the player is registered with *no apparent sporting reason* before reaching his/her real and final destination club; or in other words, a transfer made for other reasons than the will of the *middle club* to effectively benefit from the sporting services of the player:
"*Key elements in identifying a bridge transfer are an unusual pattern of movement and a transfer for no apparent sporting reason. This means – in practice – a transfer for a short period, with no playing time at the bridge club, and a lack of balance between the level the player is at and the level the club is at (the most common situation is a high level player being transferred to a low level club just to bounce back to a bigger club later; however a bridge transfer is also possible using a high level club to register a player with insufficient sporting quality to be fielded there, just to loan or transfer him immediately to a lower level club)*".

The article identifies some of the most common reasons behind bridge transfers:

– Anonymity as to the final beneficiary of the transfer fee. Bridge clubs act as a *protective shell* allowing football intermediaries and investment funds to maintain a share over the future transfer of the player (i.e. explicitly prohibited by article 18 ter RSTP).

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[155] This case concerns the move of an Argentinian player between two Argentinian clubs through a *bridge club* from Uruguay.
According to the Panel (see par. 9.3), this is the first case in which a decision imposing on a club sanctions due to violations committed in the framework of a bridge transfer is appealed to CAS.
The full award is available at: http://jurisprudence.tas-cas.org/Shared%20Documents/3536.pdf.

[156] See A. Reck, "*Bridge Transfers under the FIFA Regulation*", Published in Football Legal #1, June 2014.

– Through bridge clubs, TPO funds enjoy all the benefits of being a club, offering the protection of the FIFA regulations such as, i.a. the joint liability of the new club or efficient disciplinary enforcement remedies through the Disciplinary Committee. Furthermore, I would add, a bridge club, allows the circumvention of the TPO ban which has been in place since 2015.
– Transfer taxes and/or tax evasion. According to Reck, "*the transfer amounts are distributed depending on where the transfer would be subject to high taxation*".
– Give an international dimension to the transfer of the player, opening the door to the jurisdiction of the FIFA legal bodies.
– Avoid or reduce training compensation and/or solidarity mechanism.

It is important to mention that the discussion in CAS 3536 did not revolve around the validity of the transfer itself, but upon the possible infringement of the FIFA regulations, which at that moment did not include any specific provision. Indeed, in this case, the FIFA Disciplinary Committee, sanctioned Racing Club, for allegedly having entered false/untrue data in bad faith and making an illegitimate use of the TMS[157] by participating in a bridge transfer.

Thus, in these very specific circumstances A. Reck, raised the question as to whether, under the current regulations, the mere lack of a purely sporting reason behind the transfer could be considered a violation of the FIFA rules on the TMS (i.e. Annexe 3 of the RSTP) and whether FIFA could legitimately scrutinize the intention behind a transfer when these meet with the required formalities.

The Panel dismissed the FIFA allegations and admitted the club's appeal reducing the initial sanction to a reprimand, while at the same time, it drew the attention to FIFA as to the need to enact clear and specific rules to prevent bridge transfers with the purpose of engaging in unlawful practices because: "9.19. *Hence, the Panel is of the opinion that the current TMS rules represent neither an appropriate nor an effective tool for combating and/or sanctioning bridge transfer*".

The new article 5bis is hence, FIFA reacting to CAS recommendations and a clear manifestation of the crucial role of CAS in sport.

Up to now, and despite these recommendations of the CAS, no amendment of the TMS rules has been implemented.

In a different order, recent decisions, like the *Decision of the Single Judge of the PSC of 14 January 2015* (*ref. 01150088-e*)[158] evidence that bridge transfers are not *per se* invalid, although as seen in the CAS cases referred below, they can be left ineffective when used in bad faith to circumvent the regulations, such as avoiding the obligation to pay training compensation.

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[157] See para. 9.4, 19 of CAS 3536.

[158] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/87/76/17/01150088-e.pdf.

In CAS 2009/A/1757 *MTK Budapest v. FC Internazionale Milano S.p.A.,* award of 30 July 2009[159] Inter Milan was found to have benefited from a *bridge transfer scheme* through a Maltese middle club in order to circumvent the obligation to pay *training compensation* to the player's training club (i.e. MTK).

The Panel considered it difficult to understand why a player who was rated highly and had attracted the interest of Inter Milan would move to a club in Malta and stay there for a week before moving on to Italy, and accordingly, condemned the Italian club to pay training compensation to MTK.

Conversely, in a similar dispute with the same Italian club, the *CAS 2016/A/4603 SC Dinamo 1948 v. FC Internazionale Milano SpA*, *award of 15 February 2017*[160] decided there was *no bridge transfer* in the move of the player from Dinamo Bucharest to the Italian club Pergolettese (where he signed his first professional contract) and from there to Inter Milan. As in the previous case, the appellant club claimed that Inter Milan had used a bridge transfer scheme to avoid payment of *training compensation*.

This award is highly relevant because the Sole Arbitrator highlights some practical criteria to establish whether there can be a circumvention of article 20 RSTP ("*Training compensation*"):

a) a player stays with the club of the lower category (the "intermediate club") for only a short period,

b) a circumvention is likely if a player already signed a contract with the upper level club before being transferred to the intermediate club or if he already took part in a training camp

c) it is considered unusual if there is no rational explanation for a young, talented player to transfer to a second-tier club before a sudden discovery by a big club.

However, unlike the MTK case, the Sole Arbitrator considered that none of the above red flags were raised in the case at stake: *(a) The player had indeed stayed and played during 5 months with Pergolettese before joining Inter Mila*n; *(b) the player signed his first professional contract with and he had no previous agreement with Inter* and *(c) it seemed also reasonable that the Player transferred from the junior squad of the Appellant to a small Italian club due to the work-related moving of his parents.*

2.6 Conclusion

– With the exception of loan agreements, there are no restrictions under the RSTP to transfer amateur or free agent players from one association to another and to agree upon financial conditions for such transfers.

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[159] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/1757.pdf.

[160] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/4603.pdf.

[161] See Comment to article 10 of the FIFA Commentary. 31.

– Securing the consent of the player will be crucial for the effectiveness of buy-back clauses and other preferential rights reserved in favour of the club of origin.
– The March 2020 edition of RSTP considers bridge transfer schemes illegitimate and therefore, clubs or players involved will face disciplinary consequences if they fail to overturn the presumption established in new article 5bis.

3. Temporary transfer agreements: loans

3.1 Introduction

According to the RSTP Commentary, *the loan of a player by one club to another constitutes a transfer for a predetermined period of time*.[161] Article 10 RSTP foresees the possibility of clubs at an international level to only loan professional players. The loan contract will have to be necessarily concluded in written and besides this formal requirement, the effectivity of the loan will also require the player's consent. For the rest, a loan falling under the scope of the RSTP, will be subject to the same rules applicable to permanent transfers[162] including, as seen below, training compensation and solidarity mechanism.

Article 10 RSTP, contains no reference as to the *relationship between the clubs* during the period of loan (i.e. the private dimension), who essentially will have complete liberty to regulate it at their best convenience.

From this perspective, the contracting clubs will have to decide upon the essential elements of the loan (i.e. *the identification and consent of the player, the duration of the loan and the economic terms*) and also try to anticipate other possible situations such as: what will happen if the player terminates his employment contract with the new club before the expiry of the loan; or whether the loanee club will benefit from or – instead – waive any right to a potential future training compensation/solidarity contribution for the player; what will happen if the player is injured during the period of loan, who will pay for the insurance during the loan, what kind of insurance does the new club have to enter into, who will pay for the medical expenses and/or the salaries of the player in case of a long term injury whose recovery goes beyond the period of loan, etc.

All these potential conflictive situations arising from the contractual freedom given by the Regulations are analyzed in this subchapter.

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[162] See para. 22 and 23 in *CAS 2008/A/1593 Kuwait Sporting Club v/ Z. & FIFA*. Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/1593.pdf.

3.2 The parties to a loan agreement

As seen before in the first chapter, article 10 RSTP emphasizes the necessity to obtain the explicit consent of the player[163] in order for the temporary transfer to be valid (i.c. "*a written agreement between him and the clubs concerned*").

In CAS 2013/A/3314 *Villarreal CF SAD v. SS Lazio Roma S.p.A.*[164] however, the Panel remarked that the parties to the loan agreement were in principle the releasing club and the club of destination. The loan contract can adopt the form of a tripartite agreement (where the player joins the two clubs as a party) only if beyond the terms of the loan it also establishes the terms of the employment contract and is co-signed by the player.

If instead, the loan contract merely contains agreements concerning the two clubs, the co-signature of the loan by the player will serve (1) *as evidence of the player's consent to the loan* (the effects of which should in any case be subject to the final agreement of the employment conditions with the new club) and will (2) *save the player from having to enter into a separate agreement with his club of origin* regarding the suspension of the employment contract during the loan.

The player co-signing of the loan agreement can render the contract trilateral which will also entail consequences in case of breach of the loan as evidenced in CAS 2013/A/3269 *Clube Desportivo Nacional v. Clube de Regatas Brasil*[165] (see in-depth comment below in section 3.5).

3.3 The suspension of the employment contract during the loan period

With regards to the *relationship between the player and the releasing club*, the RSTP Commentary (See Comment under article 10 point 4, para. 2)[166] and its footnotes (See 49,[167] 54,[168] and 55[169]) offer invaluable information.

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[163] See Chapter 1.3.1.

[164] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/3314.pdf.

[165] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/3269.pdf.

[166] Comment under article 10, point 4, para 2: "*During the period that the player is on loan, the effects of the employment contract with the club of origin are suspended, i.e. the club of origin is not obliged to pay the player's salary and to provide him with adequate training and/or other privileges or entitlements as foreseen in the contract. It is the responsibility of the new club to pay the player's salary in accordance with the new contract with the player*".

[167] Footnote 49: "*If the player does not co-sign the loan agreement, he needs to enter into a separate agreement with the club of origin, whereas the effects of the employment contract are temporarily suspended*".

[168] Footnote 54: "*For the duration of the loan, the effects, rights and obligations of the employment contract concluded between the player and the club of origin are temporarily suspended (cf. footnote 49). This implies, however, that after the end of the agreed loan period, the relevant effects come back into force. Therefore, the club of origin must main certain rights to a say during the loan period*".

[169] Footnote 55: "*It is, however, also permitted by the Regulations for the new club to take over all contractual obligations of the club of origin or for the club of origin to continue to pay the player ìs salary during the loan period*".

Hence, as a general rule, the employment contract between the player and the club of origin are considered to be temporarily suspended during the period of the loan, in essence meaning that unless otherwise stipulated, the releasing club will be exempted from paying the remuneration to the player and other benefits provided in the employment contract, for instance, the obligation to provide the player with medical insurance, housing allowances etc. The parties should properly anticipate and address all these issues in the loan agreement.

For instance, in CAS 2016/A/4693 Al *Masry Sporting Club v. Jude Aneke Ilochuku*, award of 24 April 2017,[170] the Panel had to decide whether the Club of origin was still obliged to pay the player's salaries during the loan. In line with the Commentary notes above, the CAS decided that "*90. (...) failing any evidence of a specific agreement between the Parties to the contrary, which was the burden of the Respondent [the player], the Panel concludes that according to the applicable FIFA Regulations, the Employment Contract was suspended during the validity of the Loan Contract and, therefore, the Club was not liable to pay the Player's salaries in the relevant period*". [Emphasis added].

The effects of the suspension do not extend to the period of duration of the employment contract between the releasing club and the player which will continue running pending the loan.

Likewise, when the player is included as a co-party to the loan, it could be the ideal moment for the releasing club, to take advantage of this situation and regulate its relationship with the player with regard to, for example, possible outstanding salaries or other claims that the player may have against the club.

3.4 The period of loan

Article 10 para. 2 RSTP sets the general rule regarding the periods of loan by indicating that the minimum period of loan shall be the time between two registration periods. Nothing impedes the parties to agree upon longer periods and/or subsequent extensions of the duration of the loan based for instance in an option offered to the new club against the payment of an additional fee to the releasing club.[171]

During the period of loan, the player will be registered with the new club only and not with the club of origin. Indeed, cf. article 5 par. 2 RSTP players can only be registered with one club at a time and therefore, the new club will have to request the transfer delivery of the relevant ITC in the same way it would occur in a permanent transfer. Meanwhile, the so-called "*transfer right*s" will remain with the club of origin[172] and the club accepting a player on loan will not be entitled to transfer him/her out without the consent of the club of origin and the player

[170] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/4693.pdf.
[171] See e.g. http://jurisprudence.tas-cas.org/Shared%20Documents/3137.pdf.
[172] See para. 76 of the CAS award 2016/A/4790 available at: http://jurisprudence.tas-cas.org/Shared%20Documents/4790.pdf.

himself unless it obtains the express written authorization of the releasing club (cf. article 10 para. 3 RSTP).

Despite the apparent simplicity of the above provision and the basic rules deriving therefrom, there have been cases where the new club and the player on loan signed an employment contract for a longer period than the period of loan. In such cases, the CAS jurisprudence[173] has remarked that a player who signs two conflicting employment contracts would be necessarily in breach of one of the two employment contracts and could be held responsible.

The liability of the clubs found in this undesirable situation will ultimately depend on the time they signed the employment contract with the player.

Hence, if a player having signed two conflicting contracts, decides to return to his club of origin at the end of the loan (and respect his first contract) he/she would be in breach of the employment contract entered with the new club, who could claim against the player; however, the club of origin could not be considered to have induced such breach and be held jointly liable with the player to pay a possible compensation. If instead the player would opt to continue the employment contract with the new club and reject the first employment contract, then he/she would be in breach of the first employment contract with the releasing club, who could take action against both the player and the new club as having induced the breach. See also *Decision of the Single Judge of the PSC of 23 April 2013 (ref. 04132309),*[174] reminding that, *as a general rule, claims for inducement of breach of an employment contract have to be lodged against the relevant player and his new club in front of the Dispute Resolution Chamber in the context of an employment-related dispute and cannot be lodged only against the player's new club*. [Emphasis added]

3.5 Premature termination of loans: consequences

By its very definition loan agreements are signed for a predetermined period of time and inevitably during this period occur unexpected situations with a potential impact upon the relationships between the player, his new temporary club and the club of origin. By way of example, think (1) of *a player who prematurely terminates the employment contract with the new club*; or (2) *the new club breaching the loan agreement by not paying the agreed loan fee to the club of origin*.

In the first case, the player terminating the employment contract during the loan will be confronted with the doubt of whether he/she has to come back to

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[173] See e.g. para. 99 et seq. of CAS 2017/A/5339 CS Gaz Metan Medias v. Eric de Oliveira Pereira, FC Karpaty Lyvov & Clube Ateltico Metropolitano and the reference thereto to CAS 2009/A/1909. Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/5339.pdf and http://jurisprudence.tas-cas.org/Shared%20Documents/1909.pdf respectively.

[174] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/57/84/32/04132309_english.pdf.

the club of origin, while at the same time the club of origin will wonder whether it is obliged or not to take the player back and re-start the hitherto suspended contract and whether it can claim damages from the other club for such inconvenience.

In the second case, the club of origin will wonder whether it can cancel the loan and claim the player back, or whether it can still claim the full amount of loan fee agreed if the player also terminated prematurely the employment contract with the new club.

Due to the lack of pre-established requirements regarding loan contracts, it is the sole responsibility of the parties to try to anticipate these potential threats and regulate them all in each particular contract. Correctly identifying the parties to the loan agreement will also impact the consequences of a potential breach.

In the context of loan agreement signed by *the two clubs and the player*, in CAS *2013/A/3269 Clube Desportivo Nacional v. Clube de Regatas Brasil*, award of 6 May 2014,[175] Desportivo Nacional presented appeal against Regatas requesting from the latter, (1) *the payment of compensation for the breach of the loan agreement* and (2) *the reimbursement of all the amounts that Desportivo had to pay the player in substitution of Regatas*.

The Panel concluded that Regatas has indeed breached the relevant obligations under the loan agreement by failing to pay the player's remuneration, but remarkably refused to grant compensation because Desportivo had failed to demonstrate the suffering of any loss or prejudice. Conversely, the fact that the loan agreement was signed by the three parties (i.e. the two clubs and the player), determined the Panel to admit the claim for reimbursement of the amounts paid to the player by Desportivo:

"*87. (...) As a matter of fact, Clause IV, par. 2 and 3 of the Loan Agreement, can be construed as meaning that the Respondent undertook the payment obligations of the Player's salary and expenses during the loan period not only towards the Player but also towards the Appellant. In fact, the payment of the Player's salaries during the loan period was set forth as a condition of the temporary transfer of the Player from the Appellant to the Respondent (the heading of Clause IV of the Loan Agreement also reads as follows: "The general conditions governing the transfer of the consenting player"). Under Clause IV of the trilateral Loan Agreement, the Respondent was obliged to pay the Player's salary in full and to bear the insurance costs, accommodation and travel expenses of the Player. Therefore, by failing to pay the Player's salaries and other expenses, the Respondent also breached the Loan Agreement towards the Appellant and is therefore liable to compensate the Appellant for damages, in an amount corresponding to the sums paid by the Appellant to or for the Player in substitution of the Respondent*". [Emphasis added]

[175] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/3269.pdf.

In *CAS 2008/A/1593 Kuwait Sporting Club v. Z. & FIFA*, award of 30 December 2008,[176] Kuwait SC terminated the contract with a player it had on a loan basis from FC Tallin due to medical reasons. The Panel referred to the FIFA Commentary of article 10.4 (2) of the RSTP to conclude that FC Tallin had no obligation to accept the player back during the period he was supposed to be on loan with Kuwait SC.

"*27. On these grounds, the Panel finds that the Player was not obliged to return to FC Tallinn during the period covering his Loan Agreement with the Club and neither was FC Tallinn obliged to accept him back. The Player therefore did not fail to mitigate his own damages by failing to return to FC Tallinn after the termination. The Club's submissions in relation to compensation are therefore rejected*".

Hence, as a general rule, as long as the parties did not anticipate in the loan agreement the obligation of the player to return to the club of origin in case the latter terminated prematurely the employment contract with the new club; the club of origin will not be obliged to accept the player back, not the player will be obliged to return being free to sign for another club during such interim as shown in the *Decision of the Dispute Resolution Chamber of 30 June 2017 (ref. 06171326-e)*[177] later confirmed in full by *CAS 2018/A/5553*.[178]

Further to that, the premature termination of the loan can also have an impact upon the loan fee. The long-standing jurisprudence of the PSC determines that when the club of origin and the player opt for resuming the suspended contract after the player terminates the employment contract with the loanee club; the loan fee might be reduced proportionally to the effective period loan. See e.g. the *Decision of the Single Judge of the PSC of 5 June 2013 (ref. 06132050)*[179] where the Single Judge referred to this peculiar and questionable practice,[180] to reduce the unpaid loan fee (an in-depth analysis will follow in the next chapter):

"*11. In this context, the Single Judge was keen to emphasise that according to the long standing and well-established jurisprudence of the Players' Status Committee in similar matters, in case a player is transferred from one club to another for a predetermined period, but returns to his previous club prior to the expiry of this period, it is fair and reasonable to reduce the relevant payment obligation to a pro rata proportion of the compensation which had initially been agreed upon. Consequently, the Single Judge held that the overall loan fee of EUR 150,000 should be reduced to an amount which is proportionate to the time the player had effectively spent with the Respondent*".

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[176] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/1593.pdf.

[177] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/95/03/14/06171326-e.pdf.

[178] Award unpublished at the moment of writing this sub-chapter. The author acted for the player.

[179] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/56/75/96/06132050_english.pdf.

[180] See also para. 13 in Decision del Juez Unico de la CEJ de 23 de septiembre de 2014 (*ref. 09142049*) available at: https://resources.fifa.com/mm/document/affederation/administration/02/84/44/47/09142049.pdf.

Finally, some National Associations, e.g. the Romanian Football Federation, have incorporated specific provisions in their internal regulations stating that a player terminating the employment contract prematurely while being on loan with another club is not obliged to return to the club of origin being *free to join the club of his choice, as long as he returns to the club with which he has an employment contract at the end of the originally agreed loan period, without the need for approval from the club with which he has an employment contract.* See the arbitration in the matter CAS 2014/A/3602 *S.C. Football Club Universitatea Cluj S.A. v. Romanian Football Federation (RFF) & Romanian Professional Football League (RPFL*) *& S.C. Concordia Chiajna*, award of 5 May 2015.[181]

3.6 Loan plus option to permanently transfer the player and other preferential rights

Loans with an *option to transfer the player on permanent basis* on a predetermined date is a contractual scheme used very often when the new club wants to observe the player prior to paying a substantial amount for his transfer. It goes without saying that nothing impedes the parties to agree upon the payment of a fee for the loan and/or to subject the future permanent transfer to the same conditions any other transfer could be subject to as seen earlier in the chapter.

In practice, the mechanism of how an option to permanently transfer a player out of a loan agreement is rather simple and it can be seen in CAS 2017/A/5339 *CS Gaz Metan Medias v. Eric de Oliveira Pereira, FC Karpaty Lyvov & Clube Ateltico Metropolitano*.[182]

The potential new club can also agree with the current club of the player to retain an *independent option right to transfer the player* at a pre-established date as it happened in the *Decision of the Single Judge of the PSC of 23 October 2012 (ref. 1012094)*[183] where the parties later disputed whether the right had effectively been or not exerted and the consequences deriving therefrom.

Finally, as in the *Decision of the Single Judge of the PSC of 23 April 2013 (ref. 04132309)*[184] the loanee club can agree to retain a *right of first refusal,* whereby it keeps a preferential right over third clubs to transfer the player. Hence, if a third club offers to transfer the player in certain conditions, the club benefiting from a right of first refusal will be able to have a preferential right in front of such third club, if it offers the same conditions. This case is of special interest because the loanee club not only failed to make use of the preferential right, but it also breached the obligation in the loan agreement to release the player

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[181] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/3602.pdf.

[182] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/5339.pdf.

[183] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/33/98/37/1012094_english.pdf.

[184] Available at:https://resources.fifa.com/mm/document/affederation/administration/02/57/84/32/04132309_english.pdf.

and facilitate his transfer to the third club that had advanced an offer. Such behavior was considered a breach of the loan agreement and led the Single Judge to condemn the loanee club to the payment of compensation in the amount of the proposed transfer fee increased with a penalty of 10%.

Finally, all preferential rights and/or options to transfer will require under any circumstances the consent of the player in order to be effective.

3.7 Sub-loan transfers

Article 10 para. 3 RSTP[185] expressly forbids the new club to transfer the player to a third club during the period of loan without the written consent of the club of origin. According to the Commentary, "*This right to a say awarded to the club of origin also ensures that the latter's investments in order to obtain the services of the player in view of a specific predetermined period of time are duly protected*".

In conclusion, and although not a very common practice in the sport, it would be possible for a club having a player on loan to sub-loan him/her in case it obtains the express and written authorization of the club of origin.

3.8 Conclusion

The parties to a loan contract are in principle the club of origin and the new club. The co-signing of the loan contract by the player will serve *as evidence of the player's consent to the loan* and will *save the player from having to enter into a separate agreement with his club of origin* regarding the suspension of the employment contract during the loan.

During the period of loan, the employment contract with the club of origin will be suspended. Therefore, unless otherwise stipulated in the loan agreement, the releasing club will be exempted from paying the remuneration to the player and other benefits provided in the employment contract during the term of the loan.

The minimum period of a loan will be the time between two registration periods. Nothing impedes the parties to agree upon longer periods. During the loan, the "*transfer right*s" will remain with the club of origin. The club accepting a player on loan will accordingly, not be entitled to further transfer the player (be it permanently or through sub-loan) without the previous consent of the club of origin and the player himself).

As a general rule, unless otherwise stipulated in the loan agreement, if the player terminates the employment contract with the new club before the end

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[185] "3. *The club that has accepted a player on a loan basis is not entitled to transfer him to a third club without the written authorisation of the club that released the player on loan and the player concerned*".

of the loan, the club of origin will not be obliged to accept the player back, nor will the player be obliged to return before the end of the initially expected period of loan.

However, according to the well-established jurisprudence of the PSC, when the player and the club of origin resume the suspended contract after the first terminated the employment contract with the loanee club; the loan fee might be reduced proportionally to the effective loan period.

Loans can incorporate options to permanently transfer the player and other preferential rights. These contractual prerogatives can be in turn subject to the same conditions as any permanent transfer.

4. Transfer fees

4.1 Introduction

Transfer agreements can be concluded against the payment of a transfer fee or on a free basis. There are no rules or obligations to this respect. The decision will ultimately be at the discretion of the parties and the terms they agree upon.

The jurisprudence evidences that the consideration for the transfer does not necessarily have to consist in the payment of a sum of money. It can also consist of non-monetary benefits such as - the organization of friendly matches or training camps or providing with sporting equipment[186] or it can also be agreed through or implied from the *exchange of players* between two clubs. Indeed, according to the FIFA DRC decisions and CAS jurisprudence, agreements whereby two clubs decide to exchange players are considered to be *indirect financial agreements* where the player's sporting qualities have an *attached economic value* and therefore, they might trigger the right of training clubs to claim solidarity contribution, or even a sell-on clause inserted in a previous transfer agreement.[187]

But the transfer fee, in its most traditional sense, represents the economic compensation accepted by the former club in order to terminate the employment contract with the player beforehand (*in the case of a permanent transfer*) or to temporarily suspend it (*in case of a loan*), while allowing the player to sign a contract and be registered with the new club.

To this regard, the CAS panel in Matuzalem[188] indirectly came up with a valid definition of a transfer fee while calculating the compensation due under

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[186] See Decision of the Single Judge of the PSC of 26 August 2014 (ref. 08142934). Available at: https://resources.fifa.com/mm/document/affederation/administration/02/84/31/93/08142934.pdf. See also the Decision of the Single Judge of the PSC of 11 August 2015 (ref. 0815647-e). Available at: https://resources.fifa.com/mm/document/affederation/administration/02/86/49/19/0815647-e.pdf.

[187] For a comprehensive analysis of the current jurisprudence on this subject see "*Principles deriving from 'Exchange of Players' Jurisprudence*" Football Legal #11 (June 2019). Authors: Frans de Weger and Allison Hatch.

[188] See para. 104 of CAS 2008/A/1519-1520. Award not published.

Article 17 RSTP: "*The amount of the transfer fee is likely to represent the value in exchange of which the transferring club was willing to waive its rights as employer and to renounce to the services of the player*".

As mentioned previously, the transfer fee can be made dependent upon the fulfillment of one or more conditions. For instance, clubs can agree that if the new club qualifies for the group stages of the UEFA Champions League and the player takes part in at least 50% of the matches during the national championship, then the transfer fee will increase by a certain amount.[189]

In any event and whichever the consideration for the transfer is, agreements will need to be honored in accordance with the well-known general principle of law *pacta sunt servanda*. The decisions of the PSC often refer to *pacta sunt servanda* through a "*clause de style*", according to which *agreements must be respected by the parties in good faith*. But in difficult times *good faith* may become a grey notion not always easy to elucidate amongst partisan interests and so, the jurisprudence is rich in providing with examples of clubs coming up with all kinds of arguments to escape their payment obligations.

4.2 Pacta sunt servanda and common arguments raised by clubs to avoid, delay or reduce the payment of the transfer fee

We have seen earlier that when the transfer agreement is final, and its validity has not been subject to any sort of condition, the risk of *the player simply walking out of his/her employment contract with the new club right after signing*, will not save the latter from its financial obligations toward the selling club. In the *Decision of the Single Judge of the PSC of 5 June 2018* (ref. 06181557-e)[190] the new club refused to pay the transfer fee and instead deposited the amounts in a separate account waiting for the conflict with the player to be solved and alleging at the same time, that the transfer had become null because of the illegal departure of the player. The Single Judge refused these arguments and admitted the claim of the former club, emphasizing that the obligation to pay the transfer compensation was independent from any obligation that the player might have towards the new club. The breach of the player could not dispense the new club from fulfilling its obligations under the transfer agreement.

But possibly the most common reason invoked to escape payment, is the existence of a bad financial situation. Indeed, in recent years, some clubs have had to navigate through severe financial difficulties which has affected their capacity to pay their debts. It is therefore, not rare to come across case-law where the club in breach with the payment of the transfer fee or payments related to sell-on clauses declares a *bad financial situation* in an attempt to avoid or delay the payment.

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[189] See the Decision of the Single Judge of the PSC of 5 June 2018 (ref. 06180108-e). Available at: https://resources.fifa.com/mm/document/affederation/administration/03/01/17/38/06180108-e.pdf.
[190] Available at: https://resources.fifa.com/mm/document/affederation/administration/03/01/61/77/06181557-e.pdf.

The CAS jurisprudence and PSC decisions are nevertheless consistent in the sense that financial difficulties do not constitute a valid or legitimate reason in that regard. A different scenario enters into play in case the debtor club goes into administration or bankruptcy, as the possible collective negotiation proceedings might impact the ability of the club to pay and the nature of the debt, but that would require an entirely different analysis which is not within the scope of the present chapter.[191]

In *CAS 2016/A/4387 Delfino Pescara 1936 v. Royal Standard Liège & FIFA,*[192] FIFA presented its firm stance against these defense strategies which defined as "*compassion arguments*": "*118. FIFA submits that, generally, financial difficulties cannot be invoked as justification for the non-payment of a transfer fee to which a party had freely committed to paying. In these proceedings specifically, FIFA argues that "every 'compassion-argument' that the Appellant tries to seek should immediately be dismissed as the Appellant's current financial status is nothing more than the result of its own financial recklessness*".

Hence, *CAS 2012/A/3035 Parma FC SpA v. VFL Wolfsburg*, award of 26 March 2013[193] where the "*The Sole Arbitrator finds that the alleged financial difficulties of Parma are not a reason why Wolfsburg should not be entitled to the payments deriving from the Transfer Agreement. At the moment Parma concluded the Transfer Agreement with Wolfsburg, it should have realised the consequences deriving from such agreement. Parma's allegation that its financial difficulties are caused by the alleged failure of the Serie A Professional Football League in Italy to distribute the income stemming from television rights and the European financial reality at the moment are risks that are to be borne by Parma itself and do not validate the transfer fee concerning the Player to remain outstanding*".

Although it might seem obvious, the award is also of interest because the Sole Arbitrator confirms that he cannot impose a payment schedule without the agreement of both parties.

In some other cases, the club in breach will refer to *impediments related to the personal status of the claimant*. Take for example, the *Decision of the PSC Single Judge of 26 April 2016 (ref. 04161524-e*)[194] where the Respondent alleged that the Claimant had been placed by its government in a "*Specially Designated Nationals and Blocked Persons by the Government and, therefore, that all transactions with the Respondent were prohibited until the Claimant would be removed from the said lis*t". The argument was likewise, disregarded by the Single Judge.

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[191] See J. F. Vandellos Alamilla, "*Disputes involving clubs under collective procedures: new challenges beyond the Sampdoria case*", Football Legal magazine no. 8, December 2017.

[192] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/4387.pdf.

[193] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/3035.pdf.

[194] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/85/84/93/04161524-e.pdf.

Similarly, clubs with crossed claims against each other related to different transfer agreements might also request the PSC to *compensate the reciprocal credits* as it happened in the *Decisión del Juez Único de la CEJ de 11 de octubre de 2016 (ref. 10161230-es*).[195] The Single Judge emphasized however, that in that case he had no competence to operate a compensation of credits and invited the Respondent to present a claim against the Claimant if the amount was overdue.[196] The setting-off of reciprocal claims between claims related to a transfer agreement was instead admitted in *CAS 2007/A/1388 Racing Club de Strasbourg Football v. Ismaily Sporting Club & CAS 2007/A/1389 Ismaily Sporting Club v. Racing Club de Strasbourg Football, award of 21 May 2008.*[197]

On certain occasions, the club failing to pay the transfer fee will try to rely upon *force majeure* as an excuse for its faulty behavior. For instance, in *CAS 2015/A/3909 Club Atlético Mineiro v. FC Dynamo Kyiv,* award of 9 October 2015.[198] This was a dispute over the performance of a permanent transfer of a player from the Ukrainian club to Atlético Mineiro, the latter claimed that it had its accounts blocked by the Brazilian Treasury Department to justify under *force majeure* the non-payment of the transfer fee. Both the Single Judge of PSC and the CAS rejected the arguments of Atlético Mineiro, stating that the legal requirements[199] to invoke *force majeure* were not met, in particular, because the alleged financial difficulties were caused by "*its own conduct and voluntary behavior*" not consisting of a general measure adopted by the State addressed to a general group of people, and that "*a lack of financial means cannot be invoked as a justification for the non-compliance with an obligation*".

Particularly interesting is the *Decision of the Single Judge of the PSC of 27 July 2016 (ref. 07160907-e)*[200] in a case where an Egyptian club unsuccessfully invoked *force majeure* caused by the revolution in January 2011 and June 2013 as the reason to delay the payment of a transfer fee and the award in *CAS 2010/A/2144 Real Betis Balompié SAD v. PSV Eindhoven*, award of 10 December 2010 for a detailed explanation of this legal tenet.[201]

In brief, from a legal perspective, the existence of *force majeure* requires causes *which are outside the control of the parties and which could not be avoided by exercise of due care*.

Other recurrent arguments used by clubs in breach of their financial obligations towards other clubs which are to be avoided are: the *lack of issuing*

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[195] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/87/57/21/10161230-es.pdf.

[196] See article 120 CO (Compensation) for the legal requirements on compensation of credits.

[197] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/1388,%201389.pdf.

[198] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/3909.pdf.

[199] These requirements are explained in detail in the award see para. 72 et sequitur.

[200] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/91/27/43/07160907-e.pdf.

[201] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/2144.pdf.

an invoice,[202-203-204] *providing with the mistaken bank account number*,[205] and/or *not issuing tax certificates*.[206] All of these requirements are as a general rule, and unless expressly provided in the contract as an essential condition, considered mere formalities that cannot be considered as valid reasons to delay or avoid the payment of a transfer fee.

Some clubs have also tried to argue for a *reduction of the fee* in case of an unexpected injury to the player[207] during the loan period which prevented the club from benefiting from his services. As a general rule, these arguments cannot be considered to be valid reasons for reducing the fee.

Therefore, the obligation to respect the terms of the transfer agreement is without exception. The consequences of the possible breach of the contract however, poses certain challenges, for instance, whether the former club can force the player to return when the new club fails to pay the transfer fee.

4.3 Impossibility to force the player to return due to lack of payment of transfer fee

We have seen earlier in this chapter, that as a general rule and unless specified otherwise, transfer agreements are independent from employment contracts. Two clubs can agree to the transfer of a football player and such contract might produce no effects upon the relationship between the player and his new club. Consequently, unless the validity of the transfer agreement and the employment contract between the player and the new club are linked and/or subject to certain similar precedent or subsequent conditions, these will stand alone and will deploy effects independently from one another. The accurate drafting of these documents will

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[202] See para. 69 et seq. in *CAS 2015/A/4057 Maritimo de Madeira Futebol SAD v. Al-Ahli SC*, award of 30 November 2015. Available at: http://jurisprudence.tas-cas.org/Shared%20 Documents/4057.pdf and *CAS 2010/A/2128 C.S. Chimia Brazi v. S.C. C.S. Unirea Urziceni S.A.,* award of 15 November 2010. Available at: http://jurisprudence.tas-cas.org/Shared%20 Documents/2128.pdf.

[203] See Decision of the Single Judge of the PSC of 29 August 2017 (*ref. 08171838-e*). Available at: https://resources.fifa.com/mm/document/affederation/administration/02/92/53/77/08171838-e.pdf. See also CAS 2015/A/4232 *Al-Gharafa S.C. v. F.C. Steaua Bucuresti & Fédération Internationale de Football Association (FIFA)*, award of 14 June 2016 (para. 61). Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/4232.pdf. See also Decision of the Single Judge of the PSC of 8 May 2017 (*ref. 05172216-e*). Available at: https://resources.fifa.com/mm/document/affederation/administration/02/90/40/64/05172216-e.pdf.

[204] Decision of the Single Judge of the PSC of 26 April 2016 (*ref. 04161527-e*). Available at: https://resources.fifa.com/mm/document/affederation/administration/02/84/84/92/04161527-e.pdf.

[205] Decision of the Single Judge of the PSC of 10 March 2015 (*ref. 03151681*). Available at: https://resources.fifa.com/mm/document/affederation/administration/02/71/13/11/03151681_english.pdf.

[206] Decision of the Single Judge of the PSC of 15 June 2016 (*ref. 06161584-e*). Available at: https://resources.fifa.com/mm/document/affederation/administration/02/87/76/91/06161584-e.pdf.

[207] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/57/85/10 / 08142935_english.pdf.

hence, be crucial to establish the legal interplay between them while avoiding incurring risks.

When a transfer agreement fails for whichever reason and yet the player has entered into an employment contract with the new club, one of the primary issues the releasing club would have to address is whether it can ask for the return of the player.

In CAS 2007/A/1388 *Racing Club de Strasbourg Football v. Ismaily Sporting Club* & CAS 2007/A/1389 *Ismaily Sporting Club v. Racing Club de Strasbourg Football*, award of 21 May 2008,[208] the panel had to examine the above-mentioned situation.

The parties and the player signed a loan with an option for the definitive transfer of a player from the French club to the Egyptian club. The agreement provided that if Ismaily failed to pay the transfer fee for the permanent transfer, the player would have to return to RCSF. Ismaily indeed failed to pay on time and RCSF deemed invalid the permanent transfer requesting the club to send the player back from the loan. The player however, decided to remain in Egypt having signed an employment contract far beyond the period of loan.

The Panel eventually, concluded that it could not force the player to return:

"*(4) d. In any event, it should be noted that, given the principle of freedom of employment, it is not legally possible to require a football player to play for club A or club B. In the event of breach of an employment contract, or of any other contractual relationship, the only means at the disposal of those parties, which considered that they have sustained loss and damage, is to have recourse to the proper courts in order to seek compensation for the loss and damage incurred, including an application for the imposition of sporting sanction on the defaulting player, as the case may be (TAS 2003/O/530, TAS 2004/A/791)*".

Keeping this in mind, clubs will need to deploy maximum efforts to include in the transfer agreement other mechanisms meant to secure the payment of the transfer fee. One of them is the frequently used acceleration clause.

4.4 Acceleration clauses

When the payment of the transfer fee is established in several periodic installments, the creditor may want to incentivize the debtor to fulfill the terms of payment by including a so-called "*acceleration clause*".

Acceleration clauses are meant to cancel a pre-agreed payment schedule when the debtor fails to pay one or more of the instalments in the agreed dates automatically rendering due the remaining amount.[209]

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[208] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/1388,%201389.pdf.

[209] See e.g. acceleration clause transcribed in par. 4 in Decision of the Single Judge of the PSC of 14 October 2014 (ref. 10143136). Available at: https://resources.fifa.com/mm/document/affederation/administration/02/84/44/65/10143136.pdf.

The FIFA decisions demonstrate that these clauses are not presumed and must be unequivocally included in the contract. For example, in the *Décision du Juge Unique de la Commission du Statut du Joueur du 23 janvier 2018 (ref. 01180394-fr),*[210] the claimant club requested the payment of the entire transfer fee which had been established in the transfer agreement in different installments. The Single Judge confirmed that due to the lack of an acceleration clause he could admit the claimant's request to force the Respondent paying the full remaining amount.

"*8. Par ailleurs, le juge unique a souligné que le contrat ne contenait pas une clause d'accélération. Par conséquent, le juge unique a décidé que le non-paiement par le défendeur d'une ou de plusieurs tranches dues selon le contrat n'entraînait pas l'exigibilité de toute l'indemnité de transfert prévue dans le contrat*".

Consequently, unless there is an express acceleration clause in the transfer agreement, claims will only be admitted for those amounts overdue at the moment of the decision provided these have been duly requested.[211]

4.5 Penalty clauses, liquidated damages and default interest

Including penalty clauses in transfer agreements is perfectly valid in order to reinforce[212] the effectivity of the principle of *pacta sunt servanda* and encourage compliance with the terms of the contract. As a matter of a fact, doing so is both common and advisable in the context of international football contracts.

As we have seen earlier, the problem is that the RSTP leaves the *private dimension* of transfers out of its scope, and so, there are no legal dispositions in the FIFA regulations addressing contractual penalties.[213] Therefore, when the parties enter into a dispute and they must argue substantive legal matters around penalties they often encounter difficulties in accurately grounding their submissions in law.

Imagine a transfer agreement between an English club and a Spanish club which includes a penalty clause where the parties refer in a general manner to the FIFA regulations as being the applicable law. Since there are no provisions whatsoever in the RSTP regarding penalty clauses, one might find it difficult to identify the substantive applicable law (*lex contractus*) in order to determine:

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[210] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/95/02/84/01180394-fr.pdf.

[211] See Decision of the Single Judge of the PSC of 25 February 2014 (ref. 02142127). Available at: https://resources.fifa.com/mm/document/affederation/administration/02/43/84/17/02142127_english.pdf. See also Decision of the Single Judge of the PSC of 5 June 2018 (ref. 06181392-e). Available at: https://resources.fifa.com/mm/document/affederation/administration/03/01/71/70/06181392-e.pdf.

[212] F. DE WEGER, *The Jurisprudence of the FIFA Dispute Resolution Chamber*, 2nd Edition. Ed. Springer, 296.

[213] There is only, an indirect reference in article 17.1 RSTP opening the door for players and clubs to agree upon a compensation for the case of termination of the contract without just cause ("… *unless otherwise provided for in the contract …*").

whether the penalty is indeed a penalty or instead are liquidated damages; or whether the penalty must be deemed excessive and reduced accordingly.

The consequences of opting for Spanish law, English law or Swiss law to answer the above questions can dramatically impact the outcome of the case. Most *common law* systems consider contractual penalties unenforceable and against public policy to the extent that the amounts are not limited to or go beyond the anticipation of the actual loss suffered by a breach of the contract.

From a PSC perspective, article 2 of the FIFA Procedural Rules[214] offers ample discretion in the election of the applicable law, although in practice, we have seen earlier[215] that the FIFA legal bodies will decide on the basis of (1) *its own regulations* and when these don't cover the issue at stake, according to (2) *the general principles of law* and (3) *its well-established jurisprudence*.

From the CAS perspective (in appellate procedures), identifying the substantive applicable law also becomes challenging depending on the contents of the contract. It is generally accepted by Swiss scholars that when parties submit to the jurisdiction of the CAS, article R58 of the CAS Code[216] operates as a veritable tacit choice of law superseding any alternative choice in the contract. Thus, following the pathway in article R58, the Panel shall first decide the dispute in accordance with the *applicable regulations* (i.c. the RSTP); if there are no applicable regulations (as in the case of contractual penalties), one should resort to the *rules of law chosen by the parties* (when such choice exists);[217] and subsidiarily, in absence of such choice, according to the law of the country in which the federation (i.c. FIFA) is domiciled (i.e. Switzerland).

It is easy to see that the multiple combinations above can render the debate around the material applicable law rather complex and thus, all these matters ought to be gauged and addressed with utmost attention before signing the transfer agreement.

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[214] "*Article 2. Applicable material law. In their application and adjudication of law, the Players' Status Committee and the DRC shall apply the FIFA Statutes and regulations whilst considering all relevant arrangements, laws and/or collective bargaining agreements that exist at national level, as well as the specificity of sport".*

[215] See Sub-chapter 1 *General aspects of transfer agreements* and 1.1 *Introduction*.

[216] Article R58 of the CAS Code is the conflict of law rule in appeals proceedings. The CAS Code is available at: www.tas-cas.org/fileadmin/user_upload/Code_2019__en_.pdf.

[217] At this point, one must keep in mind that the reference in article 66(2) of the FIFA Statutes refer to Swiss law as the "*additional*" law to the regulations and that the meaning and extent of "*additional*", has historically generated confusion, leading to different solutions by different CAS panels in those cases where the parties explicitly opted in the contract for a particular national law in the contract other than Swiss law. This dichotomy in the identification of the applicable law, seems to have finally been elucidated in CAS 2015/A/3910 *Ana Kuze v. Tianjin TEDA FC, award of 20 November 2015* where the panel applied article R58 making a distinction between the *law applicable to the dispute* (i.e. the FIFA regulations) and the *law applicable to the contract (i.e. the rules of law chosen by the parties).*

In Swiss law, contractual penalties are regulated by articles 160 to 163 CO.[218] They can be freely included in contracts in order to protect or deter the parties from the *non-performance or from the defective performance of the contract or of any of its obligations* by the other party. The awards *CAS 2015/A/4057 Maritimo de Madeira Futebol SAD v. Al-Ahli SC*, award of 30 November 2015[219] and *CAS 2017/A/5233 Ittihad FC, Saudi Arabia v. Etoile Sportive du Sahel,* award of 22 December 2017,[220] contain comprehensive analysis of penalties under Swiss law.

These are the essential characteristics of contractual penalties under the CO:

– According to CAS 4057: "*3. Under Swiss law (Articles 160 et seq. CO) contractual penalty provisions have to contain the following necessary elements: a) the parties bound by the contractual penalty, b) the kind of penalty that has been determined, c) the conditions triggering the obligation to pay the contractual penalty, and d) the measure of the contractual penalty*".
– *Types of contractual penalties (i.e. exclusive* or *cumulative)*.

They are *exclusive*, when the creditor can request from the debtor, either the performance of the contract, or the payment of penalty. Unless the parties agree otherwise, *exclusivity is the general rule* where the penalty is promised for non-performance or defective performance of a contract, according to art. 160.1 CO.

Instead, penalties are *cumulative*, when the creditor can request both, the payment of the penalty and the performance of the contract simultaneously. As a general rule, cf. art. 160.2 CO, *when the penalty has been agreed for failure to comply with the stipulated time or place of performance, the creditor may claim the penalty in addition to performance, provided he has not expressly waived such right or accepted performance without reservation*. In such case, the creditor might also ask for the default interest (Article 104 CO).[221] Any *reservation* or objection to the performance must be made on time, that is, at the moment of the performance of the obligation.

Penalty clauses can also be construed as a sort of a *buy-out clause*, allowing the party to walk out of the contract by paying the agreed penalty (cf. art. 160.3 CO).

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[218] For a detailed analysis of penalty clauses under the CAS jurisprudence see J. López Batet & Y. Vázquez Moraga, *"El tratamiento de las cláusulas penales en la jurisprudencia del Tribunal Arbitral du Sport (TAS) sobre futbol*", Revista Aranzadi de Derecho de Deporte y Entretenimiento 49, octubre – diciembre 2015, 181.

[219] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/4057.pdf.

[220] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/5233.pdf.

[221] See para. 88 of CAS 4057.

– There is no legal provision in Swiss law which requires contractual penalties to be *reciprocal* in order to be valid. A contractual penalty can therefore be inserted in a contract for one of the parties only.[222]
– The obligation to pay the penalty is due, *independently of the existence of any damage or loss* (cf. art. 161.1 CO). Furthermore, article 161.2 CO allows the creditor to claim additional compensation if the loss or damage suffered exceeds the penalty amount, and he can prove that the debtor was at fault.
– *The parties can freely stipulate the amount* of the penalty (cf. 163 CO), although the judge *must* reduce those penalties considered *excessive* (i.e. *"when the penalty is unreasonable and flagrantly exceeds the amount admissible with respect to the sense of justice and equity*").[223] The principle of freedom of contract is therefore, limited by public order. The burden of proof lies within the debtor.[224] It is important to remark that article 163 CO is part of Swiss public policy and therefore the obligation to reduce excessive penalties must be applied even if the debtor fails to expressly invoke it or, when the *lex contractus* is not Swiss law. That being said, the duty to reduce excessive penalties must be used with "*reluctance*" as it goes against the principle of contractual freedom and contractual loyalty.[225]
– Penalties may not be claimed when the underlying obligation is *illicit or immoral*, or, unless the parties agreed otherwise, when its performance has been prevented by circumstances beyond the debtor's control (*force majeure*).

The CAS jurisprudence has often referred to liquidated damages and penalties as being the same institution under Swiss law. See e.g *CAS 2014/A/3555 FC Vojvodina v. Almami Samori Da Silva Moreira*[226] where the Panel notes that the concept of a liquidated damages clause *"(...) is identical to the concept of a contractual penalty clause in Switzerland, which appears from both the German language of Article 160 of the SCO using the terms "Konventionalstrafe" and "Strafe" as well as the French language, using the terms "clause pénale" and "la peine"* (para. 57). Thus, even if deemed *liquidated damages*, there would be room for judicial control of substance with respect of such clauses, as set out and within the limits of Articles 160 to 163 CO.

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[222] See *CAS 2013/A/3411 Al Gharafa S.C. & Mark Bresciano v. Al Nasr S.C. & Fédération Internationale de Football Association (FIFA)*, award of 9 May 2014. Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/3411.pdf.

[223] For more on the excessiveness of penalties read D. Mavromati, "*Excessive contractual penalties in football*". Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_ id=2872151 and the aforementioned CAS award 2015/A/4057.

[224] See CAS 2017/A/5233 para. 54. Footnote 220.

[225] See para. 48 of *CAS 2014/A/3664 Al Ittihad Club v. Club de Regatas Vasco da Gama*, award of 9 January 2015. Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/3664.pdf.

[226] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/3555.pdf.

Without entering into such academic discussions, it is important to highlight that part of the doctrine[227] considers *contractual penalties* to be different from *liquidated damages clauses*[228] and departing from this perspective, opting for one or another can have consequences. In essence, the main difference relies on their nature. Thus, *penalty clauses* have an inherent *punitive nature*, and therefore, the creditor does not even need to prove the incurrence of any loss or damage in order to claim its payment. Instead, *liquidated damages clauses*, seek *compensating the damages*[229] incurred as a result of the contractual breach by one of the parties, by establishing in advanced the estimation of such damages. Therefore, as opposed to contractual penalties, in the case of liquidated damages the party victim of the contractual breach, will have to proof the occurrence of damage in order to claim the payment.

In the context of football-related contracts, the legal nature of penalties, liquidated damages and/or interest rates, is often confused due to bad or vague drafting of the documents. When the nature of the clause is not clear from the contract, the burden of proof as to its nature will lie on the creditor according to the interpretation criteria under article 18 CO.

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In *CAS 2010/A/2128 C.S. Chimia Brazi v. S.C. C.S. Unirea Urziceni S.A.,* award of 15 November 2010[230] the Panel determined that despite the parties explicitly referred to the clause in the transfer agreement as being *a penalty*, it could not be construed as "*liquidated damages clause*"[231] but rather an agreement between the Parties in relation to the applicable *interest rate* in case of late payment.

"39. Indeed, based on the wording of the clause and of the submissions of the Parties, the Panel is of the view that the aim of clause 1 of the Annex of the Transfer Agreement was to assure Brazi that in case of late payment a certain interest rate would be applicable".

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[227] See "*Minimizing the risks of untimely payments by means of instruments of financially punitive and/or compensatory nature*". Author: Eugen Krechetov. Published in the International Sports Law Journal, 2013.

[228] See "*El tratamiento de las cláusulas penales en la jurisprudencia del Tribunal Arbitral du Sport (TAS) sobre futbol*". Authors: Jordi López Batet & Yago Vázquez Moraga, Revista Aranzadi de Derecho de Deporte y Entretenimiento 49, octubre – diciembre 2015, 179.

[229] See art. 41 CO.

[230] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/2128.pdf.

[231] Interestingly, by means of a footnote in the award, the Panel in CAS 2128 adds its own understanding of liquidated damages: "*Liquidated damage is applicable when a specific sum of money has been expressly stipulated by the parties as the amount of damage to be recovered by any party in result of a breach of contract by the other*".

Instead, in *CAS 2016/A/4567 Al Jariza v. FC Lokomotiv*, award of 9 November 2016,[232] the Sole Arbitrator was of a different opinion when confronted with the interpretation of a similar clause which eventually described as being a "*default interest penalty*":

"*68. Article 2.6 of the Transfer Agreement provides for this high rate of interest as a penalty, and a reading of that Article confirms that it should be construed as a penalty clause (Konventionalstraffe or clause pénale) within the meaning of Article 160 CO et seq. Not only does Article 2.6 state that it is a "penalty", it also functions as a classic penalty to put pressure on the debtor in order to foster in terrorem compliance under threat of having to pay very high penalty interest of 20% per annum for each day of lateness. Cf. Thevenoz/Werro (eds), Commentaire Romand, Code des Obligations I, pgs. 1159-1160 (effet reìpressif and effet preìventif role of penalty)*".

From a legal standpoint, contractual penalties are also different from *contractual interests for late payment* ("*intérêt moratoire*").[233] In Swiss law, default interests are regulated in article 104 CO *et seq.*. As it happens with penalties or liquidated damages, the parties may freely determine a specific interest rate for a late payment of a stipulated amount.[234] However, when a dispute is brought before the CAS, such contractual freedom will be limited to the requirements imposed by Swiss public policy[235] requirements and thus, not be considered *excessive* (regardless of the national applicable law to the substance). Note that in the above cited Chimia Brazi case (where the applicable law was Romanian law) the parties had explicitly agreed to a "*penalty*" of 1% interest per day of delay. Despite the contract being subject to a specific national law, the Panel had to assess the validity of such *interest rate* under the light of Swiss public policy, eventually deciding that it could not enforce the clause:

"*44. In any event, taking into consideration all the abovementioned, and since CAS is an arbitral body with its seat in Switzerland, the Panel is of the view that an arbitral tribunal cannot grant a late payment interest rate of 198% p.a. if doing so would violate the Swiss public policy (the "ordre public").*

45. The Panel hence respectfully disagrees with Brazi ìs assertion that the Swiss public policy is irrelevant here. Compliance with Swiss public policy has specifically been safeguarded under art. 190 (e) of the PIL, which states that an award can be attacked if it is "(...) incompatible with Swiss public policy". Indeed, even there when foreign law is applicable to the merits, the fundamental principles of law recognised in Switzerland must be respected.

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[232] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/4567.pdf

[233] Default interest or "*intérêt moratoire*" must be distinguished from "*intérêt conventionnel*" and "*intérêt compensatoire*".

[234] See art. 104 CO and para. 61 *CAS 2014/A/3664 Al Ittihad Club v. Club de Regatas Vasco da Gama*, award of 9 January 2015. Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/3664.pdf.

[235] See art. 73.2 CO.

46. *Public policy is violated if an arbitral award violates the fundamental legal principles and is therefore incompatible with Swiss law and value. The Panel has no doubts that to grant to a creditor a late payment interest rate of 198% would violate Swiss fundamental legal principles – and probably not only Swiss principles.*
47. The Panel observes that under Swiss Law it is considered usury as per art. 157 of the Swiss Penal Code where a loan is granted with an interest rate of 18% to 20% p.a. or where there is a disproportion of 25% between the value of the obligations of the Parties. Further, Swiss law foresees a maximum of 15% p.a. for loans granted to consumers".

Similarly, in the *Decision of the Single Judge of the PSC of 24 November 2015 (ref. 11150592-e)*[236] the parties to a transfer agreement agreed to a *daily fine of 2.000 Euro* in case of late payment of the established fee. Furthermore, the parties expressly mentioned in the contract that such amount had been freely agreed between them. The Claimant club, accordingly, requested the payment of the principal amount plus the established fine for the late payment, which he considered to be a *penalty* from a legal point of view. The Single Judge instead decided otherwise and determined that such clause could not be considered a *penalty*:
"9. Having duly examined art. 2.3.) of the agreement, the Single Judge considered that he could not grant the Claimant's request for a "penalty" of EUR 2,000 per day of delay. In this respect, the Single Judge noted that the "penalty" of EUR 2,000 per day of delay was to be applied "until the amount [of EUR 2,125,000] is fully paid". As such, the Single Judge was of the view that said construction should rather be considered as default interest, which, in the present matter corresponds to an interest rate of more than 35% per year. The Single Judge found such an interest rate excessive and, in view of the fact that the Claimant also requested interest on the outstanding amount, decided to award 5% interest p.a. on the amount of EUR 2,125,000 as from 1 January 2015 until the date of effective payment".

There are multiple PSC decisions in this same line, including the above cited *CAS 2016/A/4567 Al Jariza v. FC Lokomotiv*, considering interests rates of *4% per month,*[237] *20% p.a.,*[238] *0,5% per day;*[239] *0,2% per day;*[240] as being manifestly disproportionate and excessive, and so they are generally disregarded

[236] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/85/84/75/11150592-e.pdf.
[237] See Decision of the PSC of 6 March 2018 (ref. 03181547-e). Available at: https://resources.fifa.com/mm/document/affederation/administration/02/95/56/66/03181547-e.pdf.
[238] See Decision of the PSC of 15 October 2015 (ref. 10150073-e). Available at: https://resources.fifa.com/mm/document/affederation/administration/02/87/76/08/10150073-e.pdf.
[239] See Decision of the PSC of 24 November 2015 (ref. 1115770-e). Available at: https://resources.fifa.com/mm/document/affederation/administration/02/85/22/83/1115770-e.pdf.
[240] See Decision of the PSC of 17 April 2018 (ref. 04180776-e). Available at: https://resources.fifa.com/mm/document/affederation/administration/02/96/98/45/04180776-e.pdf.

in favour of the alternative default interest rate of 5% p.a. in accordance with the longstanding practice of the PSC. In some cases, however, the jurisprudence has opted for reducing the rate to a point where it does not breach public policy rather than annulling the agreement of the parties and apply 5% p.a.[241]

All in all, the FIFA PSC and CAS panels,[242] have generally concluded that a default interest rate of 17% p.a. is the maximum that can be contractually agreed without violating the Swiss public policy.

As opposed to penalties, *default interests* must be paid even in cases of *force majeure*.

To conclude with, it is necessary to briefly refer to the relationship between penalties and/or compensations, and the default interest of 5% p.a. provided in article 104 CO; and whether these two can be claimed in a cumulative manner or not.

As a general rule, *according to the long standing and well-established jurisprudence of the Players' Status Committee in similar cases, a compensation or penalty for late payment cannot be requested together with default interest as both requests are punitive in nature and aim at compensating the creditor for late payment*.[243]

The view of the CAS in this respect is more refined. For example, in *CAS 2014/A/3664 Al Ittihad Club v. Club de Regatas Vasco da Gama*, award of 9 January 2015,[244] the Panel decided that *if the contract is clear in determining that both* [penalty and default interest] *can be awarded complementarily, nothing prevents an adjudicatory body from awarding both*. This same approach of the CAS has been adopted by some PSC decisions that also seem to accept the possibility to cumulate penalties and default interests as long as this is expressly provided in the contract.[245-246] Finally, as seen before, it is also necessary to keep in mind that when the penalty is *cumulative*, it will also be possible to ask for default interest simultaneously.

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[241] See Decision of the PSC of 28 August 2013 (ref. 08133007). Available at: https://resources.fifa.com/mm/document/affederation/administration/02/25/91/13/08133007_english.pdf and *CAS 2010/A/2128 C.S. Chimia Brazi v. S.C. C.S. Unirea Urziceni S.A.,* award of 15 November 2010. Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/2128.pdf.

[242] See e.g. *CAS 2016/A/4858 Delfino Pescara 1936 v. Envigado CF*, award of 12 June 2017. Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/4858.pdf.

[243] See Decision of the PSC of 29 August 2017 (ref. 08171719-e). Available at: https://resources.fifa.com/mm/document/affederation/administration/02/94/71/15/08171719-e.pdf.

[244] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/3664.pdf.

[245] See para. 14 of the Decision of the PSC of 23 January 2018 (ref. 01180558-fr). Available at: https://resources.fifa.com/mm/document/affederation/administration/02/95/21/19/01180558-fr.pdf.

[246] See Decision of the PSC of 16 March 2016 (ref. 0316027-e). Available at: https://resources.fifa.com/mm/document/affederation/administration/02/84/84/74/0316027-e.pdf.

4.6 The meaning of "net transfer" and deductions on transfer fees

Disputes regarding the meaning of "*net transfer"*, can be easily avoided by simple and accurate drafting of the transfer agreement. Often, clubs mention that the amounts to be paid for the transfer of a player will be *net*, without specifying the scope of the term net, which leads to conflict at a later stage.

When the time to pay comes, divergences over the true meaning of net are usually connected to three different issues:

– *First*, whether the amount to pay to the former club should not include the deduction of the *solidarity contribution* under Annexe 5 of the RSTP.
– *Second*, whether the transfer fee included *training compensation* under Annexe 4 of the RSTP,
– and *third*, whether other costs related to the transfer, such as *taxes, currency exchange rates or intermediation fees* can be deducted or not.

4.6.1 Solidarity contribution

Article 1 of Annexe 5 of the RSTP determines that in principle, 5% of any transfer fee must be deducted from the total amount and be distributed by the new club as solidarity contribution to the club(s) that were involved in the player's training. The CAS jurisprudence and the PSC decisions are consistent[247] and admit that the parties can nonetheless deviate from this provision in the transfer agreement as long as the rights of third parties are not affected. In essence, this means that the new club will, in any case and regardless of any *internal agreement*, remain obliged to distribute solidarity contribution. This unalterable obligation of the new club is according to de Weger, the *golden rule* when it comes to the incidence of internal agreements on solidarity contribution towards the clubs involved in the training of the player.[248]

Thus, in CAS 2015/A/4139 *Al Nassr Saudi Club v. Trabzonspor FC,* award of 20 January 2016[249] the Panel concluded that: "*44. With respect to the question whether the parties may agree on a "net" transfer fee, the Panel adopts the decision rendered in the case CAS 2012/A/2707,*[250] *which holds that there is no legal obstacle preventing clubs from agreeing that the new club shall bear the solidarity contribution in addition to the transfer fee. As long as the new club remains responsible for paying the solidarity contribution, an internal agreement such as that in the case at hand is not*

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[247] See e.g. CAS 2017/A/4940, available at: http://jurisprudence.tas-cas.org/Shared%20Documents/4940.pdf and CAS 2009/A/1773&1774, available at: http://jurisprudence.tas-cas.org/Shared%20Documents/1773,%201774.pdf.

[248] The Jurisprudence of the FIFA Dispute Resolution Chamber, 2nd Edition. Frans de Weger. Ed. Springer, 455.

[249] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/4139.pdf.

[250] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/2707.pdf.

prohibited by the RSTP (also see CAS 2013/A/3403-3404 & 3405, para. 7.3; CAS 2008/A/1544, para. 71 and 72; CAS/2009/A/1773 & 1774 para. 7.3)".

Therefore, the obligation to calculate and distribute the required amount remains at all times with the new club regardless of any agreement. Potential claims by training clubs need to be addressed against the latter, who will in turn (and if so agreed) be able to claim the reimbursement from the former club. See *CAS 2014/A/3723 Al Ittihad FC v. Fluminense FC*, award of 22 January 2015:[251] "*3. Any stipulation between the parties to a transfer agreement consisting in an obligation of the former club of the transferred player to pay a possible solidarity contribution would not affect the training club(s) of the transferred player since it would not be viable to expect the club(s) involved in the training and education of the player to have full knowledge of contractual stipulations between the parties to a transfer agreement concerning such player. Therefore, the training club always has to claim its share of the solidarity contribution from the new club which will be allowed to reclaim it from the former club of the player if and when this amount should not have been deducted from the total transfer sum. Furthermore, it clearly follows from the Commentary on the RSTP (the "RSTP-Commentary") on Annexe 5 Article 2 of the RSTP that it is the responsibility of the new club of a player to calculate and distribute the solidarity contribution and that it has to contact the former club(s) of the player in order to receive the necessary bank details*".

In case of a vaguely drafted clause, the deciding body (i.e. FIFA PSC/CAS) will have to rely on the interpretation rules for contracts and decide in accordance with the real intention of the parties, as it happened in *CAS 2008/A/1544 RCD Mallorca v. Al Arabi*, award of 13 February 2009 (paras. 20 et seq.).[252] The PSC has made it clear on several occasions that when a contractual clause in which the net amount is meant to include the deduction of the solidarity contribution, the clause must contain an explicit reference to solidarity contribution.[253] In general, the CAS has endorsed the above in the sense that a general reference in the transfer agreement to "*net of all costs*" cannot be read as covering specific liabilities imposed under the FIFA regulations, if the parties wish to do so, concludes, *then they must do so by wording which conveys such an intention*.[254]

However, as mentioned, this will ultimately be analyzed on a case by case basis, and in some cases the simple reference to "*without any deductions*" will serve the purpose of deducting also solidarity payments.[255]

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[251] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/3723.pdf.

[252] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/1544.pdf.

[253] See Decision of the PSC of 28 February 2017 (ref. 02171119-e) para. 19. Available at: https://resources.fifa.com/mm/document/affederation/administration/02/90/85/92/02171119-e.pdf.

[254] See CAS 206/A/1158&1160&1161 *FC Internazionale Milano SpA v. Valencia CF SAD, award of 9 July 2007*. Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/1158,%201160,%201161.pdf.

[255] See CAS 2006/A/1018 *C.A. River Plate v. Hamburger S.V.*, award of 10 November 2006. Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/1018.pdf.

Finally, the discussion about the right to the reimbursement of solidarity contribution from the former club, can become utterly complex in the context of a player leaving the club of origin through a *buy-out clause in the employment agreement,* which in practice operates very similarly to that of a regular transfer agreement.[256] *Does the amount set as buy-out clause represents the net value of the transfer, or instead, the total gross value upon which the new club has to apply the deduction of solidarity contribution*?

That was the question the *Decision of the Single Judge of the PSC of 5 June 2018 (ref. 06180832-e)*[257] had to answer. The claimant club requested from the respondent, the reimbursement of the solidarity payments made to third clubs after having paid the amount of a buy-out clause to recruit the player. The respondent refused to pay alleging that only the payment of the total amount set forth in the employment contract (i.c. 8.500.000 Euro) would trigger the buy-oub of the player, and that therefore, such amount was to be considered net, i.e representing 95% of the gross transfer value. The Single Judge agreed with the arguments put forward by the respondent and rejected the claim.

Finally, see *CAS 2016/A/4821 Stoke City Football Club v. Pepsi Football Academy, award of 30 March 2017*,[258] for the estimation of the value of professional football players' involved in a free permanent exchange with regards to solidarity contribution.

4.6.2 Training compensation

What happens to the right of the former club to claim training compensation when the transfer agreement already includes a transfer fee and is silent with regards to training compensation?

The *Decision of the Dispute Resolution Chamber of 12 March 2009 (ref. 39328)*[259] sets the consistent view of FIFA in this respect:

"*8. In view of the foregoing, the Chamber stated that, according to its well-established jurisprudence, if two parties enter into a transfer agreement which provides, inter alia, for the financial conditions of the relevant transfer, i.e. the payment of transfer compensation, training compensation is considered as being included in the transfer compensation. Thereby, the DRC mentioned that the Court of Arbitration for Sport also followed this jurisprudence, e.g. in the case CAS 2004/A/785 T v/ L (par. 7.4.9). Equally, the panel emphasized that, in case the parties intend to agree on an additional amount in relation to the payment of training compensation, the transfer agreement should*

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[256] See also A.L. Lleó, "*When does a buy-out clause trigger a 'transfer' under FIFA Regulations*?", published in LawInSport on 3 November 2016. Available at: https://www.lawinsport.com/topics/articles/item/when-does-a-buy-out-clause-triggers-a-transfer-under-fifa-regulations.

[257] Available at: https://resources.fifa.com/mm/document/affederation/administration/03/01/01/28/06180832-e.pdf.

[258] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/4821.pdf.

[259] Decision not published.

explicitly refer to a specific amount, distinct from transfer compensation, which would be due as training compensation".

It goes without saying that in those cases where the transfer agreement concerns an amateur player, and the obligation to pay training compensation extends to third clubs other than those in the transfer agreement, the obligation towards these other clubs remains untouched and unaffected by any possible dispositions in the transfer agreement establishing otherwise (e.g. the waiver of the former club).[260]

4.6.3 Other deductions: Taxes, intermediation fees

When the parties don't define with enough precision the meaning of the term net in the transfer agreement, the debtor club will be tempted to apply possible deductions on the final amount to pay such as taxes, duties or other expenses related to the transfer.

In CAS 2012/A/2806 *SC Corinthians Paulista v. Panathinaikos FC, award of 17 December 2012*[261] the parties indeed disagreed over the understanding of the term "*net amount*" in the transfer agreement. Corinthians withheld and collected income tax in favour of the Brazilian tax authorities when paying the transfer fee to Panathinaikos. The Single Judge decided in favour of the Greek club, ordering Corinthians to pay the withheld amount, concluding that if it had been the will of the parties to deduct certain taxes, it should have been explicitly mentioned in the transfer agreement.

Corinthians appealed alleging that the term "*net*" *"55. (...) [requires] a distinction to be made between amounts which are not recoverable by Respondent (such as solidarity contribution, Brazilian currency exchange tax and remittance banking costs) and those amounts which are recoverable (such as the Brazilian withholding income tax), the latter of which is deductible from the total amount due to the Respondent*". According to Greek corporate law, income tax withheld in Brazil generates a tax credit in Greece which can be offset for the purposes of calculating corporate income tax in Greece, generating an unjust enrichment if paid.

Panathinaikos instead, considered that "*net*" was ambiguous and it should be interpreted generally as meaning "*without any deduction*". The Panel endorsed this last view and referred to CAS 2006/A/1018[262] where it is established that "*net*" means that the agreed net amount must exactly correspond to the amount which is received in the creditor's bank account:

"*75. (...) It must be added that it is a common understanding in the practice of sports contracts – particularly in employment contracts between clubs*

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[260] For more on the right of clubs to waive training compensation see *CAS 2017/A/5277 FK Sarajevo. KVC Westero*, award of 16 April 2018. Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/5277.pdf.

[261] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/2806.pdf.

[262] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/1018.pdf.

and footballers – that "net amount" refers to the final amount the creditor expects to receive in its bank account. Under this approach, all sorts of taxes, expenses and charges due to the tax authorities or to other third parties (for example the banks involved in the payment) in connection with the payment, whether recoverable or not by the creditor, are to be paid by the debtor on top of the agreed net amount".

A similar approach has been adopted by the PSC[263] when clubs request the deduction of other expenses from the transfer fee or sell-on clause, such as intermediation fees. As long as such deductions are not clearly established in the transfer agreement or they cannot be proven to have been effectively discharged, they will not be accepted. In the *Decision of the Single Judge of the PSC of 17 April 2018 (ref. 04180657)*[264] the parties explicitly provided in the transfer agreement that intermediation fees would be deducted from the sell-on clause. However, the Single Judge refused to apply the deduction because the respondent club "*failed to provide conclusive evidence from which it could be established that indeed an intermediary agreement existed with said intermediary and that a commission was effectively paid to the latter*".

4.7 Bank guarantees

Bank guarantees are often requested by the transferring club as a security for payment of the transfer fee. These instruments can generate substantial costs (i.a. service charge, collateral securities, anticipated discount commissions) the payment of which can result in a conflict between the parties if they are not stipulated in a clear manner in the contract.

In the *Decision of the Single Judge of 29 July 2013 (ref. 07131503)*,[265] the Single Judge had to decide whether the Claimant was entitled to recover from the Respondent the monies pertaining to the bank guarantees on first demand issued in connection with the transfer of the player. In the transfer agreement at stake, the Respondent, expressly assumed "*the responsibility of all costs [emphasis added] from the anticipated discount of such bank guarantees*". Accordingly, "*20. (...) the Single Judge concluded that the transfer agreement signed between the Claimant and the Respondent obligated the latter to bear all the expenses in relation to such bank guarantee as claimed by the Claimant, in particular in accordance with clause 2 of said agreement*" and admitted the request of the Claimant.

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[263] See Decision of the Single Judge of the PSC of 10 November 2015 (ref. 1115948) para. 9. Available at: https://resources.fifa.com/mm/document/affederation/administration/02/77/97/35/1115948.pdf.

[264] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/99/48/74/04180657-e.pdf.

[265] Available at:https://resources.fifa.com/mm/document/affederation/administration/02/52/00/22/07131503_english.pdf.

See also: *Decision of the Single Judge of 11 August 2015 (ref. 0815083-e)*[266] on penalties for failing to provide the bank guarantee on time; and the *Decision of the Single Judge of 26 April 2016 (ref. 04160024-e)*[267] where the Respondent paid the entire transfer fee but in the interim, failed to provide the bank guarantee. The Single Judge remarked that he was *not in a position to rule on a contractual obligation, in which the direct financial consequences were not explicitly and unequivocally stipulated in the relevant clause*.

Likewise, in the above cited *CAS 2010/A/2144 Real Betis Balompié SAD v. PSV Eindhoven,* award of 10 December 2010,[268] Betis undertook to provide PSV with a *duly signed guarantee bank* confirming its ability to pay the fee for the option to transfer the player on a permanent basis out of the loan signed with the Dutch club. Betis exercised the option clause but failed to secure the employment contract with the player and was refused the bank guarantee required under the loan agreement. Betis considered that the bank's refusal to issue the bank guarantee implied the nullity of the exercise of the option clause. The Panel however, decided that the delivery of the bank guarantee was not a condition *sine qua non* for the validity of the option but rather a secondary and subsequent obligation to secure the payment of the transfer fee, and obliged Betis to pay the transfer fee despite failing to sign the player.

4.8 Conclusion

Clubs are free to agree upon the payment of a sum of money for the transfer of a player. When that is the case, agreements will need to be honored in accordance with the well-known general principle of law *pacta sunt servanda*.

Going through financial difficulties; not having provided the relevant invoice; failure to issue tax certificates and other similar arguments, do not constitute, as a general rule, a valid reason to avoid, delay or reduce the payment of the transfer fee. The only possible exception to this effect would be the entering of the acquiring club, into collective proceedings such as insolvency or bankruptcy, in which case, national insolvency laws would enter into play in order to determine the legal status of the club and of its debts.

Under the legal principle of *freedom of employment*, it is not legally possible to require a football player to return to the club of origin when the transfer agreement is breached. However, the club of origin can anticipate and protect against this situation in the transfer agreement by bringing the player as party to the agreement and subjecting the validity of the transfer and of the employment

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[266] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/84/66/66/0815083-e.pdf.

[267] Available at: https://resources.fifa.com/mm/document/affederation/administration/02/90/87/18/04160024-e.pdf.

[268] Available at: http://jurisprudence.tas-cas.org/Shared%20Documents/2144.pdf.

contract to certain conditions, and by imposing upon him/her financial penalties that may serve as a deterrent effect.

Acceleration clauses are used to cancel a pre-agreed payment schedule when the debtor club fails to pay one or more of the instalments of the transfer fee in the agreed dates automatically rendering due the remaining amount. These clauses are not presumed and must be unequivocally included in the contract.

Penalty clauses in transfer agreements are legal, and they serve reinforcing the effectivity of the principle of *pacta sunt servanda,* encouraging compliance with the terms of the contract. The parties can freely stipulate the amount of the penalty (cf. 163 CO), although the judge must reduce those penalties considered excessive. In order to avoid confusion around their true nature (i.e punitive, compensatory or default interests) they need to be drafted accurately.

A clear drafting of the transfer fee clause will also help the parties to avoid discussions around the net value of the transfer and what deductions can be applied to the transfer fee (*i.e solidarity payments, training compensation, intermediation fees, bank commissions, taxes etc.*). However, when the clubs dispute the meaning of the clause, the Single Judge will have to find out the true and real intent of the parties through the interpretation rules of contracts.

NEGOTIATING A TRANSFER – CHECKLIST

1) Identify the nature of the transfer agreement (*i.e. definitive or temporary*).
2) Verify the age and status of the player (*i.e. amateur/professional*) in order to anticipate possible costs on training compensation and/or solidarity payments. Request for a copy of the player's passport (cf. Art. 7 RSTP)[269] from the former Football Association.
3) Identify the parties to the transfer agreement (*i.e. the releasing club; the new club and/or the player*) their respective obligations, as well as possible rights of former clubs (e.g. sell-on clauses).
4) Establish the conditions to which the transfer agreement might be subject to (*i.e. successful passing of the medical examinations; obtaining the players' visa/working permits; the signing of an employment contract between the player and the new club; the timely delivery of the ITC by the former club; the issuance of bank guarantees,* etc.) and if so, their nature (i.e. condition precedent or condition subsequent).
5) Decide whether to include preferential rights (*e.g. buy-back clause; option to transfer; rights of first refusal*) always within the limits of Articles 18 bis (TPI) and 18 ter (TPO) RSTP.
6) Clarify whether the transfer fee is *net or gross*; identify which deductions can be applied to it (e.g. intermediation fees, solidarity payments, training compensation, bank commissions, taxes etc.); establish contingency payments for sporting performances; and if there is a reserve of a share over the economic rights in a possible future transfer of the player to a third club.
7) Decide on whether to include or not mechanisms to encourage the fulfillment of the obligations assumed under the transfer agreement such as acceleration clauses, penalties, interests for late payment, liquidated damages, bank guarantees etc.
8) Identify the competent forum to hear any disputes related to the transfer agreement (FIFA Players' Status Committee, the CAS) and the applicable law to the agreement.
9) In case of loan agreements, determine: (a) the consequences of the premature termination of the employment contract between the player and the new club (*i.e. obligation to come back to the former team or not, the impact on the loan fee*); (b) the obligation of the new club to pay the remuneration of the player and (c) the obligation of the new club to contract an insurance company against the risk of injury during the term of loan.
10) Diligently comply with the obligations under the TMS.[270]

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[269] See FIFA circular 1679.

[270] Cf. FIFA circular 1679.

IMAGE RIGHTS

by *Konstantinos N. Zemberis*[*]

1. Introduction

The present chapter is aiming to analyse the so called "Image Rights" and the related agreements for their exploitation.

Following the definition of the term, the reasons of the ever-increasing popularity and importance of image rights, in particular in the sports world, will be explained.

In the sports world, image rights can be dealt with from different perspectives: in fact, we have image rights of individuals (e.g., football players, basketball players, tennis players, F1 drivers and other athletes, etc.), image rights of clubs (e.g., football and basketball clubs, baseball teams, etc.) and image rights of associations/confederations (e.g., FIFA, FIBA, NBA, etc.).

In this chapter, we focus mainly on football players as image rights holders and we address topics related to the exploitation of image rights, the protection of such rights against infringements, the possible restrictions that might exist that affect the exploitation of such rights, the exploitation possibilities in the frame of a transfer of player, and the important issue of dispute resolution where we examine the jurisdiction of the CAS and of FIFA with respect to image rights disputes.

Moreover, as the intention is to have a more practical approach to the matter, at the end of the chapter there is a "practical guide" for drafting image rights agreements.

It is self-understood that image rights is a very broad subject with complex aspects and it is thus impossible for the present chapter to fully cover all pertinent issues.

However, this chapter shall be useful for practitioners who are involved in transfers of players and who are generally working with football players.

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2. *Image rights definition and importance*

During the last twenty years the term "image rights" has become very common in the sporting world and is used to determine the right of an athlete to exploit his image and the pertinent rights that emerge from such image.

It is thus crucial that the term is defined before one can enter into more details concerning the different aspects of image rights and the problems and opportunities that are related to such rights.

By referring to image rights of a famous football player, we refer to a group of characteristics of the said person that define him and by which he can be easily recognised.

The term includes, apart from the actual image of the person, his voice, his name, his signature, his initials, but even the combination of his name and shirt number, his likeness, his caricature, graphic representations of him and logos, etc.

Indeed, "image rights" is to be understood as an umbrella term that includes any characteristics of a person which are part of his identity and personality, or elements by which a person can be easily identified by the public or be distinguished from others.

What is, though, that makes image rights so important in today's reality and why they are more and more football players that are entering into image rights agreements with big brands and are being remunerated with considerable amounts in the frame of such agreements?

In a world of media and internet, where information can travel in amazing speeds and is easily shared and exchanged globally at the touch of a button and where the brands and the image are playing a key role in the lifestyle decisions of people, image rights of popular players have a significant value, influence and importance as they allow big brands to more easily and efficiently reach their target groups, as well as to penetrate new markets faster and have a greater impact on people.

On the other hand, it is exactly the aforementioned importance of such rights and the described above properties that explain why there are so many and frequent infringements and violations of such rights by third parties.

Image rights need therefore to be protected according to the principle that anything that is worth exploiting, is worth protecting.

As it will be explained in paragraph 4 below, image rights are mainly protected either on the basis of the personality right (continental countries) or on the basis of the "right of publicity" and/or "right of privacy" (Common law jurisdictions) and such protection has strongly contributed to the development of the notion of exploitation of Image Rights by the image rights holders.

3. Exploitation of image rights

While it is an undisputed fact that there were sponsorship and other image rights agreements in the past, whereby famous football players, football clubs, associations, etc., agreed to be associated with certain brands and/or advertise different products of known brands against a considerable remuneration, the truth is that the actual booming in the exploitation of image rights has been a recent phenomenon, that is, of the last couple of decades.

The main reasons for such booming were a) the increased level of protection in common law jurisdictions like the United Kingdom and the Unites States of America, which used to be in the past much lower than the one in continental countries, since at that time no right of privacy and publicity was recognized to famous athletes, b) the development of the internet and other media that enables an easier and more penetrating, efficient and influential access to markets and people, than any time before and c) the understanding and acceptance that image rights agreements have a genuine and independent value and are real commercial agreements and not emoluments of the employment.

The independent value of image rights agreements was recognized in the UK following the landmark "Sports Club" case[1] involving two famous footballers of Arsenal FC, David Platt and Dennis Bergkamp, who apart from their employment contracts, had entered, through their image rights companies, into separate agreements with Arsenal FC, whereby they were being remunerated by the club for some agreed promotional activities.

The Her Majesty's Revenue and Customs ("HMRC") initially held that the said promotional agreements were actually "sham agreements" that were permitting the players to escape from tax obligations (since companies' tax rate was much lower than individuals' income tax rate) and national insurance payments, and ruled that the remunerations under these agreements were actually emoluments of the players' employment.

Following though an appeal lodged by the players, the Special Commissioners finally decided that there was a real and independent value in the aforementioned promotional agreements signed between the players' companies and Arsenal FC. Thus, they accepted that the remuneration of the players under these agreements was not an emolument of their employment, but in fact a genuine payment under a real commercial agreement.

The outcome of this case was the moving force for more image rights agreements between players and clubs and had a great impact on the evolvement of the exploitation of image rights by the players.

However, it should be pointed out that the HMRC in the UK always address image rights agreements with some skepticism and try to tackle schemes that are in reality just an effort to evade tax and social security obligations.

[1] Sports Club plc and others v. CIR (SpC253, [2000] STC (SCD) 443.

In that respect, the HMRC always rely on the idea that there is no property right in the name and image of a player recognized in the UK, but only a genuine value in some promotional activities and obligations that emerge from promotional agreements (which according to the HMRC are wrongly referred to as image rights agreements).

The approach of the HMRC is based on some remarks and considerations of judges in the delivery of some relevant judgments.[2]

Today, all famous players are taking advantage of their increased popularity, their fame and public recognition and exploit their image rights by entering into big sponsorship agreements and/or other image rights agreements that bring them enormous revenues.

Likewise, big clubs, leagues and associations are of course also exploiting their respective intellectual property rights and generate huge turnovers.

Some current sponsorship deals of players and clubs are indicative of the value and importance of such rights, like for example (reported amounts):
Cristiano Ronaldo & Nike 16,2 million euros per year (lifetime deal),[3]
Lionel Messi & Adidas 11 million euros per year (lifetime deal),
Manchester United & Nike 32,5 million euros per year,
Manchester United & Chevrolet (GM) 72 million euros per year,
Liverpool FC & Warrior Sports 34,2 million euros per year.[4]

It is interesting to note that while many players keep their image rights and enter into image rights agreements directly with their club, most of the football stars have assigned their image rights to image rights companies that belong to them, or are being controlled by them, and then such companies negotiate and enter into image rights agreements with the clubs, whereby they grant all or some of the image rights of the players.

The reason why many players exploit their rights through image rights companies is twofold. First, there is obviously a tax benefit since highly paid individuals are taxed in all countries higher than legal entities (it should be reminded that while tax evasion is illegal, tax planning is not), and second, big football stars can focus on their game while somebody else (in many case experienced executives) is taking care of their businesses.

As aforementioned, the ever-increasing value and importance of image rights, in combination with the emergence of new media and the rapid development of the internet, has rendered the protection of image rights more relevant and necessary than ever, since nowadays, not only infringements are more frequent but they are actually easier and much more difficult to deal with.

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[2] HMRC Internal Manual, Capital Gains Manual 12 March 2016 as updated, CG68455, CG68460, CG68465, where reference is made to Fenty v Arcadia Group Brands Ltd [2015] EWCA civ 3 (para. 29 & 33), Douglas and Anor v Hello! Ltd and others [2007] UKHL 21 (para. 124) and Sports Club plc and others v CIR (SpC253, [2000] STC (SCD) 443) (para. 8).

[3] www.bloomberg.com/news/articles/2019-09-07/cristiano-ronaldo-gets-162-million-euros-from-nike-deal-spiegel.

[4] https://sportsshow.net/richest-sponsorship-deals-of-soccer/.

It is, thus, of utter importance to know what the weapons are in the arsenal of an image rights holder to protect his image rights and safeguard his image rights agreements.

4. Legal instruments for the protection of image rights holders

The legal means that are available for an image rights holder to protect his/her image rights and their exploitation, heavily depend on the jurisdiction where the infringement took place or where the litigation is taking place and on the type of the infringement in question.

4.1 Common Law jurisdictions

In common law jurisdictions like the UK and the USA, the main instruments for the protection of image rights holders are:

a) Misappropriation actions / Passing Off
These actions are considered to be one of the best legal measures for the efficient protection and enforcement of image rights.
In order for such an action to be successful, the famous player/image rights holder needs to prove that a) the image rights holder has fame and goodwill, b) that there was an unauthorized use of his image, name, voice, etc. for commercial purposes and with commercial profit or advantage, c) that due to the infringer's actions, it appears to be an association with a brand or a specific product/service and/or an implicit or explicit representation/ endorsement of such a brand or product/service or that at least a significant percentage of the people had been led to believe that such an association or representation/endorsement exists and d) that the image rights holder has suffered certain damages as a result of such infringement.
Thus, for example, if a company uses the image of a football player without his consent, in an advertisement campaign in a magazine for the launch of a new product in a way that the public would normally believe that the football player has indeed endorsed and approves the said product, the football player would be able to stop such infringement and/or be compensated for the unauthorized use on the basis of a passing off/misappropriation action.
In such case, the football player would be able to stop the infringement and/or be compensated for the unauthorized use with, at least, an amount equivalent to the amount that he would have received if he had authorised the use of his/her image.
The landmark case of passing off is considered to be the case of the famous racing driver Edmund Irvine who successfully brought an action against Talksport Radio, a company that used without his consent a doctored picture of him showing him to hold a portable radio with the logo of Talksport (instead

of a mobile phone, as the original picture) in the frame of an advertising campaign.[5]

The Court of Appeal held that there was a false endorsement in the said case, since the use of the doctored image created the false impression that Eddie Irvine endorsed Talksport radio. The judges awarded the amount of £25,000 to Eddie Irvine for damages, which was actually the amount that he would have received (assumption on the basis of his previous endorsements) if Talksport Radio had asked his permission and the use of his image was legitimate.

Another important and more recent case of passing off that involved a celebrity and could be a very useful precedent, was the case of the famous pop star Rihanna and the known retailer Topshop, in which Rihanna successfully argued that Topshop has used her image without her permission on a T-shirt.[6]

b) Trademarks Laws

Another important tool in the disposal of the image rights holder for the protection and enforcement of his legal rights is Trademark laws [for example the Trademarks Act of 1994 in UK[7] and the Federal Trademark Law (Lanham Act)[8] in the USA].

Indeed, many famous players tend to register their names and nicknames, combination of name and shirt number, etc., as trademarks in order to facilitate the exploitation of such image rights and at the same time increase the level of their protection.

Actions based on trademark are very effective when there is a direct infringement of the player's trademark and when there is an obvious danger of creation of confusion to the public as to the origin of the products/services of the infringer.

However, when the infringement does not entail an unauthorized use of the actual registered trademark or when no confusion as to the origin of the products exists, trademark laws cannot really assist the image rights holder to protect his rights and for this reason, trademark law is a less effective weapon for the protection and enforcement of image rights than the passing off/misappropriation actions.

One should not overlook though that the registration of a player's name, signature, etc. as trademarks can be an asset for the player, which is very useful in the exploitation of such image rights.

[5] Irvine v. Talksport Ltd [2003] EWCA Civ 423.
[6] Robyn Rihanna Fenty v. Arcadia Group Brands Ltd (T/A/ Topshop) [2013] EWHC 2310 (Ch).
[7] www.legislation.gov.uk/ukpga/1994/26/contents.
[8] www.bitlaw.com/source/15usc/.

4.2 Civil Law jurisdictions

In Civil Law jurisdictions the protection of image rights is, as a rule, higher than the one in common law jurisdictions since the protection is based on personality right. Of course, while the protection on the basis of personality right is by far the most efficient and strong measure of protection and enforcement of image rights, there are other legal weapons as well that can be useful for the image rights holder.

Thus, protection and enforcement of image rights are usually succeeded by recourse to:

a) Actions on the basis of personality right

Image rights are considered to be part of the general personality right which consists of the person's right to protect and receive protection for his honour, integrity, name, life, freedom, privacy, image, etc.

Thus, in most civil law countries, the right to one's image and name and image rights in general, are protected by invoking the general personality right, which is an absolute right that receives the highest protection.

Indeed, in most countries there are provisions protecting personality rights, which are invoked and used for the protection and enforcement of image rights.

In Switzerland for example, article 28 of the Swiss Civil Code[9] provides that:

"1. Any person whose personality rights are unlawfully infringed may petition the court for protection against all those causing the infringement.

2. An infringement is unlawful unless it is justified by the consent of the person whose rights are infringed or by an overriding private or public interest or by law".

Furthermore, article 28a of the same Code[10] provides the following regarding the possible actions in case of an infringement:

"*1 The applicant may ask the court:*

1. to prohibit a threatened infringement;

2. to order that an existing infringement cease;

3. to make a declaration that an infringement is unlawful if it continues to have an offensive effect.

2 In particular the applicant may request that the rectification or the judgment be notified to third parties or published.

3 Claims for damages and satisfaction and for handing over profits in accordance with the provisions governing agency without authority are reserved".

[9] www.admin.ch/opc/en/classified-compilation/19070042/201801010000/210.pdf.

[10] Ibidem.

b) Trademark Law

As in the case of common law jurisdictions, trademark laws are frequently used by image rights holders to protect and enforce their rights when there is a direct infringement of a registered trademark.

Trademarks are very useful for the exploitation of some image rights of a player (name, image, graphic representations, etc.) and of the rights of football clubs, leagues and associations, since registered trademarks can be easily used by the image rights holder, whether it is the player or the club, league or association or by a licensee that has been authorized to use such trademarks.

In addition to the aforementioned legal weapons that are frequently used, depending the jurisdiction and the type of infringement, to protect and enforce image rights, there are some more legal tools that can be used in special circumstances either alone or in combination with another type of action.

Such legal tools are copyright laws, advertising and broadcasting regulations, human rights laws and other similar types of laws and regulations.

Finally, in many cases, the European Convention on Human Rights (ECHR) and especially article 8 of such convention (Right to respect for private and family life)[11] could be invoked (frequently in combination with data protection regulations) to protect famous players from an unauthorized use of their image rights.[12]

5. *Type of image rights agreements*

There are many different types of agreements that a player may enter into in his effort to exploit in the best possible way his image rights.

Sponsorship and endorsement agreements, merchandising agreements and licensing agreements are some typical examples.

The aforementioned interconnected type of image rights agreements can be exclusive or non-exclusive, long-term or for a single event or launch of a product, may refer to all or some of the image rights, may authorize any kind of use of such rights or just a specific one, etc.

Likewise, clubs have many different ways to exploit their rights and secure a considerable income.

Possible agreements range from jersey sponsorships and assignments of stadium naming rights, up to broadcasting/tv rights agreements and events sponsorships.

It is thus obvious that the possibilities for players and clubs are endless and it is true that big brands are continuously discovering new ways to promote

[11] www.echr.coe.int/Documents/Convention_ENG.pdf.

[12] See the landmark case von Hannover v. Germany (application 59320/00) at https://hudoc.echr.coe.int/eng-press#{"itemid":["003-1036787-1072690"]}.

their products and brands, which in turn means more ways for image rights holders to exploit their rights and benefit from them.

6. Image rights agreements in the frame of a transfer

In the last twenty years it has become a very frequent phenomenon to have image rights agreements signed between football players and football clubs in the frame of a transfer of the player to the club.

Indeed, in many transfers of players, the player and the club do sign two contracts, one employment contract for the professional services provided by the player to the club and one for the image rights that the player is granting, either directly or through a company, to the club for the duration (usually) of the employment contract.

It has been proven that in many cases, the image rights agreement signed in parallel to the employment contract of the player, was only a sham agreement and a ruse that enabled the parties to avoid national insurance payments and to diminish the amount of taxes that would have been payable if the amount stipulated in the image rights agreement had been included in the employment contract as salary of the player.

However, while in many situations, especially of younger and/or less popular players, the said agreements were not genuine image rights agreements, in the case of very famous and popular football stars, such agreements were real image rights agreement, whereby the player was receiving a remuneration for granting or licensing some of his image rights to the club or for agreed promotional activities, usually for the same period of duration of the employment contract signed between the parties.

This controversial issue became clear following the landmark Sports Club case in the United Kingdom that was analysed herein above in section 3 and involved the famous footballers David Platt and Dennis Bergkamp, their image rights companies and Arsenal FC.

After the said ruling, more and more popular football players both in the UK and in other countries enter into such agreements with their clubs, whereby they grant, either directly or through image rights companies that belong to them or are being controlled by them, some of their image rights and they authorise the club to make use of such rights for commercial exploitation.

In fact, such agreements are beneficial for both parties. For football clubs the benefits are obvious. By paying the agreed remuneration, they become entitled to use the name, image and other image rights of football stars (according to the agreement) for commercial purposes, such as advertising, promotion, merchandising, etc.

On the other hand, the player is usually receiving a considerable remuneration (depending on his popularity and value) and at the same time the value of his image rights is increasing by the association with a big club or big

brands and the penetration and popularity in new markets, meaning that he would be able to receive higher remunerations for the same rights in the future and to attract more brands that would be eager to be associated and co-operate with him.

There are however some negative aspects as well in this practice of signing image rights agreements in parallel with employment contracts.

Indeed, unless the players have received the adequate legal advice during the negotiation and drafting of such agreements, they might find themselves in difficult and problematic situations in case the club does not respect its obligations arising either from the employment contract or from the image rights agreement, or both.

Thus, if the club is properly paying the player his salary but is not paying him the remuneration agreed for the granted or licensed image rights, the player would not be able to terminate entirely his professional relationship with the Club, but only the breached image rights agreement, being thus in the awkward situation to continue his employment with the club and at the same time be probably involved in a litigation against such club.

Likewise, if a club does not respect its contractual obligations under the agreements and the employment contract is terminated due to the club's breach, the player would not be able to claim before sporting judicial bodies (i.e., national DRCs, FIFA DRC, etc.) both the outstanding amounts from his employment contract and from the image rights agreement, but only the ones from the employment contract, since the sporting judicial bodies will not be competent to decide on a genuine image rights agreement.

Furthermore, if the image rights agreement is not properly drafted, a club might be entitled to continue to use the player's image rights, even if the employment contract is terminated due to a breach of the said club, provided that the image rights agreement is being respected and thus continues to be in force.

On the other hand, a club might find itself in an awkward situation, if it has paid a considerable remuneration to a player for his image rights and during the exploitation of such rights, the player breaches his employment contract and leaves the club.

In such cases, while it would be possible for a club to be compensated by the player for the breach of the employment contract, it would be difficult to be compensated for the damage suffered from the loss of the image rights of the player, especially if it is a foreign player who is then transferred to a club in a different country.

7. Image rights in the club context

It should be though clarified that even in the cases where there is no separate image rights agreement signed between a player and a club and no additional remuneration paid for any special licensing of the player's image rights, still the

football club will be in principle entitled to make use of the player's name, image, etc., in the "club context".[13]

That means that in the frame of an employment contract signed between a football player and a football club, some image rights of the player are always also granted by the player to the club, with respect to the use of his image and his name as a member of the club's football team.

Thus, the use of the player's image and name by the club in a picture of him wearing the club's jersey, alone or together with one or more teammates, etc. for the promotional activities of the club is legitimate and the player's consent is considered to have been granted by entering into an employment contract with the specific club, even if not expressly mentioned in the said contract.

Likewise, as aforementioned, no additional remuneration is needed and such use is considered the minimum necessary for the club to promote its team, its sponsors but also its products and is covered by the payable salary.

It is also interesting to note that in most countries where there is a standard employment contract form for players and clubs, there is usually a clause providing for the use of the player's name and image in the club context, as well as other obligations of the player with respect to the promotional activities of the club and/or restrictions on the player with respect to the exploitation of his image rights.

Clause 4 of the FA standard employment contract is a typical example of such clauses and probably the most elaborated one.[14]

So, it is quite common, as it will be explained in detail in the next section below, to have clauses providing that the player is not allowed to enter into any sponsorship or other type of image rights agreement with any of the main competitors of the club's or the league's main sponsor, etc.

8. Possible conflicts affecting exploitation

While the football stars are in principle free to exploit their image rights as they like, by either transferring, granting or licensing them directly or through their image rights company to a third party in whole or in part, or by entering into sponsorship agreements for one event or for a more extended co-operation, or by just granting a one-time license to a company to use their image and name for one

[13] According to the standard Premier League Contract, "Club context shall mean in relation to any representation of the Player and/or the Player's Image a representation in connection or combination with the name colours Strip trade marks logos or other identifying characteristics of the Club (including trade marks and logos relating to the Club and its activities which trade marks and logos are registered in the name of and/or exploited by any Associated Company) or in any manner referring to or taking advantage of any of the same". See https://static1.squarespace.com/static/579f1eef2e69cf81541f5565/t/57bc6605e58c62993057c155/1471964677468/standard+pl+contract.pdf.

[14] Available at https://static1.squarespace.com/static/579f1eef2e69cf81541f5565/t/57bc6605e58c62993057c155/1471964677468/standard+pl+contract.pdf.

advertisement or otherwise, in many cases the said freedom is restricted and the players cannot enter into an image rights agreement with some third parties.

Such limitations to the players' freedom to exploit their image rights can be imposed either by previous agreements of the players or by the employment contracts of the players with clubs, or by regulations of leagues and/or associations and confederations by which the player shall abide, as an indirect member of such leagues, associations and/or confederations.

Thus, for example, a player who has already a sponsorship agreement with a big manufacturer of luxury cars, will obviously have a contractual obligation not to enter into another agreement with a competitor of the said manufacturer for the period of duration of the said agreement, sometimes even for a period after the expiry of the said agreement.

Moreover, a player can have restrictions on his freedom to exploit his image rights by means of the employment contract signed with a football club. Indeed, a football club will usually demand that the football star does not enter into an agreement with the main competitors of the principal sponsor of the club.[15]

Finally, such restrictions might arise also from the participation of the player to a specific league or international tournament. In fact, professional leagues frequently require that the players of its member teams do not enter into sponsorship agreements with and/or do not promote during the league games, brands that are directly competing with the main sponsors of such leagues. Likewise, FIFA for example is very strong in protecting the rights of its main sponsors during world cup tournaments and does not allow the promotion of their competitor brands during the games.

It is clear from the above that a player needs to fully disclose any image rights agreements that he has entered into and remain valid at the moment of execution of an employment contract with a club, in order for the club to be aware before entering into the contract and thus to avoid possible problems and relevant disputes in the future.

It is also obvious that a football star shall receive the necessary expert legal advice when entering into a sponsorship agreement, so that he ensures that he is not signing clauses that excessively restrict his freedom to exploit his image rights and that might affect his future agreements.

9. Jurisdiction of FIFA bodies and CAS with respect to image rights agreements

One of the main concerns of a lawyer who represents a football player that enters into an image rights agreement with a company or a football club, is to predict possible disputes and their nature and insert in the contract the most appropriate jurisdictional clause.

[15] See for example paras. 4.2. & 4.3. of clause 4 of the FA standard contract at https://static1.squarespace.com/static/579f1eef2e69cf81541f5565/t/57bc6605e58c62993057c155/1471964677468/standard+pl+contract.pdf.

In football word, it is very common that genuine image rights agreements provide for either the jurisdiction of the Court of Arbitration for Sport (especially in case the counterparty is a football club) or of another arbitral tribunal or the jurisdiction of the civil courts of a certain country.

It is thus possible for image rights disputes to be resolved by arbitration and the aforementioned clauses providing for the jurisdiction of the CAS or other type of arbitration are perfectly valid.

However, it is very important for football players and their advisors to be aware and remember that FIFA, as a general rule, has no competence to decide on image rights disputes, that is, for disputes arising from image rights agreements between players and clubs.

Notwithstanding the above though, the FIFA DRC would be competent to deal with claims based on image rights agreements, when such agreements are not genuine image rights agreements but rather simulated agreements aiming to present part of the salary of a player as remuneration for granting image rights in order for the parties to escape from tax and social security obligations.

Indeed, as it was very clearly explained in the grounds of a FIFA DRC decision rendered on 25 September 2014 in a dispute between the Brazilian player Fábio Rochemback and the Chinese club Dalian Aerbin FC, regarding a claim for outstanding payments from both an employment contract and an image rights agreement, the FIFA DRC might be competent to decide on a claim based on an image rights agreement when from a number of elements in the agreement, it can be verified without doubt that such agreement is in reality part of the employment relationship and the remuneration paid under this agreement is in reality part of the salary of the player. The relevant part mentions:[16]

"As a general rule, if there are separate agreements, the DRC tends to consider the agreement on image rights as non employment-related and does not have the competence to deal with it on the basis of art. 22 of the Regulations. However, such conclusion might be different if specific elements of the separate agreement suggest that it was in fact meant to be part of the actual employment relationship. Such elements, like, for instance, stipulations regarding bonuses, the use of a car, accommodation, which are typical for employment contracts and not for image rights agreements, do not appear to be included in the image rights agreement which is at the basis of the [Player's] petition".

The said approach of the FIFA DRC has been confirmed by the CAS in a couple of cases.

In particular, in the award of 30 October 2015 in the case CAS 2015/A/3923 Fábio Rochemback v. Dalian Aerbin FC,[17] which was issued following

[16] As cited in para. 12 (under number 18) of the CAS 2015/A/3923 *Fábio Rochemback v. Dalian Aerbin FC*, award of 30 October 2015, available at https://jurisprudence.tas-cas.org/Shared%20Documents/3923.pdf.

[17] CAS 2015/A/3923 *Fábio Rochemback v. Dalian Aerbin FC*, award of 30 October 2015, available at https://jurisprudence.tas-cas.org/Shared%20Documents/3923.pdf.

an appeal of the player against the aforementioned decision of the FIFA DRC that rejected the part of his claim that was based on the image rights agreement, the sole arbitrator, who set aside the DRC decision and accepted the rejected in first instance claim, notes:

"The Sole Arbitrator observes that based on the wording of this provision (i.e. employment-related disputes), FIFA is apparently not only competent to deal with employment disputes between a club and a player in the narrow meaning of the term, which would refer to disputes that arose in respect of a specific employment agreement, but also in disputes between clubs and players that are related to the employment. Employment relations are much wider than employment agreements and may cover areas that are not referred to in the written employment agreement. Therefore, employment-related disputes are by all means a wider range of disputes than just disputes over employment agreements. The Sole Arbitrator finds that article 22(b) of the FIFA Regulations is therefore in principle not to be interpreted narrowly but rather the FIFA DRC and CAS, when asked to interfere through an appeal, should take into consideration the overall nature and elements of the dispute in light of the overall circumstances of the employment relations for the sake of establishing whether the dispute is related to the employment relations.

...

In view of all the above, the Sole Arbitrator finds that the Image Rights Agreement 'was in fact meant to be part of the actual employment relationship' and that it is therefore to be regarded as an addendum or a supplementary agreement to the Employment Contract. This is indeed in accordance with the practice of the FIFA DRC when it came to the conclusion that a separate agreement was meant to be part of an actual employment relationship, according to the jurisprudence submitted by the Club (C v. A, decision of the FIFA DRC dated 13 December 2013, §13; A v. O, decision of the FIFA DRC dated 17 January 2014, §6)".

Likewise, in another CAS award of 3 February 2016 in the case 2015/A/4039 Nashat Akram v. Dalian Aerbin Football Club,[18] the Panel notes:

"Comparing the Employment Contract and the manner in which the Image Rights Agreement has been drafted also seems to suggest that the Parties were well aware that the Image Rights Agreement was not really intended to act as an image rights contract per se, but to serve as a document through which the rest of the financial terms contained in the Offer would be reflected so that Aerbin would presumably be in a better position from a tax point of view. This is also corroborated by the fact that the Image Rights Agreement was also drafted and executed on Aerbin's letter head.

The assumption that the Image Rights Agreement was merely a sham, is strengthened by the fact that Aerbin has never used the image of the Player.

[18] CAS 2015/A/4039 *Nashat Akram v. Dalian Aerbin Football Club*, award of 3 February 2016, available at https://jurisprudence.tas-cas.org/Shared%20Documents/4039.pdf.

This could be considered as quite peculiar, since the amounts the Player shall receive in exchange for the exploitation of his image are relatively high".

Whether, therefore, the FIFA DRC will consider itself competent to decide on claims based on image rights agreements, will depend on whether the said agreements are genuine image rights agreements or not and will be decided on a case by case basis.

10. Fiscal issues

Taxation is a key issue in both the exploitation of image rights and in the negotiations and drafting of image rights agreements.

Indeed, remuneration under image rights agreements is usually taxed at a different rate than remuneration under the employment contract, since a) football stars are usually creating image rights companies to which they assign their image rights and then such companies enter into the sponsorship, licensing and other image rights agreements with clubs or big brands and thus, any income from such agreements is taxed at companies' rate which is much lower than the individuals' one and b) in many cases, like in merchandising agreements, the revenues are in the form of royalties which are also subject to special and usually much lower tax rate.

Moreover, for clubs it is preferable to pay higher remuneration to a player or his image rights company for promotional activities and image rights than to pay high remuneration under the player's employment contract, since a) payments under image rights agreements do not entail payments of social insurance contributions and b) due to lower tax rate of companies, the final cost for a club is usually lower than if the same payments were made under the employment contract of the player.

However, players shall be very careful when structuring the exploitation of their image rights, especially when they create image rights companies and they need to decide on the actual type and location of such companies, since using companies based in tax havens to avoid tax obligations will in most cases result in the players being charged with tax evasion and criminal offences (e.g., Lionel Messi's conviction for tax fraud,[19] Cristiano Ronaldo's deal with Spanish tax authorities, whereby he paid 18.8 million euros, after being charged with tax evasion,[20] etc.).

Likewise, players and clubs shall reflect the real value of the agreed promotional activities and/or of the granted image rights in their agreements, otherwise they risk being charged with tax evasion or fraud.

Finally, given the complexity of international taxation issues, regulations and treaties, it is of utter importance for players and their advisors to correctly negotiate and draft image right agreements, so that they have secured that the

[19] www.bbc.com/news/world-europe-40534761.

[20] www.bbc.com/news/world-europe-46957605.

matter of taxation of the player, both in the country where he is playing football and in his home country, if different, as well as the matter of possible applicable VAT, have been duly addressed and that there would be no unpleasant surprises for the player in the future.

11. Negotiating and drafting image rights agreements

It is obvious and understood from the nature of the image rights and the way they can be exploited, that there is large space for negotiations when it comes to image rights agreements, both on the commercial side, but also during the actual legal drafting of the agreements.

One should be very careful when negotiating an image rights agreement and must have a strategy that will allow the best possible outcome and the more beneficial agreement possible.

As a principle, the player/image rights holder and his representative would like and would try to grant the least possible rights and cede such rights for the more restricted possible territory, and the company/sponsor would like and would try to get as much rights as possible for the largest territory possible.

We will examine here below some of the most important points that need to be addressed and negotiated by the parties and be stipulated in the image rights agreement.

In other words, we will explain which provisions are typical or recommended in such agreements and which clauses shall not be forgotten when drafting such an agreement.

An image rights agreement shall include provisions for:

a) Definition of key terms

For example:

"Player's Image Rights: means the Player's name, nickname, initials, likeness, voice, signature, shirt number, photographs, caricature, video footages, any kind of depiction and any and all other characteristics of the Player"

"Products: means any and all kind of products that the Company designs, manufactures, brands or sells, as well as any and all the products that the Company might design, manufacture, brand or sell in the future and during the term of the Agreement"

"Intellectual Property Rights: means any and all trademarks, copyright, performance rights, domain names and/or other intellectual property rights owned or controlled by the Player"

b) Warranties

Warranties by the holder of the rights

For example:
"The player warrants to the company that he is the sole owner and holder of the granted rights and that he is free and entitled to enter into this agreement and that he has not entered into any agreement with any third party that might be in conflict with the present grant of the rights and the terms of this agreement"
"The player warrants that he will indemnify and will hold harmless the company against any possible action, claim and any possible damage or expenses suffered by the company, as a direct or indirect result of a breach of the previous paragraph's warranties"

Warranties by the company/sponsor

For example:
"The company warrants to the player that it is free and entitled to enter into this agreement and that it will not use the granted rights in a way that might damage the image and reputation of the player"
"The company warrants that it will indemnify and it will hold harmless the player against any and all actions or claims and against any damage or expenses that he may suffer as a direct or indirect result of the actions of the company and of the use of the granted rights"

c) Territory

For the territory of the agreement and possible limitations thereof

For example:
"The grant of the rights is valid for the whole world"
or
"The grant of the rights is valid for Europe and Africa only"

d) Regarding exclusivity (general or in a specific industry) or non-exclusivity

For example:
"The Player grants his Image Rights to the company on an exclusive basis worldwide"
or
"The Player grants the company the right to use his image rights for its promotional activities in Europe. The Player warrants that he has not

entered into any agreement with any competitor of the Company, nor will he enter into any such agreement in the future that might limit or might be prejudicial to the use of the rights by the Company"

e) i. For the scope of the agreement and the specific content of the license and the extent of the transferred rights

For example:
"The Player grants the Company the license to use his name and his image for the placement of its new product called (....) in the European market. The Company shall have the right to use the name and image of the Player for the endorsement of the said product for a period of 2 years"

ii. For the kind of exploitation that is permitted and the media that are covered by the license
For example:
"The Player grants the Company the exclusive right to use his image and his name for the promotion through the internet and mobile technology of its new product called (....)"

iii. For the obligation of the player to participate in promotional activities of the company
For example:
"The Player shall participate in 5 (five) promotional events of the Company per year, provided that he is duly notified in writing at least one week before any such event"

f) For the duration of the agreement and the terms of its renewal if any

For example:
"The term of this Agreement is two (2) years from the day of execution, unless terminated earlier in accordance with the terms of this Agreement. It is expressly agreed between the parties that the Company shall have the right to extend the term of this Agreement for one (1) more year under the same terms, provided that a written notice on the exercise of the said right of the company is sent to the Player at least three (3) months before the expiry of the present Agreement"

g) Obligations of the rights holder after the agreement and consequences in case of violation

For example:
"The Player shall not be entitled to enter into any agreement that involves the assignment, grant or license of any or all of his image rights with any third party that is an immediate competitor of the Company, for a period of one (1) year after the expiry or termination of this Agreement" (not applicable for football boots and goalkeeper gloves)
&
"In case of breach of any term of the Present Agreement by the Player, the Company shall have the right to reduce the remuneration of the player up to 10% and in case of recurrent breaches by the player, the Company shall have the right to reduce the remuneration of the player up to 50% or to terminate the Agreement with just cause and claim compensation for any damages suffered because of the breach (es) of the Agreement"

h) Obligations of the licensee or grantee, including the financial obligations, and consequences in case of violation

For example:
"The Company shall be obliged during the term of this Agreement: a) to pay the Player the agreed herein remuneration on the stipulated dates, b) to reimburse the Player all reasonable out of pocket expenses and the accommodation and travel costs incurred by the Player in complying with his obligations regarding Promotional Services, c) to ensure that the Products are manufactured to the highest standards and d) not to use the rights granted under this Agreement in a way that may be defamatory for the player and/or may discredit the said granted rights"
"The Company shall pay the player for the rights licensed by means of the present Agreement, the total remuneration of 100,000 euros per year of the Agreement. The said amount would be paid in 4 equal instalments of 25,000 euros each, payable on the 15th of March, on the 15th of June, on the 15th of September and on the 15th of December of each year of the Agreement"
"In case of breach of any of the terms of this Agreement by the Company, the Player shall invite the Company in writing to remedy the breach within 15 days and if the Company does not remedy such breach within the said deadline of 15 days, then the Player shall have the right to terminate the Agreement with immediate effect. In this case, the Company would be liable to pay the Player the remaining remuneration of this Agreement until the normal expiry of its term, plus an agreed penalty of 50,000 euros"

i) For possible additional remuneration (bonus) of the licensee or grantee for the grant of the rights and the conditions of payment

For example:
"The Company will pay the Player for the rights granted under this Agreement, a base compensation amounting to USD 300,000 per year of the contract. The said compensation would be paid in two (2) instalments of USD 150,000 each, the first one payable by 1st May of each year of the Agreement and the second one payable by 1st November of each year of the Agreement
In case the Player participates in the World Cup tournament of ... with his national team, the Company shall pay him an additional compensation of USD 50,000 within one (1) month from the final game of the World Cup tournament"

j) Right of termination of the licensee or grantee in case the player starts to discredit them, e.g. in case of doping

For example:
"The Company shall have the right to terminate this Agreement with just cause and immediate effect upon written notice to the Player, in case the Player is sanctioned for the use of any prohibited substance or drug"

k) Right of termination of the player in case the situation of the licensee or grantee discredits him (e.g. in case of fraud) or if the financial arrangements are not met

For example:
"The Player shall be entitled to terminate this Agreement with just cause and immediate effect upon written notice to the Company, in case a) the Company fails to pay any of the amounts due under this Agreement, or b) the Company goes into compulsory or voluntary liquidation or c) the Company's management is found guilty for committing a financial or other type of fraud"

l) For the obligation of the licensee or grantee to take action against any kind of infringement of the image rights in question

For example:
"The grantee shall be obliged to take legal action against any possible infringement of the granted rights by any third party"

m) For the obligation of the player to provide any kind of assistance necessary to the licensee/grantee in order for the action against possible infringers to be successful

For example:
"The Player shall be obliged to provide any assistance to the Licensee (including but not limited to sign any claims and other legal documents and to present himself in any court hearings) that might be necessary in order for the legal actions of the Licensee against possible infringers to be successful"

n) For the obligation of the licensee/grantee to make proper use of the image rights and never use them in a way that would discredit the player

For example:
"The Company shall use the image rights of the player licensed hereby in good faith, avoiding any use that might be defamatory or that might discredit the said rights of the Player"

o) Reference to possible restrictions from previous agreements of the rights holder or other

For example:
"The Player shall not use and/or wear products of any immediate competitor of the Company, with the exception of the obligation of the player to wear such products when playing for the national team of his country"

p) Confidentiality and/or non-disclosure clause

For example:
"The parties are not allowed to disclose to any third party other than their employees or their professional advisers or as required by law and/or by any public authority, any information regarding the financial and/or other material terms of this Agreement or any information disclosed to them as a result of this Agreement. The present clause shall survive the expiration or termination of this Agreement

q) VAT and Tax Clause

For example:
"The amounts mentioned in this Agreement shall be paid to the Player net from any taxes and/or other deductions. If VAT is applicable, the

Company would pay the agreed herein amounts plus the applicable VAT"
or
"The amounts mentioned in this Agreement shall be paid to the Player net from any taxes and/or other deductions. Any income or other taxes however, that might be imposed by the tax authorities of the country of residence of the Player, according to the laws of the said country, would be payable by the Player"
or
"*All amounts payable to the Licensor under this Agreement are exclusive of VAT, which shall be also paid, if applicable, subject to the Licensor providing the licensee with a VAT invoice"*

r) Penalty clauses

For example:
"In the event that the Company delays any of the payments under this Agreement for more than one week from the stipulated date of payment, the Company would be liable to pay the Player an additional amount of 10,000 euros for any such delayed payment"
or
"In the event that the Player violates any of its obligations under this Agreement, the Company shall be entitled to reduce his remuneration under this Agreement up to 20% if the Player has failed to remedy such breach within 10 days of being required to do so by written notice"

s) Notice and deadline for the violating party to remedy any breach

For example:
"Either party shall have the right to terminate at any time this Agreement with immediate effect by giving written notice to the other party in the event that the said other party has committed a material breach of any of its obligations under this Agreement and has not remedied such breach within 15 days of being required to do so by written notice"

t) Clause regarding notices, notifications and communications

For example:
"Any and all notices to be given by one party to the other, shall be in writing in English and shall be sent either by e-mail to the e-mails of the parties mentioned herein above (unless written notice of a change of e-mail has been provided), or by registered mail to the addresses of the parties mentioned herein above (unless written notice of a change of address has been provided)"

u) Indemnities clause (Hold harmless)

For example:
"The Licensee agrees to protect, defend and indemnify the Licensor and hold him harmless from any and all possible claims, legal actions, costs, damages and/or expenses that he may suffer or sustain as a result of the actions of the Licensee"

v) Force majeure clause

For example:
"If any of the parties is prevented from fulfilling its obligations under this Agreement by reason of force majeure, that is, by any circumstances that were not foreseeable at the date of execution of this Agreement and are beyond the control of the party in question (including but not limited to any fire, storm, flood, earthquake, or other natural physical disaster or to any strike or lockout), the party unable to fulfill its obligations shall not be deemed to be in breach of its obligations, provided that such party immediately gives notice of this to the other party. The party whose performance is prevented by force majeure, shall do everything in its power to resume full performance of its obligations as soon as possible"

w) Post-termination arrangements and restrictions

For example:
"Upon expiration or termination of this Agreement for any reason, the Company shall be entitled to use, for a period of 3 months after such expiration or termination, any and all advertising and promotional materials and to sell any merchandise that has remained in stock, provided that the said merchandise was produced before the expiration or termination of this Agreement"
"Articles ... & ... of this Agreement survive the expiration or termination for any reason of this Agreement"
or
"*Following the expiration or termination of this Agreement for any reason and for one year after such expiration or termination, the Player shall not enter into any agreement involving assignment, grant or license of any image rights of the Player with any immediate competitor of the Company*"

x) For the jurisdiction (including the possibility of arbitration) and the applicable law (particular attention shall be paid to the capability of enforcing the decision)

For example:
"This Agreement and any and all matters arising from or in connection to this Agreement, shall be governed and construed in accordance with the laws of England and Wales. The parties expressly agree that the High Court in London would have exclusive jurisdiction (including for procedures regarding interim measures) over any possible dispute arising from or in connection to this Agreement"
or
"The parties expressly agree that any and all disputes arising from or in relation to this Agreement, shall be submitted exclusively to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland and shall be resolved definitively in accordance with the Code of sports-related arbitration. The Panel of the arbitration will consist of three arbitrators, the language of the arbitration will be English and Swiss Law will apply"

y) Boiler-plate clauses when necessary (e.g., severance clause, waiver clause, survival of terms clause, etc.)

For example:
"In the event that any provision of this Agreement is declared null and void, the parties shall amend such provision in a way that reflects the intention of the parties without such provision being null and void and if this is not possible, it shall be severed from this Agreement with all other provisions of this Agreement remaining in full force and effect"

z) If drafted in more than one language, for the prevailing one

For example:
"This Agreement was drafted in both English and Portuguese. The parties expressly agree that in case of any discrepancies between the two versions, the English version shall prevail"

It is of course self-understood that a sponsorship or other image rights agreement between a football star and his club or a big brand, will normally include many more clauses and much more complicated ones.

Nonetheless, the above-mentioned clauses can serve as a basic practical guide to drafting an image rights agreement.

12. Conclusion

Image rights are increasingly important in the football world. Most of the famous football players are earning today more from their endorsements and other image

rights agreements than from their employment. It is exactly though the fact that image rights have a considerable value in today's football reality that leads to their infringement and their need of being protected. The concept is however still under development and evolves day by day and does not enjoy the same acknowledgement and protection, nor the same treatment, in all jurisdictions.

It is thus a complicated matter that requires an in-depth analysis and all the above essential points to be taken into account, when negotiating and drafting the relevant image rights agreements.

TRAINING COMPENSATION AND SOLIDARITY MECHANISM

by *Vanessa Plavjanikova*[*] and *Ariel N. Reck*[**]

I. Introduction

Training compensation and solidarity contribution are two mechanisms designed by FIFA to reward training clubs. The concepts have been part of the Regulations for the Status and Transfer of Players (hereafter: *the Regulations*) since 2001, following the Bosman ruling of the European Court of Justice[1] and the Gentlemen's agreement between the European Commission, FIFA and UEFA.

There have been several modifications since their implementation, the key reform introducing the Transfer Matching System for the procedure of training compensation and solidarity claims. Nonetheless, the core aspects of the system remained the same. Currently, new reforms are being implemented as part of "FIFA 2.0: The vision for the future",[2] bringing positive changes with regard to the enforcement and distribution of training rewards.

Despite being rather "minor issues" in the context of transfers, training compensation and solidarity contribution shall not be overlooked. In line with the practical approach of the book, this chapter contains reasoned "check list" of the concepts, addresses therewith related challenges and introduces the latest as well as the upcoming changes of the Regulations.

II. Training Compensation

1. Concept

1.1 General principles

The system of training compensation is designed to support the training and education of young football players, by rewarding the clubs when one of their

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[**] Sports Lawyer, Argentina. E-mail: arielreck@yahoo.com.
[1] Case C-415/93, *Union Royale Belge des Sociétés de Football Association and others v. Bosman and others*, ECLI:EU:C:1995:463.
[2] Available at https://resources.fifa.com/mm/document/affederation/generic/02/84/35/01/FIFA_2.0_Vision_LOW_neu.17102016_Neutral.pdf, last access on 30 November 2019.

players becomes a professional. At the same time, the clubs that do not bear such financial burden, shall reimburse the training club for the latter's efforts. The system is built on the objective to encourage the clubs to invest in their grass-roots. The regulatory basis is to be found in art. 20 and Annexe 4 of the Regulations.

The principles are laid down in art. 20 of the Regulations, which establishes the following:

(1) Player's training and education takes place between the ages of 12 and 23.
(2) Training compensation is payable for training incurred up to the age of 21 and is triggered by a transfer up to the age of 23, unless it is *evident* that the player has already terminated his training period before the age of 21.[3]

1.2 Player's birthday

With regard to the aforementioned, it is important to clarify the rule of player's birthday. Within the system of training compensation, it is the *season of the respective birthday* that is relevant for the legal entitlement.

Example:
In case that the player was born on 3 March 1996 and the season runs from 1 July to 30 June, the season of the player's 12th birthday ran from 1 July 2007 until 30 June 2008.

1.3 Event giving rise to the dispute and the particularity of the training compensation

The training compensation is due based on two different legal grounds:

(1) When a player is registered for the first time as a professional;[4]
(2) When a professional is transferred between clubs of two different associations.[5]

In both scenarios, the respective registration or the transfer must occur before the end of the season of the player's 23rd birthday.[6] For the Regulations to apply, the relevant first registration as a professional needs to occur with a club affiliated to a different association than the one of the training club.[7] Under these circumstances, training compensation is due whether the transfer takes place during or at the end of the player's contract.[8]

Since the concept is meant to be a financial compensation, the training club shall benefit of training compensation for a specific player *only once*.

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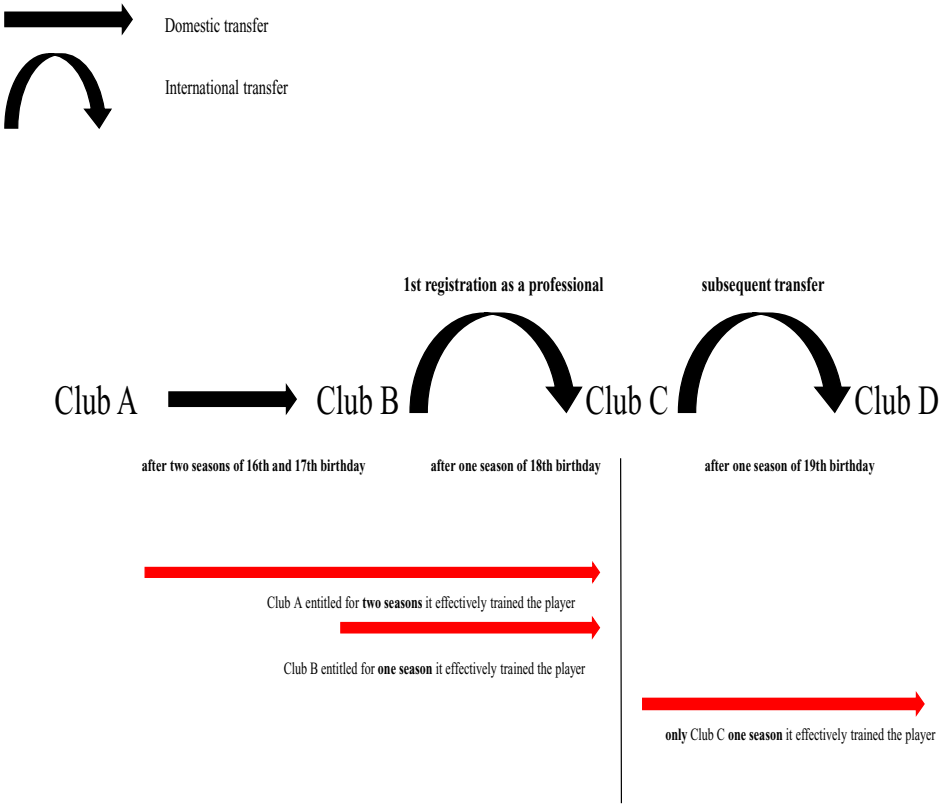
[3] Art. 1 para. 1 Annexe 4 of the Regulations.
[4] Art. 2 para. 1 i) Annexe 4 of the Regulations.
[5] Art. 2 para. 1 ii) Annexe 4 of the Regulations.
[6] Art. 2 para. 1 Annexe 4 of the Regulations.
[7] Art. 22 lit. d) of the Regulations.
[8] Art. 20 of the Regulations.

Consequently, on registering as a professional for the first time, the new club will have to pay training compensation to every club with which the player has previously been registered. In case of subsequent transfers of the professional, training compensation will only be owed to his former club.



1.4 The liable party and the beneficiary

The obligation to pay the training compensation always lies with the new club, which reimburses all former clubs that registered the player and that contributed to his training starting from the season of his 12th birthday.[9]

Furthermore, in case that the training club has in the meantime ceased to participate in organised football or no longer exists, its national association becomes entitled to receive the compensation. Aligned with the objective of the training compensation, the reimbursement shall be reserved for youth development programmes within the respective association.[10]

[9] Art. 3 para. 1 Annexe 4 of the Regulations.
[10] Art. 3 para. 3 Annexe 4 of the Regulations.

2. Calculation

2.1 Categories and calculation formula

The calculation formula also follows the rationale of the Regulations as the compensation amounts to the costs that would have been incurred by the new club if it had trained the player itself.[11]

While solidarity contribution rules apply globally without differences, the training compensation rules are established on a confederation basis *per* specific category of clubs.[12] The costs in each category correspond to the amount needed to train one player for one year multiplied by the so called *player factor,* which is the ratio between the number of players who need to be trained to produce one professional player.[13] The pertinent amounts are published by FIFA once per year around the end of May by means of a circular letter,[14] and have remained unchanged since 2002.

The current version of the yearly training costs:[15]

Confederation	Category I	Category II	Category III	Category IV
AFC		USD 40,000	USD 10,000	USD 2,000
CAF		USD 30,000	USD 10,000	USD 2,000
CONCACAF		USD 40,000	USD 10,000	USD 2,000
CONMEBOL	USD 50,000	USD 30,000	USD 10,000	USD 2,000
OFC		USD 30,000	USD 10,000	USD 2,000
UEFA	EUR 90,000	EUR 60,000	EUR 30,000	EUR 10,000

The calculation formula takes into consideration the yearly training costs of the new club's category multiplied by the number of years of training with the former club(s).[16] In the event that the player does not stay with the club for the complete season(s), the calculation is made on a *pro rata* basis.[17]

2.2 Role of national associations

The FIFA members are asked to allocate their clubs into the *four categories*,[18] depending on their expenditures linked to the training of youth players, whereby

[11] Art. 5 para. 1 Annexe 4 of the Regulations, see also CAS 2015/A/3981 *CD Nacional SAD v CA Cerro*; CAS 2011/A/2681 *KSV Cercle Brugge v FC Radnicki*.
[12] Art. 4 para. 2 Annexe 4 of the Regulations.
[13] Art. 4 para. 1 Annexe 4 of the Regulations.
[14] Art. 4 para. 2 Annexe 4 of the Regulations; see latest version: FIFA Circular no. 1673 of 28 May 2019.
[15] FIFA Circular no. 1673, 4.
[16] Art. 5 para. 2 Annexe 4 of the Regulations.
[17] Art. 3 para. 1 Annexe 4 of the Regulations.
[18] Art. 4 para. 2 Annexe 4 of the Regulations, Art. 5.1 para. 2 Annexe 3 of the Regulations.

not all national associations have all categories at disposal.[19] When doing so, the following guidelines established by FIFA are to be taken into consideration:

i. "Category 1 (top level, e.g. club possesses high quality training centre):
- all first-division clubs of national associations investing on average a similar amount in training players.
ii. Category 2 (still professional, but at a lower level):
- all second-division clubs of national associations with clubs in category 1
- all first-division clubs in all other countries with professional football.
iii. Category 3:
- all third-division clubs of national associations with clubs in category 1
- all second-division clubs in all other countries with professional football.
iv. Category 4:
- all fourth- and lower division clubs of the national associations with clubs in category 1
- all third- and lower division clubs in all other countries with professional football
- all clubs in countries with only amateur football".[20]

These guidelines are not applied rigidly; if a club in a lower division makes big investments into the youth training, it will be respectively placed into a higher club category (the financial investment prevails). FIFA members are free to propose another system for categorizing their clubs,[21] however, to this day, none of them has made use of this possibility.

2.3 Overlapping seasons

Further challenge concerns the relevant season for the calculation: shall the one of the former club or the one of the new club be considered? This can potentially affect not only the amount of training compensation, but more importantly, with regard to the season of player's 23rd birthday, it can influence the existence of the entitlement *per se*.

Both FIFA and CAS have sustained that the relevant season is the one of the former club.[22]

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[19] Cf. FIFA Circular no. 1673 of 28 May 2019 for further details about which member association disposes of what categories.
[20] FIFA Circular No. 779, 2 et seq.
[21] Ibid., 3.
[22] CAS 2015/A/4183 Club Atletico Independiente v. Cdp Curicó Unido. FIFA DRC 478 10 December 2009: *"13. In that regard, the Chamber stressed that the player had been registered for Respondent on 31 August 2007, i.e. during the season of the player´s 23rd birthday in x. In that context, the Chamber highlighted that the season of the player´s 23rd birthday in the sense of art. 2 par.1 lit. b) of Annex 4 to be taken into consideration is the season of the Association of the last club for which the player is registered prior to the event giving rise to training compensation, i.e. in casu the*

Nonetheless, the seasons in the member countries are not unified and might therefore coincide, *e.g.* the season in Country A runs as from 1 January until 31 December of the relevant year, whereas the season in Country B runs as from 1 July until 30 June of the following year. Another similar situation can occur within one association, if an amateur season runs from January to December, while the professional season from July to June.

In case of such "overlapping season", its length differs from the usual 12 months, which must consequently be reflected in the calculation of such relevant year.

If the player's birthday is between 1 January and 30 June, the season of his XY birthday runs from 1 January until 30 June of the same year, *i.e.* 6 months. If the player's birthday is between 1 July and 31 December, the season of his XY birthday runs from 1 January until 30 June of the following year, *i.e.* 18 months. In both scenarios, the training club would receive the compensation for 12 months. The basic rule is to never award more than the yearly training costs within the one season of the player's XY birthday.

2.4 Calculation exceptions

2.4.1 Age

The training costs for young players between their 12th and 15th birthdays are always based on category 4 to ensure that the training compensation is not set at unreasonably high levels.[23]

2.4.2 Special provisions for EU/EEA

Furthermore, training compensation includes special rules regarding exclusively transfers applicable within the territory of the EU and the EEA.[24] With regard to calculation of the training costs, art. 6 para. 1 Annexe 4 of the Regulations has to be taken into consideration: If a player moves to a higher category club, the calculation is based on the average training costs of the former and the new club.[25] In case the player moves to a lower category club, the calculation is based on the category of the latter, which corresponds to the general rule.[26]

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season of the Association of the Claimant"; In that same sense FIFA DRC of 23 January 2013, no. 2988.

[23] Art. 5 para. 3 Annexe 4 of the Regulations.

[24] Art. 6 Annexe 4 of the Regulations; These provisions are linked to the EU/EEA free movement, see II. 3.3.3.

[25] Art. 6 para. 1 lit. a) Annexe 4 of the Regulations.

[26] Art. 6 para. 1 lit. a) Annexe 4 of the Regulations.

2.4.3 The "clearly" disproportionate compensation

Art. 5 para. 4 Annexe 4 of the Regulations gives the Dispute Resolution Chamber (hereafter: DRC) the discretion to adjust the amounts of the training compensation if they deem it clearly disproportionate.

In its long-standing jurisprudence, the DRC emphasizes that the calculation mechanisms as foreseen in the Regulations and in the yearly circular letter, are to be applied rigorously.[27] From the CAS jurisprudence it follows that "*the clubs have to provide evidence, to the comfortable satisfaction, that the compensation in question is disproportionate*".[28] From the case law on this matter, both at FIFA and CAS level, it is evident the burden to prove the disproportion lies on the club challenging it and is very high.[29]

3. Exceptions and therewith related challenges

Within the concept of training compensation, several exceptions can influence the entitlement of the training club. Those exceptions are either foreseen in the Regulations or established by the jurisprudence.

3.1 As foreseen in the Regulations

3.1.1 Completion of player's training

FIFA as well as CAS rely on a literal interpretation of the wording of art.1 para. 1 Annexe 4 of the Regulations,[30] considering that only *exceptional* cases, in which is *evident* that the player's training period ended prematurely, can be subject to a reduction of the training period. Moreover, the burden of proof, which lies with the new club, is very high:

"*The proof to show that a player has completed his training period before the age of 21 is at the burden of the club that is claiming this fact. A player who regularly performs for the club's "A" team could be considered as having accomplished his training period, but a decision on this will have to be taken on a case-by-case basis as only under exceptional circumstances can a player be considered to have completed his training before the age of 21. If the club does not provide any data concerning the number of times the player was*

[27] DRC Decision of 12 January 2007.

[28] CAS 2009/A/1810 & 1811 *SV Wilhelmshaven v. Club A. Excursionistas & Club A. River Plate*.

[29] See among many others: CAS 2009/A/1908 *Parma FC S.p.A. v. Manchester United FC*, CAS 2015/A/4214 *Nõmme JK Kalju v. FK Olimpic Sarajevo*, CAS 2013/A/3082 *Budapest Honvéd FC v. América FC*, CAS 2014/A/3518 *Zamalek Sporting Club v. Accra Hearts of Oak Sporting Club*, CAS 2015/A/3981 *CD Nacional SAD v CA Cerro* and CAS 2011/A/2681 *KSV Cercle Brugge v. FC Radnicki*.

[30] This provision is also mentioned in art. 6 para. 2 Annexe 4 of the Regulations for the EU/EEA countries.

actually fielded in the first team, it fails to discharge its burden of proof in this regard".[31]

There are no specific criteria when exactly the training period can be considered as completed. It always has to be assessed on a case-by-case basis. The non-exhaustive factors to be looked at are, *e.g.*, *financial value* of the player such as his salary, market value or a transfer sum of an optional permanent transfer in case of a loan and *performance* of the player, taking into account regularity of his appearances, amount of minutes played, level of the matches played and national team appearances.[32]

3.1.2 Termination of an employment contract without just cause by the former club

The assessment of the termination of the contract is addressed in a separate claim. Such employment-related dispute between the player and the training club suspends the proceedings for the training compensation, since the outcome can affect the entitlement *per se*.[33]

3.1.3 Transfer to category 4 club

As mentioned above,[34] the amount of training compensation depends on the category of the player's new club. One of the challenges faced with regard to this matter is the incorrect categorization of clubs by their national associations. This occurs, in particular, following relegation or promotion of their members. Moreover, the associations sometimes attempt to categorize their members into lower categories in order to reduce their liability, or even exempt them from paying training compensation by placing the clubs in category 4.[35]

The case law of the DRC establishes that categorization at national level is irrelevant and in case a club is placed in the wrong category and the discrepancy is manifest, the DRC will apply the training categories in accordance with its guidelines, despite the fact that the association concerned had indicated a different categorization.[36]

Further issue related to the category of the new club arises when one club owns several teams, participating in different divisions or levels. If such ownership structure is used as a *bridge transfer* in order to reduce training

[31] CAS 2012/A/2968 *Konyaspor Kulübü Dernegi v. Ituano Futebol Clube.*
[32] CAS 2014/A/3518 *Zamalek Sporting Club v. Accra Hearts of Oak Sporting Club*, CAS 2007/A/1320-1321 *Feyenoord Rotterdam v. Clube de Regatas do Flamengo*, CAS 2013/A/3119 *Dundee United FC v. Club Atlético Vélez Sarsfield*, CAS 2008/A/1705 *Grasshopper v. Alianza Lima*, CAS 2018/A/5513, CAS 2017/A/5090.
[33] Art. 2 para. 2 i) Annexe 4 of the Regulations.
[34] See under II. 2.1.
[35] Art. 2 para. 2 ii) Annexe 4 of the Regulations.
[36] DRC Decision of 1 March 2012, nr. 3121501 and DRC Decision of 30 August 2013, nr. 1149.

compensation, the teams will be considered as one entity and the deciding bodies impose the highest training category of the involved clubs, notwithstanding the fact that the player was actually registered for a team competing in a lower division.[37]

3.1.4 Reacquisition of amateur status

In general, training compensation is not payable in case of a transfer, where the player reacquires an amateur status.[38] Nonetheless, in case the player re-registers as a professional within 30 upcoming months, the new club is obliged to comply with the training compensation obligation.[39]

3.1.5 Special provisions for the EU/EEA

Further special rule for the countries within the EU/EEA is established in Article 6 para. 3 of Annexe 4 of the Regulations, which obliges the former club to provide the player an *offer of contract*, or to otherwise provide evidence for a *true and genuine interest in the services of the player*, in order to maintain its entitlement to training compensation.

The real extent of such obligation was established by CAS Panel: "*According to Article 6 para. 3 of Annexe 4 RSTP, a club can claim training compensation provided that one of these two alternative requirements is met: it offered the player a professional contract ("First Alternative") or it can otherwise justify that it is entitled to training compensation ("Second Alternative"). .... The club must demonstrate (absent any offer) that it had a 'genuine and bona fide interest in retaining the services of the player' in order to be entitled to a training compensation. It must take a proactive attitude vis-à-vis the player so as to clearly show that it still counts on him/her for the future season(s)*".[40]

In this regard is important to mention that the DRC appears to be stricter than CAS when assessing the *bona fide interest* of the former club to keep the player in cases where no contract was offered.[41] Nonetheless, also CAS panel decided that a club terminating the player's contract due to financial difficulties and by virtue of the decision of a judicial commissioner was not entitled to claim

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[37] See CAS 2014/A/3834 *Club de Fútbol Atlante v Club Atlético Velez Sarsfield* and CAS 2014/A/3710 *Bologna FC 1909 S.p.A. v. FC Barcelona*: "*The intention behind the categorisation of clubs in the RSTP is to classify clubs in four different categories, depending on the total investments made by the club in youth development in general. Whether a specific player plays in a club's A team or in any other team of the club does not influence the total investment made by the club and, as such, does not alter the category in which the club is classified for the calculation of the amount of training compensation*".

[38] Art. 2 para. 2 iii) Annexe 4 of the Regulations.

[39] Art. 3 para. 2 of the Regulations.

[40] CAS 2018/A/5733 *Koninklijke Racing Club Genk v. Manchester United Football Club.*

[41] See DRC Decision of 16 April 2009 and DRC Decision of 1 March 2012.

training compensation, highlighting that the club did not discharge its burden of proof to demonstrate its genuine interest in keeping the player.[42]

3.1.6 Women's football

Despite the fact that the Definitions section of the Regulations states that "*[t]erms referring to natural persons are applicable to both genders"*, by explicit mention in art. 20, *in fine*, of the Regulations, the afore-described principles of training compensation do not apply to women's football. This exception is based on a decision of the *DRC*,[43] in which the members decided that the system, as such, at least for the time being, shall not be applied to women's football since it shows a scenario completely different to men's football.[44]

Bearing in mind the objective of the training compensation – to reimburse the efforts made in development of youth players by rewarding the training clubs – but at the same time considering the potential reluctance of a club envisaging to acquire the services of a player developed elsewhere, given the current realities in women's football, to carry the burden of paying training compensation in accordance with the principles of the men's game, the Chamber unanimously agreed "*that the award of the training compensation for the transfer of female players could possibly even hinder the further development of women's football and render the previous efforts to have been made in vain*".[45]

In 2015 a new claim alleged, among other arguments, that the status of female football changed and therefore training compensation shall be applicable. The DRC rejected the claim, yet the decision was challenged in front of the Court of Arbitration for Sports. In its award *CAS 2016/A/4598, WFC Spartak Subotica v. FC Barcelona*, CAS overruled the respective decision of the DRC. Nonetheless, this award cannot be considered as a turning point for women's training compensation, as the arbitral body "*acknowledge[s] that in a different case, with different parties presenting different (and possibly more) evidence, a CAS Panel might well conclude that the RSTP 2012*[46] *did not apply to women's football*".[47] Moreover, the Panel adds that this "*decision only binds the parties to this arbitration*".[48]

In the aftermath of the CAS award, an explicit specification that the principles of training compensation do not apply to women's football was introduced in order to clarify the situation and to bring art. 20 of the Regulations in line with the existing jurisprudence of the DRC.[49]

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[42] CAS 2014/A/3542 *Club Grenoble Football 38 v. Bologna Football Club 1909 S.p.A.*
[43] DRC Decision of 7 April 2011, no. 411375.
[44] Ibid., 8, paras. 11 et seq.; confirmed by the DRC Decision of 5 November 2015, no. 11150999.
[45] Ibid.,10, para. 19.
[46] Regulations on the Status and Transfer of the Players, Edition 2012.
[47] CAS 2016/A/4598, *WFC Spartak Subotica v. FC Barcelona*, 13, para. 49.
[48] Ibid.,13, para. 49.
[49] FIFA Circular no. 1603, 2.

However, "*[...] the FIFA administration is working on a specific concept to be applied to the women's game in consultation with the stakeholders, bearing in mind the overall objective to promote and enhance the development of women's (professional) football*".[50]

3.2 Jurisprudence

3.2.1 Transfer fee

According to the long-standing jurisprudence of the DRC, training compensation is deemed to be included in case of a transfer upon payment of a transfer fee, *i.e.* in the absence of indications to the contrary, the agreed transfer fee includes the possibly due training compensation. This position was also confirmed by CAS.[51]

3.2.2 Waiver

A usual defense of clubs that are subject to a training compensation claim is, that the former club waived its right to training compensation when the player was released as free agent. According to the CAS jurisprudence, free agents are players who are free from contractual engagements and for which no transfer fee is paid. However, the Regulations nor CAS jurisprudence do not make any reference to the applicability of this concept to the training compensation.[52] Therefore, in order to waive the right to receive training compensation, a clear and unambiguous waiver, explicitly referring to the training compensation, must be signed by the former club in favour of the new club.[53] This right is based on the contractual freedom.

3.2.3 Loan

In case of a loan, the training compensation is not due in the following situation:

1) The club that the player joins on a loan is not obliged to pay training compensation to the club of origin. The DRC explained, that while this interpretation might seem against the wording of art. 10 of the Regulations, the rationale behind the whole system makes this the only suitable interpretation: *"The Chamber was eager to point out that it could not have been the intention of the legislator of the relevant regulatory provision (i.e. art. 10 par. 1 of the Regulations) to trigger the consequences of art. 3 par. 1 of Annex 4 of the Regulations on the occasion of a transfer on a loan basis and, thus, potentially deprive the loan of its essential flexibility and, in connection with the training and*

[50] Ibid., 2.
[51] CAS 2011/A/2455 *CA River Plate v Villarreal FC*.
[52] CAS 2009/A/1919 *Club Salernitana Calcio 1919 S.p.A. v. Club Atlético River Plate & Brian Cesar Costa*. See also DRC Decision of 13 July 2017, no. 0454.
[53] CAS 2012/A/3009 *Arsenal FC v. Central Español*.

education of player, its purpose of providing young players with the opportunity to gain practical experience in official matches for another club in order to develop in a positive way".[54]

2) Moreover, the club of origin is not entitled to training compensation from any third club for the period of time the player spend effectively in the loanee club.[55]

However, if following the loan, the player moves to a third club on a definitive basis and the prerequisites giving rise to the entitlement are fulfilled, both clubs, *i.e.* the loanee club and the club of origin, will be entitled to the training compensation for the respective training periods,[56] unless the club of origin demonstrates that it bore the costs for the player's training during the duration of the loan.[57]

In this regard, it is important for the new club to consider that the loanee club is entitled to training compensation even if it is not in the strict sense the *last club* of the player.[58] Moreover, a valid reason for non-payment of the training compensation between the last club and the new club, such as withdrawal of the claim, transfer fee,[59] valid waiver, termination of the employment contract or no offer of a new contract within the territory of the EU / EEA,[60] does not affect the entitlement of the loanee club.

3.3 Further challenges

3.3.1 Bridge transfers

Bridge transfers are used with the intention to reduce the training compensation amount due by the new club. It will be demonstrated on one of the leading cases *MTK Budapest v. FC Internazionale Milano S.p.A.*,[61] how such construct works in the practice and how the judicial bodies deal with the matter.

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[54] See, *inter alia,* DRC Decision of 19 June 2017.

[55] Art. 10 para. 1 of the Regulations.

[56] Art. 10 para. 1 of the Regulations and CAS 2016/A/4541 *FC Kuban v. FC Dacia*.

[57] CAS 2008/A/1705 *Grasshopper v. Alianza Lima*.

[58] The issue seemed undisputable for many years until CAS 2012/A/2908 *Panionios GSS FC v Paraná Clube. However*, shortly after that award, other CAS cases (CAS 2013/A/3119 *Dundee United FC v. C. A. Vélez Sarsfield* and CAS 2014/A/3620 *US Citta di Palermo v. Club Atlético Talleres*) confirmed the original criterion established before the Panionios case.

[59] DRC decision of 15 June 2017, no. 1997 confirmed by CAS in CAS 2018/A/5513 *Sport Club Internacional v. Hellas Verona Football Club S.p.A.* Against this position see CAS 2016/A/4823 as reported in ECA legal bulletin 7/2017.

[60] The FIFA DRC position in this regard is that "*a possible obligation to offer the player a contract in compliance with art. 6 par. 3 of Annexe 4 of the Regulations would in principle lie with the former club of the player and not with the Claimant. As stated in art. 6 par. 3 of Annexe 4 of the Regulations, said provision is without prejudice to the right of training compensation of the player's previous club(s)*" in DRC decision of 30 August 2013.

[61] CAS 2009/A/1757 *MTK Budapest v. FC Internazionale Milano S.p.A.*

The Italian club, Inter Milan, was interested in a player from the Hungarian club, MTK Budapest, yet no agreement regarding the transfer of the player was reached between the two parties. Consequently, the player, still an amateur, decided to accept a first contract with a Maltese club, where he stayed only 9 days before his subsequent transfer to Inter Milan.

As a consequence, MTK Budapest claimed training compensation against Inter Milan. The claim was admitted due to the *unusual pattern of movement*. The highly rated player stayed in the Maltese club for little more than a week before moving on to Inter Milan. With regard to the objectives of the Regulations, it was Inter Milan that benefited from the training efforts invested by MTK Budapest. In line of the foregoing, the compensation for MTK Budapest was also based on the Inter Milan's category.

In line with the aforementioned jurisprudence, other similar attempts reached football deciding bodies with decisions in the same matter.[62] If the bridge move is proven, the consequence is to annul the effects of the bridge transfer for the training club, by either imposing the compensation at the level of the "newest" club or by imposing the compensation to both subsequent clubs: the bridge club for the amount corresponding to its category and the final club for the difference up to its category.

As illustrated, bridge transfers are often used as an instrument to circumvent the obligation to pay the training compensation. In order to secure that football transfers comply with legitimate objectives, the practice is prohibited through the new art. 5bis of the Regulations. According to the new provision, a bridge transfer is presumed in case of two consecutive transfers (national or international) of the same player within a period of 16 weeks.[63] The The prohibition was implemented in the latest Regulations of 1 March 2020.[64]

3.3.2 The player passport and the forthcoming Electronic Registration System

3.3.2.1 The player passport

In order to lodge a training compensation claim, the documentation of the respective player's *complete career history*[65] has to be submitted to the competent FIFA body. In this respect, the assistance of the national associations is essential since it is the association that "*[...] is obliged to provide the club with which the player is registered with a player passport containing the relevant details of*

[62] CAS 2011/A/2477 *Spartak Moscow vs RFU & FC Rostov*, CAS 2012/A/2968 *Konyaspor Kulübü Dernegi v. Ituano Futebol Clube* and DRC Decisions: no. 10131359 (October 2013), 7101140 (July 2010), 0213936 (February 2013).
[63] Art. 5bis para. 2 of the Regulations.
[64] FIFA Circular no. 1709, 3.
[65] Art. 5 para. 2 annexe 6 of the Regulations.

the player. The player passport should indicate the club(s) with which the player has been registered since the season of his 12th birthday […]".[66]

The dependency on the national association can bring along many challenges. One of the difficulties faced is the inconsistent approach in how players are registered and transferred at domestic level. It is not an exception that FIFA receives *incomplete* and/or *contradictory player passports,* sometimes even from the same member association. In such cases, FIFA asks for a clarification from the relevant national federation, trying to establish complete, real and reliable information. Unfortunately, this is not always possible.

Nonetheless, it is an established jurisprudence[67] that the new clubs are able to rely in *good faith* on the information contained in the player passport available to them at the time of the respective transfer, as it constitutes the main documentary evidence of the periods of registration of players with each former club.[68] Such approach provides for legal certainty.

3.3.2.2 The Electronic Registration System

Tracking of player's history is often complicated and without the latter, the claim could not be brought further since the essential evidence is missing. Changes are thus needed to improve enforcement of the training compensation available for the clubs. In order to ensure that the beneficiaries will actually be able to receive the due training compensation, it is essential to be able to *track all clubs* with which the player was registered. This is the objective behind the new Regulations,[69] that entered into force in October 2019, and the mandatory implementation of the following technologies:

(1) Electronic Player Registration System;
(2) Electronic Domestic Transfer System;
(3) FIFA Connect System.

The use of an electronic domestic transfer system will be a mandatory step for all national transfers of professional and amateur players (*both male and female*). A national transfer will consequently be entered in the electronic domestic transfer system each time a player is to be registered with a new club within the same association. Any registration of a player for a new club without the use of the system will be invalid. The electronic player registration system will record the information about the registration of all players at their association from the age of 12. Moreover, it will assign each player a FIFA ID, a worldwide unique identifier of the player.[70] In this manner, it will be ensured "*[…] that reliable and complete*

[66] Art. 7 of the Regulations.
[67] This jurisprudence refers to both, training compensation and solidarity mechanism.
[68] DRC Decision of 28 September 2006, no. 961202B; DRC Decision of 20 May 2011, no. 511126; DRC Decision of 30 August 2013, no. 08121946; DRC Decision of 6 November 2014, no. 1114348; DRC Decision of 19 February 2015, no. 0215163.
[69] For the complete overview see FIFA Circular no. 1679.
[70] Art. 5 para. 1 of the Regulations.

player registration data in the form of an electronic passport is available. This step will not only increase transparency and professionalism, but most importantly, it will form the basis for more efficient and coherent distribution of training rewards to the clubs entitled to such compensation".[71]

The new approach enshrined in the Regulations of October 2019 has the potential to eliminate the challenges mentioned above. The associations will be obliged to introduce the new technologies by July 2020.

3.3.3 Free movement and training compensation in the EU

Pursuant to the principle of free movement of workers within the European Union, a worker has the right to accept any job offer made to him and to move from a country to another one without any obstacles.

With respect to football players, this issue was first raised in 1995, thus long before the current system of training compensation was implemented. In the famous *Bosman decision*,[72] the Court of Justice of the European Union (hereafter: *CJEU*) decided, *inter alia*, that the new club's duty to buyout the right to sign an employment contract with an out-of-contract player was *an obstacle to freedom of movement for workers*.[73]

However, such obstacle could be *justified* in the light of the specificity of sport, when there is a *legitimate interest*, which is *necessary* and *proportionate*.

The CJEU recognized that "*[...] 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*".[74] However, the CJEU deemed that the rule concerning out-of-contract players in force prior to the 2001 edition of the Regulations was disproportionate to achieve the objective of maintaining financial and competitive balance between football clubs.[75]

In the aftermath of *Bosman*, the European Commission started a long negotiation process with the football stakeholders, which culminated in an agreement between UEFA, FIFA and the Commission itself, defining new key principles applicable to the transfer system.[76] The agreement was reflected in the 'new' FIFA transfer rules in 2001.

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[71] FIFA Circular no. 1679, 2.

[72] Case C-415/93, *Union Royale Belge des Sociétés de Football Association and others v. Bosman and others*, EECLI:EU:C:1995:463 (hereafter: *Bosman*).

[73] Bosman, para. 100.

[74] Bosman, para. 106.

[75] See Bosman, para. 106: *[...] the same aim can be achieved at least as efficiently by other means, which do not impede freedom of movement for workers.*

[76] See at https://europa.eu/rapid/press-release_IP-01-314_en.htm, last access on 6 August 2019.

In the *Bernard*[77] case the CJEU confirmed the Bosman principles, and in particular, reiterated that creating proportionate incentives for clubs to train and develop young players would justify a training compensation system, provided the relevant amounts somehow reflect the real training costs.[78] In this respect, it was explicitly recognized that the so-call *player factor*,[79] *i.e.* the ratio of players who need to be trained to produce one professional player, can be taken into account.

With regard to the current Regulations, FIFA has taken all measures to ensure that the movement of young players is not excessively hindered, while concurrently encouraging the development and training of young football players. However, a certain hindrance effect undoubtedly exists, in particular in case of players not belonging to the category of top-players. This is the main line of argument raised by FIFPro with respect to the current training compensation regime. Indeed, in recent times they are explicitly questioning the proportionality of the existing rules.

3.3.4 USA

For years, the US Soccer Federation maintained that a consent decree contained in the ordinary courts case *Fraser vs. MLS*[80] prevented it from enforcing training compensation as foreseen in the Regulations. At the time, the FIFA "training and development fees" were not based on the current training compensation rules, simply because those came into force only in 2001.

Although the US Soccer Federation eventually moved away from that reasoning, the position remained the same on the argument that adhering to the FIFA rules would result in litigation on anti-trust grounds from various stakeholders opposed to training compensation and solidarity payments, such as the MLS Players' Association.

In a public statement on 18 April 2019 the MLS informed that "*with an investment in MLS academies totaling hundreds of millions of dollars over the past decade, the league announced that its clubs will begin to assert training compensation claims as per FIFA regulations and seek FIFA-administered solidarity payments. Participation in these two systems allows MLS clubs to continue to invest in elite training for domestic players and provide them opportunities for soccer development free of charge*".[81]

As to the Federation, its position remains the same. Following the aforementioned statement by the MLS, the federation confirmed that "*U.S. Soccer*

[77] Case C-325/08, *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC*, ECLI:EU:C:2010:143.

[78] For a detailed analysis of the Bernard judgement and its impact on the world of sport see "*Training Compensation in Sports*", (M. Colucci ed.), SLPC, 2010.

[79] Cf. Annexe 4, art. 4 para. 1 of the Regulations.

[80] In the wake of Bosman, in 1996, a group of MLS players filed a federal class action lawsuit challenging the training compensation in light of the anti-trust law.

[81] See at www.mlssoccer.com/post/2019/04/18/mls-clubs-seek-training-compensation-claims-and-solidarity-payments, last access on 28 November 2019.

has maintained a position of neutrality on the issue of training compensation and solidarity payments and, accordingly, will not be a party to enforcement of those regulations".[82]

III. Solidarity Mechanism

1. Concept

1.1 General principles

The solidarity mechanism aims to foster the training and development of players. In comparison to the training compensation, this concept is more straightforward as it does not provide for exceptions such as completion of players training, special provisions for the EU/EEA and it also applies to women's football.[83] The regulatory basis is to be found in art. 21 and Annexe 5 of the Regulations.

The principles are laid down in art. 21 of the Regulations, which establishes the following:

1) Professional has to be transferred before the expiry of his contract against payment.
2) Any club that has contributed to education and training of the player shall receive a proportion of the compensation paid to player's former club.

1.2 Player's birthday

In accord with the training compensation, player's training and education takes place between the ages of 12 and 23,[84] the *season of the respective birthday*[85] being decisive for the calculation of the solidarity payment. As opposed to the training compensation, the player's birthday does not have an effect on the legal entitlement *per se*, since the solidarity contribution is triggered by every transfer of the player as a professional during his entire career.

1.3 Event giving rise to the dispute

1.3.1 Common rule

The solidarity compensation is due when a professional player is transferred before the expiry of his contract against payment (guaranteed or conditional).[86]

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[82] Available at www.espn.co.uk/football/major-league-soccer/story/3839481/fifa-rules-against-solidarity-payments-over-yedlins-tottenham-transfer, last access on 28 November 2019.
[83] See *Definitions* section of the Regulations.
[84] See art. 1 Annexe 5 of the Regulations, cf. art. 20 of the Regulations.
[85] See II. 1.2.
[86] Art. 1 Annexe 5 of the Regulations.

For the Regulations to apply, the relevant transfer as a professional needs to occur with a club affiliated to a different association than the one of the training club.[87]

1.3.2 Future addendum: Domestic transfer with an "international dimension"

Part of the current FIFA reform process is the reinforcement of solidarity mechanisms for training clubs. The challenge to be tackled was the reoccurring questioning of the Regulations with regard to the applicability of solidarity mechanism.

The issue was raised before CAS with regard to the domestic transfer of the Uruguayan goalkeeper, Fabián Carini, from Juventus F.C. to Internazionale Milano[88] and the domestic transfer of the Argentinian player, Juan Román Riquelme from FC Barcelona to Villarreal.[89] While the two appeals were rejected, both CAS panels held that the national systems were yet to be implemented as required by FIFA.[90] Nonetheless, the majority of the federations did not include domestic solidarity contributions and those who implemented it, limited the jurisdiction to their affiliated clubs with no right for clubs from different associations.

In the same manner, FIFA continued to reject solidarity claims related to domestic transfers. *E.g.,* in 2012, the DRC rejected the claim of a foreign club trying to collect the contribution based on the rules of the Dutch Football Association.[91] The DRC held that a club affiliated with a third association is not entitled to benefit from rules and regulations of an association with which it is not affiliated and, as such, cannot claim solidarity contribution or training compensation based on national regulations at FIFA level.

Meanwhile, it has been announced, that solidarity contributions will apply to domestic transfers with an "international dimension".[92] The domestic transfer will therefore be subject to the payment of solidarity contribution, also to training

[87] Art. 22 lit. d) of the Regulations.
[88] CAS 2007/A/1287 *Danubio FC v. FIFA & Internazionale Milano*.
[89] CAS 2007/A/1307 *Asociación Atlética Argentinos Juniors vs Villarreal* (note: Unpublished; appeal to the Swiss Federal Tribunal rejected, see SFT Judgement of 20 June 2008, 4A_18/20081).
[90] CAS 2007/A/1287 "*As to the fact that no solidarity mechanism has been so far implemented by the Italian football association, the Panel notes that, according to paragraph 3 of the Preamble to the 2001 edition of the FIFA Regulations, and to art. 1 paragraph 3 (b) of their 2005 edition, FIFA requires from the national associations that they implement a system for transfers that observes the general principles of the Regulations. At the same time, the Panel remarks that, before being effective, such "national" system must be approved by FIFA, and that, in a circular letter dated 23 September 2005 FIFA gave a deadline to the national federations until 30 June 2007, to submit to FIFA for approval their national regulations on the system of transfers*".
[91] DRC Decision of 1 February 2012, no. 2121218.
[92] FIFA Circular no. 1709, 1.

clubs affiliated to different associations. The implementation of the extended application of the solidarity mechanism will come into force on 1 July 2020.[93]

1.4 The liable party and the beneficiary

1.4.1 As foreseen in the Regulations

The obligation to pay the solidarity contribution always lies with the new club,[94] which reimburses all the former training clubs with which the player has previously been registered and that have been involved in the player's training and education between the seasons of his 12th and 23rd birthdays.[95]

As already seen in the respective provisions on training compensation, in case that the entitled club has in the meantime ceased to participate in organised football or no longer exists, its national association is entitled to lodge the claim, using the solidarity payment for youth development programmes within their structure.[96]

1.4.2 Private agreements

Despite of the aforementioned rule, obliging the new club to warrant the payment of solidarity to the former training clubs, private agreements between the new (*buying*) club and the former (*selling*) club take place, shifting the financial burden on the latter. This is one of the most occurring conflicts in relation to the solidarity mechanism.

In the award *CAS 2008/A/1544 – RCD Mallorca (Spain) v/Al Arabi,*[97] the Panel confirmed that the solidarity mechanism is assignable to the former (*selling*) club, but clarified that towards third parties, *i.e.* the clubs entitled to the solidarity contribution, the obligation to pay the contribution remains with the new club, even in the case of an internal arrangement between the new (*buying*) club and the former (*selling*) club. In particular, the arbitral body concluded:

"*73. To summarize, the 2005 FIFA Regulations, as already foreseen in previous rules and FIFA circulars, foresee the following principles: (i) It is the new club that has the obligation to pay the solidarity contribution to the club(s) entitled to it. (ii) Towards third parties, i.e. the clubs entitled to the solidarity contribution, the obligation to pay the contribution remains with the new club, even if there are internal arrangements between the new club and the*

[93] FIFA Circular no. 1709, 3.
[94] Art. 2 paras. 1 and 2 Annexe 5 of the Regulations.
[95] Art. 1 Annexe 5 of the Regulations.
[96] Art. 2 para. 3 Annexe 5 of the Regulations.
[97] CAS 2008/A/1544 *RCD Mallorca (Spain) v/Al Arabi*.

transferring club. (iii) The transferring club and the new club are free to agree on a shift of the final, financial burden of the solidarity contribution and, in particular, to agree on a rule regarding any reimbursement due or not due.
77. Therefore, upon an analysis of the aforementioned provisions, the Panel concludes that neither the relevant provisions of the FIFA Regulations nor those of Swiss law forbid the parties to stipulate who will carry the final financial burden of the solidarity contribution".

Although FIFA rejected such position for many years, arguing that the solidarity mechanism is a principle well-established in the Regulations, from which the parties signing a transfer or loan contract cannot derogate through the contents of a contract, in 2017, FIFA changed its long-standing position, in line with the aforementioned CAS jurisprudence.[98]

Between the parties, the shift of the financial burden is often realized through a negotiation of a *"net"* figure in the respective transfer fee, establishing that no further additional payment shall be carried by the new (*buying*) club, irrespective of the regulations. In such cases, CAS ruled that "*if the new club fails to retain the 5% solidarity contribution from the transfer amount, it is still entitled to claim it back*".[99]

The process in the practice runs as follows: notwithstanding the parties' deviation from the Regulations, the claimant has to file its petition towards the new (*buying)* club, debtor in the sense of the Regulations. The respondent can file a separate claim against the former (*selling*) club for reimbursement.[100]

2. "Transfer"

2.1 Definition

One of the essential requirements to trigger the solidarity mechanism is the "transfer" of the player from one club to another. In the meaning of art. 1 annexe 5 of the Regulations, the transfer is not only to be interpreted in its strict sense.

The broad wording of the aforementioned article recognizes the right to the solidarity contribution, when the player *"moves"*. Furthermore, the article establishes that *"5% of any compensation"*[101] shall be distributed.

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[98] See Lombardi & Associates, *FIFA's U-turn on solidarity contribution: regulations v contractual freedom?*, available at https://static1.squarespace.com/static/566848d7a2bab88225a8f758/t/5b4c6ac2575d1fa91f478e87/1531734724561/2017+06+27+Article+EPFL.pdf, last access on 8 November 2019.
[99] CAS 2006/A/1018 *C.A. River Plate v. Hamburger S.V.*
[100] Art. 22 lit. f of the Regulations in connection with art. 23 para. 1 of the Regulations; see also CAS 2015/A/4105 *PFC CSKA Moscow v. Fédération Internationale de Football Association (FIFA) & Football Club Midtjylland*.
[101] See also wording of art. 21 of the Regulations: the claiming club is entitled to proportion of the "*compensation paid [to the] former club*".

In light of the foregoing, the solidarity mechanism is applicable to transfer fee, sell-on fee, bonus payment and even to a payment of loan compensation.[102] However, in particular cases, such as compensation for breach of contract, buyout clause or the exchange of players, the question of applicability is not so straightforward.

2.2 Particular cases

2.2.1 Breach of contract by the player

An earlier CAS award *CAS 2008/A/1523 Club Atlético River Plate v Newell's Old Boys*, confirming the DRC decision in this regard, held that the *solidarity contribution is not applicable to compensation for breach of contract*. Two Argentinian Clubs, River Plate and Newell's Old Boys, requested the application of the solidarity mechanism on the sums paid by Newell's Old Boys to the Turkish club, Fenerbahçe Istanbul, established in a settlement agreement between the two clubs.

The settlement agreement was related to a compensation determined by CAS in the claim of Fenerbahçe Istanbul against the Argentinian player, Ariel Ortega.

The original compensation amount set by FIFA, confirmed by CAS, amounted to EUR 11 million. Since the player was a free agent, no club hired him to avoid being jointly liable for the above-mentioned sum. Almost two years later, Newell's Old Boys reached an agreement with the Fenerbahçe Istanbul for an amount of EUR 3,5 million. Ortega's training club, River Plate, sought to apply the solidarity mechanism to this amount. FIFA rejected the claim and CAS confirmed the inapplicability of the solidarity mechanism to this type of compensation. The main argument was that the settlement agreement between Newell's Old Boys and Fenerbahçe Istanbul could not be considered a "transfer" to the regulatory purposes, since it had not occurred during the term of the contract between Ortega and the Turkish club.

2.2.2 Buyout clause

The inclusion of the buyout clause in employment contracts has become a common practice in professional football. Alongside with this proliferation, also its execution by the players has become more usual, generally with the financial assistance of the new contracting club. From the case law of FIFA DRC and CAS it follows, that also in such constellation, the new club is obliged to pay the solidarity contribution. Nonetheless, the deciding bodies approach the buyout clause differently.

[102] With regard to the loan see art. 10 para. 1 of the Regulations.

In one of the leading cases, *CAS 2011/A/2356 Lazio S.p.A v C.A. Vélez Sársfield & FIFA*, a buyout clause was stipulated in the player's, Mauro Zarate, employment agreement with the Qatari club, Al Saad. His new club, Lazio S.p.A, financially assisted the player with the execution of the respective clause.

When the Argentinian club, Vélez Sarsfield, filed a claim for solidarity compensation against Lazio S.p.A, one of its main arguments was the broad wording of art. 1 annexe 5 of the Regulations, which uses terms like "transfer" and "any compensation" for the entitlement. Lazio S.p.A rejected the claim, arguing that the player terminated the contract with his former club, Al Sadd, unilaterally and signed his new contract with Lazio S.p.A as a free agent. In its appeal to CAS, the Italian club insisted on the absence of a "transfer" in the given case.

The Panel established that various elements are required to qualify the move of a player from one club to another as a "transfer" in light of the provisions of solidarity: 1) the consent of the former club to the premature termination of the contract with the player,[103] 2) the interest and consent of the new club to acquire the rights of the player, 3) the will of the player to move from one club to another and 4) the price or value of the transfer.

The Panel confirmed that all of the requirements were present in the case, the consent of the former club given in advance, at the time it agreed with the player to insert the buyout clause in the employment contract and established its value. The award further acknowledged that the transfer was not the "usual transfer", in which the interests and consent of the parties are all expressed at the same time and in one single (transfer) agreement. The reality of the case and the substance of the transaction shall, nonetheless, prevail over the forms and schemes. This is especially applicable to the solidarity mechanism, considering the wording and rationale of art. 1 annexe 5 of the Regulations.

The question remained, which club had to bear the financial burden of the payment in these circumstances. The amount established in Zarate's employment agreement was a "net" figure, hence Lazio S.p.A. filed a separate claim for reimbursement against Al Sadd. The Single Judge of the FIFA Player Status Committee rejected the claim, arguing it was time barred. CAS in its award *CAS 2016/A/4585 SS Lazio S.p.A v Al Sadd SC*, revoked the decision, considering that the event giving rise to the dispute for the reimbursement was not the transfer of the player itself, but the decision of CAS, ordering Lazio S.p.A. the payment in favor of Vélez.

Entering the substance of the case, the Panel, nonetheless, rejected the reimbursement request on the basis that the termination by Zarate could not be considered a "transfer" and, therefore, no solidarity contribution should have been

[103] Lazio made an analogy to the *Keita* dispute (CAS 2010/A/2098 *Sevilla FC v RC Lens*), regarding a sell-on fee, where the player terminated his contract prematurely and the new club warranted the indemnification to the former club. The lack of consent of the former club was, *i.c.*, the deciding element why the conduct between the former club and the new club was not to be considered as *"sale"* for the purposes of a sell-on fee.

paid. Aware of the contradiction between its decision and that of the award *CAS 2011/A/2356*, the Panel held that Al Sadd never consented the termination of the contract and therefore, one of the necessary requirements to trigger the solidarity mechanism, was missing.

For the Panel, the clause inserted in Zarate's employment contract was just a penalty foreseen in case of a unilateral breach and therefore could not be interpreted as an anticipated consent with the player's termination or as a transfer price set in advance. The subsequent acts of Al Sadd, especially the negotiations where the Qatari club asked for a higher transfer amount and the claim in front of FIFA for breach of the loan agreement, confirmed the lack of consent with the leave of the player.

Further example is the buyout clause established in Geoffrey Kondogbia's employment agreement with the Spanish club, FC Sevilla, according to the provisions of the Spanish Royal Decree 1006/85. The Monegasque club, AS Monaco, and the player exercised the buyout clause, depositing the corresponding amount at "La Liga".

The French club, FC Lens, claimed the solidarity payment. AS Monaco agreed to make the payment, only if FC Sevilla reimburses the solidarity sums paid. The Spanish club opposed and, in addition, claimed from AS Monaco the payment of the percentage of the solidarity mechanism for the season, in which Kondogbia had been registered with FC Sevilla.

The FIFA DRC,[104] accepted FC Lens' claim against AS Monaco. In a separate decision, the Chamber rejected FC Sevilla's claim against AS Monaco for the solidarity contribution.

With respect to the FC Sevilla's claim, the DRC pointed out, that the particularities of the clause, governed by the Spanish Royal Decree 1006/85, determined that the solidarity contribution was implicitly included in the amount of EUR 20,000,000, agreed as buyout sum.

As to the claim of FC Lens, the Chamber interpreted the operation as a "transfer" within the meaning of art. 21 and art. 1 of Annex 5 of the Regulations Following the reasoning from Zarate case, the DRC considered that both an "ordinary transfer" and the exercise of the buyout clause had similar characteristics in terms of the nature of the payment. Both are made to prematurely terminate an employment contract and allow the signing with a new club. The Chamber noted, that the only difference was the, in advance established, transfer price: in the buyout clause, the price is agreed between the former club and the player, without the intervention of the new club. However, the new club consents the price in a later stage, when executing the buyout clause alongside with the player. The decision added, that this interpretation is aligned with the objective and purpose of the solidarity mechanism.

[104] DRC Decision of 24 April 2015.

The award *CAS 2015/A/4188 AS Monaco v. Sevilla FC* it clarified that even if the Royal Decree was not directly applicable to the appellant (foreign club, *i.e.* AS Monaco), the latter took advantage of the benefits of the clause, and therefore should also carry any derived burden. The payment of the solidarity mechanism above the value of the clause and without the possibility of deduction was a consequence of the application of the Royal Decree.

The application of the solidarity mechanism on a buyout clause was recently confirmed in decision of the Single Judge of the Players' Status Committee, with the following argumentation:

"(a)lthough in some occasions the inclusion of such buyout clauses in football employment contracts seems to be the direct consequence of a state law provision, the substance of the transaction underneath their execution and the purpose that such clauses serve must be always kept in mind. In this respect, the Single Judge wished to emphasise that the reality and the substance of the transactions should prevail on discussions about forms or schemes of transfers.

Moreover, the Single Judge thought important to bear in mind that, although formally speaking these buyout clauses seem to require that the player pays the related amount himself, in reality most of the times, if not always, their amount is, as a matter of fact, not payable by a physical person. As it happens, players do not trigger buyout clauses by paying the, often enormous, amounts themselves. The clubs wanting to secure their services do so on their behalf. In other words, buyout clauses, regardless of how they are drafted, constitute de facto an anticipated acceptance of a future possible transfer of a player against the relevant predetermined amount".[105]

Based on all the above, we can conclude, that in cases of a buyout clause, the FIFA DRC will very likely accept that the payment made is subject to solidarity contribution. The answer is not straightforward at CAS level. Some Panels have already suggested that the nature of the clause, to be established on a case-by-case basis, is relevant for the interpretation of the move as "transfer" and the subsequent determination, if solidarity contribution is applicable.

2.2.3 Exchange of players

The fact that solidarity contribution is calculated on the basis of "any compensation" also gives rise to cases related to exchange of players, which are not uncommon in football.

Both FIFA and CAS agree in applying the solidarity mechanism to these transactions. The disputed issue is the way of calculation applicable to such transfer. The common ground is that the *player's market value* shall be considered, nonetheless, the problem remains how to calculate that value. Since each deal is

[105] DRC Decision of 24 July 2019.

different from another, it is not possible to offer a single solution as demonstrated by the following CAS and FIFA DRC case law.

According to the CAS panel:

"A transaction in the market for players, during which the registration rights for a given player change hands, is the moment at which the market attributes a particular value to a particular player. In the case of an exchange where one player's registration rights are exchanged for another's, and no additional compensation is provided by either party to the transaction, this transfer price must necessarily be the same for both players. In the specific context of a permanent exchange of two professional football players without payment of any transfer compensation by either of the two clubs involved in the transaction, the most accurate, simple and adequately meeting the aims of the solidarity contribution method to determine one player's "market value" is the previous transfer compensation paid in the establishment of his long-term contract".[106]

In a different case, the DRC took the average value between the former transfer prices of the two exchanged players:

"16. In this respect, the members of the Chamber took note of the transfer compensation paid by C to W for the transfer of the player P, according to the information in TMS, as well as the respective confirmation from C, according to which C paid W the total amount of XXX 2,450,000. Equally, the Chamber took into account the transfer compensation paid by the Respondent to Z for the transfer of the player K, which, according to the Claimant, amounted to XXX 6,790,000. With regard to the latter amount, the Chamber emphasized that it was not contested by the Respondent. The Chamber thus established that these two amounts shall serve as basis of the Claimant's assessed transfer value.

17. In continuation, the Chamber held the view that the average between the transfer compensation paid for the transfer of the player P to the C (XXX 2,450,000) and the transfer compensation paid for the transfer of the player K to the Respondent (XXX 6,790,000) is the most accurate value of the acquisition by the Respondent of the services of the player P. The Chamber thus calculated that the value of the player's transfer equals XXX 4,620,000 (XXX 9,240,000 : 2 = XXX 4,620,000)".[107]

In a case involving the contribution for the exchange of players on loan (plus a fixed loan fee to cover the differences in the salaries of the exchanged players) the DRC made a complicated calculation: the player's former transfer value was considered and subsequently divided by the contractual years to arrive to a "*one year player's value*". This value was further reduced to 40%, because the deal was a loan and not a permanent transfer.[108]

[106] CAS 2016/A/4821 *Stoke City Football Club v. Pepsi Football Academy*.
[107] DRC Decision 26 May 2016.
[108] DRC Decision of 17 August 2012.

In the author's opinion,[109] it makes sense to use the previous transfer as a starting point because the actual transfer value can be manipulated by the club and therefore can be inaccurate. Furthermore, factors such as player's age and performance shall be considered for the respective calculation.

3. Calculation

3.1 Calculation formula

The calculation of the solidarity contribution is based on the *compensation* paid by the new club to the former club. From the total amount of such compensation, *5%* is deducted and subsequently redistributed to all former training clubs, where the player has been registered between his 12th and 23rd birthdays, as follows:

- "Season of 12th birthday: 5% (i.e. 0.25% of total compensation)
- Season of 13th birthday: 5% (i.e. 0.25% of total compensation)
- Season of 14th birthday: 5% (i.e. 0.25% of total compensation)
- Season of 15th birthday: 5% (i.e. 0.25% of total compensation)
- Season of 16th birthday: 10% (i.e. 0.5% of total compensation)
- Season of 17th birthday: 10% (i.e. 0.5% of total compensation)
- Season of 18th birthday: 10% (i.e. 0.5% of total compensation)
- Season of 19th birthday: 10% (i.e. 0.5% of total compensation)
- Season of 20th birthday: 10% (i.e. 0.5% of total compensation)
- Season of 21st birthday: 10% (i.e. 0.5% of total compensation)
- Season of 22nd birthday: 10% (i.e. 0.5% of total compensation)
- Season of 23rd birthday: 10% (i.e. 0.5% of total compensation)"[110]

The calculation formula takes into consideration the number of years of training with the former training club(s).[111] In the event that the player does not stay with the club for the complete season(s), the calculation is made on a *pro rata* basis.[112] The amount is distributed in accordance with the player's career history as provided in the player passport.[113]

3.2 Overlapping seasons

Calculation of the solidarity mechanism appears in principle as a simple task: 5% of the compensation is divided by the seasons the player was trained between the ages of 12th and 23rd birthdays. Nonetheless, the calculation gets more demanding in case of an overlapping season, as explained in the training compensation

[109] Ariel RECK.
[110] Art. 1 Annexe 5 of the Regulations.
[111] Art. 1 Annexe 5 of the Regulations.
[112] Art. 1 Annexe 5 of the Regulations.
[113] Art. 2 para. 2 Annexe 5 of the Regulations; in this regard see II. 3.3.2.

chapter above.[114] As a reminder: the general approach of the DRC for these kind of cases is, that the compensation shall never reach beyond nor under the 5% established by the Regulations. Famous example is the case of Gonzalo Higuain.[115]

When the Argentinian player transferred from Real Madrid to Napoli, the Argentinian club, River Plate, lodged a claim for the solidarity contribution. While the amateur season in Argentina runs from January to December, the professional season runs from June to July. The season concerned was the season when the player turned professional at River Plate. Since he is born in December, that season run for 18 months.

The decision read as follows: *"On account of the above and in accordance with art. 1 of Annexe 5 of the Regulations, the DRC considered that the Claimant is, thus, entitled to receive solidarity contribution for the period as from 5 August 1999 until 16 February 2000, i.e. for 7 months of the season of the player's 19th birthday bearing in mind that the applicable duration of the season was extended to 18 months due to the change of player's status from amateur to professional on 5 August 1999. In terms of the percentage of the 5% solidarity contribution, the DRC calculated that, on a pro rata basis, this corresponds to 3.88% of 5%*".[116]

3.3 Net and gross amounts

The responsibility for the payment of the solidarity contribution also entails a "mathematical" complication, in the case the new (*buying*) club and the former (*selling*) club agree on a compensation in *"net"* amount, explicitly excluding the solidarity mechanism out of the sum. The jurisprudence clarifies,[117] that if the parties agreed on the *"net"* transfer amount, the calculation will be based on the gross amount.

Example:
The new (*buying*) club and the former (*selling*) club agree on a transfer fee of EUR 1,000,000, *net*, exclusive the solidarity contribution as established by the FIFA Regulations.
The gross amount is calculated as follows: 1,000,000 divided by 95 and multiplied by 100. The relevant basis for the solidarity calculation is therefore EUR 1,052,631.58.

CAS precedent compared the solidarity mechanism "*to some extent, to the levy of a tax*"[118] and as with taxes, the first conflict is always the basis for its application. In fact, the calculation of the solidarity contribution has been always

[114] See under II. 2.3.
[115] DRC Decision of 24 August 2014.
[116] Ibid.
[117] CAS 2016/A/4518 *FC Porto v. Hellas Verona FC & Club Atlético River Plate*.
[118] CAS 2006/A/1018 *C.A. River Plate v/ Hamburger S.V.*

disputed. In particular, in countries where taxes and levies are imposed over the transfer fee, it was argued, that the solidarity contribution should be applicable only over the *"net"* amounts received by the former (*selling*) club.[119]

As support for this interpretation, CAS jurisprudence related to *"sell on fees"*, was invoked.[120] However, in these cases with a contractual relationship, it was the parties who drafted the relevant clauses. In such situations, the use of specific terms, *e.g. "net",* is therefore crucial. On the contrary, solidarity contribution is based on the FIFA Regulations, with no contractual relationship between the claiming clubs and the club obliged to pay. Furthermore, and the Regulations clearly state that, the contribution shall be calculated on the basis of "*any compensation"*.

That was also the position of CAS in *CAS 2012/A/2944 Genoa Cricket and Football Club S.p.A v Club Bella Vista,* where the sole arbitrator made clear, that the solidarity payment was to be calculated taking into account the "full" transfer compensation payable by one club to another, in order to acquire the player's services. That included not only the amount payable as the "*price of the definitive transfer*", but also the amounts payable for "*all other inherent obligations*", even if both concepts were separated in the transfer agreement.

While the issue might seem marginal in countries where *other costs and levies* are low and moderate, in some others it may be of greater relevance.

IV. Procedural Rules

1. Admissibility of the claim

1.1 Jurisdiction

According to the art. 22 lit. d) of the Regulations, FIFA is the competent body to hear disputes related to training compensation and solidarity mechanism between clubs belonging to *different national associations.* Furthermore, in line with the art. 22 lit. e) of the Regulations, FIFA will also decide on cases involving clubs from the *same association* if the *transfer* in dispute occurs between clubs belonging to *different associations*.[121]

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[119] *E.g.* in Uruguay, Argentina and Paraguay, the various taxes and levies amount to 20%, Chile 10%, Colombia 8%. The main reason for such provision is the fact that the players receive a percentage over the transfer fee assigned by law or collective bargaining agreement.

[120] See among others, CAS 2012/A/2806 *SC Corinthians Paulista v. Panathinaikos FC* and CAS 2013/A/3054 *Club Atlético River Plate v. US Città di Palermo*.

[121] See also DRC Decision of 19 April 2018, no. 1253: "*On account of the aforementioned considerations, the members of the Chamber came to the conclusion that it would not have been the intention of the lawmaker to operate such a distinction between solidarity mechanism and training compensation in the case of an international transfer of the player as a professional and a dispute involving clubs belonging to the same association, given that both the mechanisms aim to reward*

The disputes are adjudicated either by the DRC[122] or, in cases without complex factual or legal issues and with an established jurisprudence, by the Single Judge of the DRC.[123]

1.2 Statute of limitations

As established in art. 25 para. 5 of the Regulations, the DRC or the Single Judge of the DRC shall not hear any case if more than two years elapsed since the event giving rise to the dispute.

The event giving rise to the dispute is based on the registration of the player with the new association. The new club has the obligation to pay the training compensation in 30 days following the respective registration.[124] In like manner, payment of the solidarity contribution should not be made later than 30 days after the player's registration.[125] In case the transfer fee is due in instalments, the respective solidarity payments are due 30 days after the instalment was paid.[126] Consequently, the *31st day after the registration or the payment of an instalment* is the day giving rise to the dispute. As from that day, the former club(s) have two years to lodge a claim by FIFA.

2. Formal requirements

The procedure governing claims related to training compensation and the solidarity mechanism are set in Annexe 6 of the Regulations, along with the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (hereafter: "Procedural Rules").[127]

The main procedural difference, in comparison to the other claims submitted to FIFA deciding bodies, is the use of the TMS.[128] The claiming club[129] shall upload its claim in TMS,[130] including all the mandatory documentation and information as foreseen in art. 5 para. 2 Annexe 6 of the Regulations (for training

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the clubs which were involved in the player's training. Consequently, the sub-committee considered that the application of art. 22 lit. e) Regulations on the Status and Transfer of Players (edition 2016) should be extended, by way of analogy, also to the cases of disputes for training compensation between clubs belonging to the same association, provided that the transfer at the basis of the dispute occurs between clubs belonging to different associations".

[122] Art. 24 para. 1 of the Regulations.

[123] Art. 24 para. 2 ii) of the Regulations and art. 24 para. 2 iii) of the Regulations.

[124] Art. 3 para. 2 Annexe 4 of the Regulations.

[125] Art. 2 para. 1 Annexe 5 of the Regulations.

[126] Art. 2 para. 1 Annexe 5 of the Regulations.

[127] Art. 1 para. 2 Annexe 6 of the Regulations.

[128] Introduced in FIFA Circular letter no. 1500 of 4 September 2015.

[129] In case the club does not have its own TMS account, it is the national association that uploads the claim on behalf of its affiliated club, art. 1 para. 1 Annexe 6 of the Regulations.

[130] Art. 1 para. 1 Annexe 6 of the Regulations.

compensation) or art. 6 para. 2 Annexe 6 of the Regulations (for solidarity mechanism) and art. 9 para. 1 of the Procedural Rules.[131]

Submissions by any other means, but the TMS, are not considered by the FIFA Administration.[132] Subsequently, the entire procedure takes place via TMS. The clubs and national associations are obliged to check the TMS at regular intervals of at least every three days with attention to the "Claims" tab,[133] in order to ensure the right to be heard. Thanks to TMS, the procedure is accessible to everyone and the cases are being dealt with in an efficient manner.

3. FIFA written proposals for the amount of compensation

Having the principle of procedural economy in mind, art. 13 of the Procedural Rules was introduced in August 2019 in order to speed up the decision-making process in training compensation and solidarity mechanism cases.[134]

In case the FIFA administration is in possession of a complete claim without complex factual or legal issues, a *written proposal*,[135] with a calculation of an amount owned in the case, will be submitted by the Player Status Department to the parties concerned.[136] The latter have 15 days to object, otherwise the proposal becomes automatically binding.[137] In case the parties disagree with the proposed amount and request a formal decision, the respondent has 5 additional days to argue rejection.[138] For the cases of rejected proposals, the latter is without prejudice to any formal decision by the competent body on the basis of art. 13 para. 2 of the Procedural Rules.[139]

4. Amendments of November 2019: abolition of the advance of costs

The latest amendments to the Procedural Rules entered into force on 1 November 2019[140] and brought along many positive changes to the proceedings of training compensation and solidarity mechanism. The most significant one was

[131] Essential is, *inter alia*, the following official documentation of the claimant's national association: player passport, start and end dates of the respective sporting seasons, registration date of the player, date of the transfer, category of the involved clubs (training compensation).
[132] See art. 5 para. 1 Annexe 6 of the Regulations and art. 5 para. 1 Annexe 6 of the Regulations.
[133] Art. 2 para. 1 Annexe 6 of the Regulations.
[134] FIFA Circular no. 1689 of 21 August 2019, 1.
[135] For further details regarding the form of the proposal see FIFA Circular no. 1689 of 21 August 2019, 2 et seq.
[136] Art. 13 para. 1 of the Procedural Rules.
[137] Art. 13 para. 1 of the Procedural Rules.
[138] Deadline granted to the respondent for an answer to the claim is always 20 days, see Art. 16 para. 10 of the Procedural Rules in connection with FIFA Circular no. 1694 of 30 October 2019, 1.
[139] FIFA Circular no. 1689 of 21 August 2019, 3.
[140] For an overview see FIFA Circular no. 1694 of 30 October 2019.

the abolition of the advance of costs. The impediment to submit a claim is therefore reduced, especially with regard to the smaller clubs.

With the objective to simplify the proceedings, the next change concerns the submission of a solidarity mechanism petition, which no longer has to specify the amount in dispute.[141] The claimant has to simply clarify the percentage claimed. Further amendment also concerns the filing of the claim: in case the FIFA administration does not receive a completed claim upon their request, the petition shall be deemed to have been withdrawn.[142]

In order to deal with the proceedings in a more efficient manner, stricter rules for time limits were introduced in the latest edition of the Procedural Rules. Not only has the request for a deadline extension be motivated,[143] but the FIFA administration has the discretion to grant shorter deadlines in order to avoid misuse of the provision.[144]

The last change concerns the request for grounds. Those will only be notified upon the payment of the procedural costs,[145] to avoid that grounds are requested only to postpone the actual payment of the training compensation or solidarity.

V. FIFA Clearing House

1. Concept of FIFA Clearing House

The FIFA Clearing House is the central element of the reform package of the transfer system endorsed by the Football Stakeholders Committee in September 2018.[146] The objective is to "*process transfers with the aim of protecting the integrity of football and avoiding fraudulent conduct*".[147] The entity of a Clearing House will centralise and simplify the payments associated with transfers, *e.g.* solidarity, training compensation, agents' commissions and, potentially, transfer fees. As consequence, transparency and good functioning of the system shall be ensured.

The FIFA Clearing House will be set up as a separate entity with oversight control of FIFA, which will have the ultimate power to decide and run the operations

[141] Art. 9 para. 1 lit. h of the Procedural Rules.
[142] Art. 9 para. 2 of the Procedural Rules.
[143] Art. 16 para. 11 of the Procedural Rules.
[144] FIFA Circular no. 1694 of 30 October 2019, 1.
[145] Art. 15 para. 4 of the Procedural Rules.
[146] FIFA Media release of 25 September 2018, accessed at www.fifa.com/about-fifa/who-we-are/news/football-stakeholders-endorse-landmark-reforms-of-the-transfer-system, last access on 25 November 2019; the respective reform package was approved by the FIFA Council on 26 October 2018.
[147] Ibid.

of the Clearing House entity. With regard to its function, the Clearing House shall not aim at gaining any profit from the assets and transactions controlled, and should keep financial interest gain at a minimum by reducing the accounting balance as possible.[148]

On 25 July 2019, FIFA announced first steps towards the establishment and operation of the FIFA Clearing House.[149] The establishment should become the reality on 1 July 2020, yet its operational start is yet to be determined.[150]

2. Impact on training compensation and solidarity mechanism

The first goal of the FIFA Clearing House is to automate the distribution and payments of training compensation and solidarity contributions. The FIFA Clearing House will act as an intermediary in these payments, receiving the complete amount from the engaging club and distributing this money to the training clubs.[151]

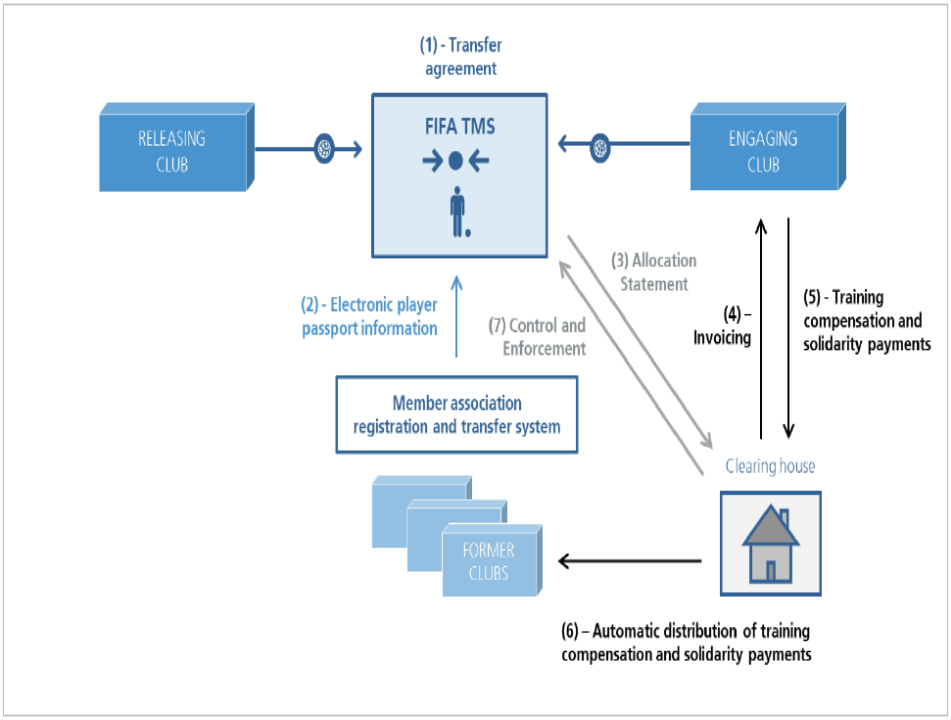
As seen through in the chapters above, the key pre-requisite for the calculation and the automatic distribution of training rewards is the comprehensive player passport. The recent implementation of the electronic registration systems in all member associations and the creation of the Electronic Player Passport was therefore essential for the functioning of the Clearing House.[152]

The following table describes the automated process and the roles of the responsible parties. For a better visualisation, see the illustration below.

[148] Ibid, 9.
[149] "Request for Proposal (RFP): Establishment and Operation of the FIFA Clearing House", 25 July 2019, available at www.fifa.com/about-fifa/who-we-are/news/fifa-takes-the-first-step-for-the-establishment-and-operation-of-the-fifa-cleari, last access on 25 November 2019.
[150] Ibid, 11.
[151] Ibid, 5.
[152] See under II. 3.3.2.

Process step	Description	Party in charge
Transfer agreement Player signs his first contract as professional	A transfer agreement to transfer a professional player between a releasing and an engaging club is entered and finalized in the FIFA TMS application. A player is registered for the first time as a professional. Subject to the conditions of article 20 and 21 of the RSTP.	Clubs and Associations
Preliminary Player Passport	All the registration information is retrieved from the member associations' registration systems and provided to FIFA to create the Preliminary Player Passport. This player passport is reviewed and validated, or disputed, by the relevant association(s), where the player was trained.	FIFA Administration
Allocation statement	Once this Preliminary Player Passport is validated, the payment instructions are communicated to the FIFA Clearing House, in the form of an allocation statement. This includes contact and banking information of the clubs and associations involved.	FIFA Administration
Invoicing	The FIFA Clearing House issues an invoice to the engaging club of the player according to the allocation statement. The FIFA Clearing House must ensure that the money paid by the engaging club is distributed to the training club(s) in compliance with national and international financial regulations, including applicable Anti-Money Laundering laws and checks for sanctioned countries. The FIFA Clearing House must perform follow-up and dunning processes in case of outstanding payments. Further enforcement steps will be performed by the FIFA Administration (see Control and enforcement step).	FIFA Clearing House
Debiting	The engaging club pays the amount as defined in the allocation statement for Training Compensation and Solidarity Contribution.	Engaging Club
Crediting	The FIFA Clearing House distributes the amount to the training club(s) according to the allocation statement. The FIFA Clearing House must confirm and validate the banking details of the involved club(s) and association(s) in order to perform these payments.	FIFA Clearing House
Control and enforcement	FIFA receives information about paid and outstanding payments from the FIFA Clearing House for further monitoring of the clubs' compliance with their obligations in respect to the regulations. FIFA will be in charge of imposing any sanctions in case of non-compliance.	FIFA Administration

Source: "Request for Proposal (RFP): Establishment and Operation of the FIFA Clearing House" from 25 July 2019, 6 et seq.



Source: "Request for Proposal (RFP): Establishment and Operation of the FIFA Clearing House" from 25 July 2019, 7.

Along with the recently implemented changes, the FIFA Clearing House bring along encouraging improvements with regard to the enforcement and distribution of training rewards.

THIRD PARTY OWNERSHIP

by *Stefano Malvestio*[*] and *Marcos Motta*[**]

1. Third party ownership: what is it?

1.1 Introduction

Third-party ownership ("TPO") refers to the circumstances in which a third party invests in the economic rights of a professional football player, potentially in order to receive a share of the value of any future transfer of that player.

While some claim that the practice is a danger to the game and that it causes players to lose control of their own sporting careers,[1] proponents argue that third-party ownership provides clubs with funds that they may otherwise never have access to and allows them to be more competitive.[2] Investment allows these

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[1] Representatives of FIFPro and UEFA have, in several occasions, expressed their opinion in favour of the outright ban on the practice of TPO in football. In this respect, see sub-section 1.6 of this Chapter on "The football stakeholders points of view".

[2] Notably practitioners such as Marcos Motta, founding partner of Bichara e Motta, Juan De Dios Crespo, partner heading the sports department at Ruiz – Huerta & Crespo, Ariel Reck, sports lawyer in Argentina, are among the most representative exponents of the current in favour of regulating the practice of TPOs rather than a complete ban of the same.

teams to keep their young talent for longer, participate in the transfer market and potentially recoup larger transfer fees than they might otherwise be able to do.

This contribution analyses TPO from a practical perspective, starting from a general overview of TPO and of the main related concepts such as federative and economic rights. After having looked into the main applicable regulations and jurisprudence[3] at an international level, we will address the basics of TPO contractual practices, as well as the main alternatives relied upon by practitioners following FIFA's decision to ban TPO. Finally, the last part of this chapter will be dedicated to the (so far unsuccessful) legal challenges brought to the validity of the TPO ban.

We also believe that this contribution comes at an interesting time for TPO, in light of FIFA's announced reform of its transfer system and of the amendments recently introduced to the definition of third-party in the FIFA Regulations on the Status and Transfer of Players ("FIFA RSTP" or "the FIFA Regulations"), which, in the authors' opinion, might bring the practice back into the spotlight of the international sports law forums.

In fact, after FIFA decided to outlaw it, the debate on TPO – previously focused on the *pros* and *cons* of the practice[4] and, consequently, on whether it was preferable as a matter of policy to regulate it or to ban it – had somehow "stagnated" (on the assumption that FIFA already had taken the decision to ban it), being essentially focused, at an academic level, on the challenges brought in different courts against the prohibition[5] and, at a practical level, on finding alternative contractual structures capable of reaching the same objectives pursued through the use of TPO without incurring in any regulatory breach.[6]

However, on 8 May 2019, FIFA published its 2019 Edition of the FIFA Regulations which, having entered into force on 1 June 2019,[7] amended the definition of "third party" pursuant to art. 18-ter FIFA RSTP excluding "players" from such a definition.

Although this represents to a certain extent, as we will see, a codification of existing jurisprudence of the FIFA Disciplinary Committee, the authors anticipate that the formalization into the FIFA Regulations of the players entitlement to hold their own economic rights is likely to have significant consequences at a practical level that might, as said, restore the importance of TPO in the field of sports law.

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[3] To the extent that it is available. See considerations in footnote 68 *infra*.

[4] See sub-section 1.5 of this Chapter on "TPO: Pros and Cons".

[5] See section 4 of this Chapter on "Challenges before national and international courts".

[6] For instance through representation contracts with "graduated" commission fees or via structures involving ownership or partnership with clubs. See Section 3.2 of this Chapter on "TPO and agents/intermediary' commissions".

[7] Art. 29, FIFA Regulations on the Status and Transfer of Players (2019 edition).

1.2 Definition of third-party ownership

"Third-Party Ownership" is the definition given to a business practice created by the football market to answer to financial needs of football clubs and players, combining them with the interest of investors, other clubs or agents to profit from potentially undiscovered or unexploited talent.

Although – as we will see in continuation – there's no single "TPO" model, TPO has been defined as:

"*The entitlement to future transfer compensation of any party other than the two clubs transferring the registration of players from one to the other, with the exclusion of the players' training clubs as per the solidarity mechanism in accordance with the FIFA Regulations on the Status and Transfer of Players*".[8]

TPO is therefore essentially an investment (whether financial or not) made by a party other than the club holding the player's registration into the transfer value of a player, which is eventually monetized in the moment of the player's transfer to a future club.

Defining this as "ownership" is, however, inaccurate. As a matter of fact, nobody, not even the club itself, "owns" a player. The club holds an employment relationship with the player which is subject to the FIFA (and national) rules on the protection of contractual stability.[9] Within this context, the "transfer fee" or "transfer value" of a player represents the amount which the club would be ready to accept in order to terminate such employment relationship by mutual consent.

The player is thus registered by its employer club with an association[10] and becomes eligible to play. Nothing of this constitutes a title of "property" or "ownership" rights over such player; for this reason, the practice has also been defined as "Third-party entitlement" ("TPE") or "Third-party investment" ("TPI").[11]

Such inaccurate association between the entitlement to a percentage of a future transfer fee and "ownership" rights over a player has, however, contributed to the creation of a negative public perception around the practice. For instance, in the context of the debates that led to FIFA's decision to ban TPO, the then UEFA General Secretary Mr. Gianni Infantino, used such association to negatively characterize TPO as follows:

"*Why is third-party player ownership an issue for football? Firstly, it raises ethical and moral questions. Is it appropriate for a third party to own the economic rights to another human being and then to trade this 'asset'? This*

[8] Centre de Droit et d'Economie du Sport (CDES), "Research on third-party ownership of players' economic rights (part II)", June 2014, 20.

[9] Chapter IV, articles 13-18, FIFA Regulations on the Status and Transfer of Players.

[10] See sub-section 1.3 of this Chapter on "Federative Rights".

[11] For ease of reference, we will maintain "TPO" in the course of this contribution.

would be unacceptable in society and has no place in football. Footballers (like everyone else) should have the right to determine their own future".[12]

The argument, in the authors' opinion, is scarcely grounded under a legal perspective since the consent of the player is always a required element of any football transfer.[13] However, similar statements exercised a comprehensible impact over stakeholders and decision-making bodies.[14]

Another common misconception is that the entitlement of the third-party to a share of the player's future transfer fee derives from a financial investment done by such third-party, which provides funding to a club interested in signing a player. This is actually only one of the variety of TPO models ("investment TPO") and the reason of said misconception is that this form of TPO is the most common in Europe, where clubs – mainly pertaining to the Spanish and Portuguese leagues – used TPO funds to acquire players they could otherwise not afford.

In South America, however, which is where the practice started and was most relied upon, other forms of third-party participation in the economic rights of players are recurrent. In certain instances, a percentage of the economic rights over a player is granted to agents, the player himself or his previous club, as a reward for indicating, registering or transferring a youth player with a new club ("recruiting TPO"). In other cases, TPO can be a financial mechanism used to retain a player rather than to transfer him. This happens when a club either receives an offer for a transfer of one of his players and cannot (by itself) sustain his financial expectations and thus either assigns him a portion of economic rights as an alternative way of (future) compensation, or sells such rights to a third-party, using the funds thus immediately obtained (without losing the player) to guarantee the player the salary increase he expected ("retaining TPO"). This may represent an important alternative bargaining tool for clubs with limited resources, allowing them to increase their capacity to compete at an international level against wealthier entities.[15]

Finally, TPO can also be a way for a club to obtain funding when it requires financial support, not in order to sign or maintain a specific player, but rather to comply with its ordinary financial obligations, and thus receives financial support from a third party in exchange for assigning a percentage of the economic rights of one or more players of its squad ("financing TPO"); this TPO model

[12] UEFA, "No place for third-party ownership", 19 March 2013, available at www.uefa.com/insideuefa/about-uefa/news/newsid=1931937.html?redirectFromOrg=true.

[13] As simply but brilliantly put by A. Reck, "*Otherwise, for clubs, owning 100% of a human being would be equally immoral*". A. Reck, "*The impact of the TPO ban on South American football*", in "*Debating FIFA's TPO ban: ASSER International Sports Law Blog symposium*", International Sports Law Journal (2016) 15:233–252.

[14] See sub-section 1.6 of this Chapter on "The football stakeholders points of view".

[15] Within this context, it is worth noting that critics of TPO allege that the mechanism is against contractual stability; this view, however, is based on the conception of TPO as an "investment" modality, and not necessarily backed by other forms of partnerships such as the "retaining TPO".

tends to be more financially risky for the club involved, likely to be in a poor bargaining position *vis-à-vis* the investor and thus possibly inclined to accept conditions which in the long-term might prove counterproductive.[16]

1.3 Federative Rights

The concept of "economic rights arising out of the federative rights"[17] has been, for years, the terminology used to define a party's entitlement to a percentage over the future transfer of an athlete in the countries where recourse to TPO was more recurrent.[18]

FIFA, who previously affirmed that concepts such as "federative rights" and "economic rights" did not or no longer exist,[19] now also makes use of such notions,[20] which have also been adopted in a number of CAS.[21]

The "federative rights" are the right of a club to hold the registration of a player with the relevant association; they arise out of the registration of a player at an association, which is necessary for the same to be eligible to play for a club[22]

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[16] On the other side, it appears that if a club is ready to enter into any such financial deal, this would be for a lack of sustainable alternatives and that thus simply abolishing TPO, without at the same time offering viable alternatives, does not *"per se"* necessarily protects the clubs' financial stability.

[17] In Spanish, "*derechos federativos derivados de los económicos*"; in Portuguese, "*direitos federativos derivados dos económicos*".

[18] Spain, Portugal, Mexico and all South-America.

[19] "FIFA stated that since September 1, 2001 the concept of 'federative rights' to players did no longer exist. It had been replaced by the principle of maintenance of contractual stability between the contracting parties, which entailed, in particular, that compensation for unilateral breach of contract without just cause was to be paid by the party in breach of contract in favour of the counterparty" in CAS 2008/A/1482 *Genoa Cricket and Football Club S.p.A v/ Club Deportivo Maldonado*.

[20] Art. 18-ter of the FIFA Regulations on the Status and Transfer of Players refers to "Third-party ownership of players' economic rights".

[21] For instance, the Panel in the awards CAS 2004/A/635 *RCD Espanyol de Barcelona v. Atlético Vélez Sarsfield* and CAS 2004/A/662 *RCD Mallorca v. Club Atlético Lanús* affirmed that:

"A Club holding an employment contract with a player may assign with the player's consent, the contract rights to another clubs in exchange for given sum of money or other consideration, and those contract rights are the so-called economic rights to the performances of a player.

This commercial transaction is legally possible only with regard to players who are under contract, since player who are free from contractual engagements – the so-called free agents – may be hired by any club freely, with no economic rights involved (…)"

"(…) in accordance of the above distinction, while a player registration may not be shared simultaneously among different clubs, a player can only play for one club at a time, the economic rights being ordinary contract rights, may be partially assigned and thus apportioned among different right holders. The finds implicitly confirmation of the lawfulness of contracts trading portions of economic rights in both the 1997 and 2001 FIFA Regulations".

[22] Art. 5, FIFA Regulations on the Status and Transfer of Players:

"1. A player must be registered at an association to play for a club as either a professional or an amateur in accordance with the provisions of article

2. Only registered players are eligible to participate in organised football".

and, for professional football players, only takes place pursuant to the conclusion of a written employment contract.[23]

As parties to the relevant employment contracts are, per definition, only a club and a player, and an employment relationship cannot be fractioned, federative rights are exclusively owned by a single football club[24] and are strictly linked to the employment contract signed between such club and the athlete: once such contract comes to an end, the federative rights of the club also expire and the player becomes a "free agent".[25]

1.4 Economic Rights

The "economic rights" represent the economic aspect of the "federative rights": when a club enters into an employment relationship with a player and then registers him with a national association, it earns the protection granted by the FIFA rules on contractual stability.

This protection entails that, without the club's consent, the player will not be entitled to enter into an employment relationship (and thus transfer his federative rights) with a new club. The previous club's consent is normally given against the payment of a "price" contractually pre-determined by the player and the club ("buy-out clause") or agreed between the two clubs in a transfer agreement ("transfer fee").[26]

The club holding the player's federative rights is thus entitled to demand a financial compensation in exchange for its consent to terminate the employment relationship with the player. This entitlement represents the "economic rights" over a certain football player.[27]

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[23] Art. 2 para. 2, FIFA Regulations on the Status and Transfer of Players:
"A professional is a player who has a written contract with a club and is paid more for his footballing activity than the expenses he effectively incurs. All other players are considered to be amateurs".

[24] CAS 2004/A/635 *RCD Espanyol de Barcelona v. Atlético Vélez Sarsfield*: "while a player registration may not be shared simultaneously among different clubs, a player can only play for one club at a time".
An exception to this was the Italian *"comproprietà"* (abolished by the FIGC as of the 2014/2015 season), where two football clubs shared in equal percentages the registration of a player for a season, at the end of which they had to agree on which of them would maintain the (entire) registration for the following year (and if unable to find an agreement, they had to present secret offers through an auction).

[25] "Free" from contractual engagements. See Art. 18 para. 3, FIFA Regulations on the Status and Transfer of Players: "A professional shall only be free to conclude a contract with another club if his contract with his present club has expired or is due to expire within six months. Any breach of this provision shall be subject to appropriate sanctions."

[26] See J.F. Vandellos Alamilla, "*Transfer agreements pursuant to the FIFA PSC decisions and the CAS jurisprudence*" in this book.

[27] In CAS 2004/A/635 *RCD Espanyol de Barcelona v. Atlético Vélez Sarsfield*, the Panel described this as follows: "A Club holding an employment contract with a player may assign with the player's consent, the contract rights to another clubs in exchange for given sum of money or other

This commercial transaction is legally possible only with regard to players who are under contract, since free agents – for whom, as seen above, no clubs holds the federative rights – may be hired by any club freely, with no economic rights involved.[28]

Clubs thus hold the economic rights over the players registered with them; however, they may, subject to the limitations now imposed by art. 18-ter FIFA RSTP, assign such economic entitlement to different right holders.[29]

For clubs, economic rights therefore represent a future potential credit which, under an accounting perspective, is an asset capable of being registered in its financial accounts.[30]

1.5 TPO: Pros and Cons

During the years preceding FIFA's decision to issue its outright ban on TPO, a consensus existed between stakeholders and practitioners that the TPO practice, as it existed and thus essentially unregulated, presented several problematic aspects and that a regulatory intervention by FIFA was desirable. However, long were the debates between those in favour of merely regulating the matter and those who understood that a complete ban was needed, with the discussions being centred on whether the positive aspects of TPO outweighed the negative ones.

The most evident benefit inherent to the TPO practice – characteristic of the financing and investment TPO models – is that of offering an alternative financial tool to clubs, permitting them to immediately dispose of financial resources while allowing them to maintain a player for a longer period of time.

The retaining and recruiting TPO models allow, on the other side, less powerful clubs to respectively maintain or acquire players they could otherwise not afford, permitting them to compete on the international transfer market with wealthier clubs.

Both of these aspects contribute to increase competitive balance and allow clubs with minor financial strength to remain competitive on the pitch.

Clubs can thus potentially have access to a wider number of deals and – if the players are chosen wisely and the conditions agreed with the third-party are

consideration, and those contract rights are the so-called economic rights to the performances of a player".

[28] Ibidem.

[29] CAS 2004/A/635 *RCD Espanyol de Barcelona v. Atlético Vélez Sarsfield*: "(…) in accordance of the above distinction, while a player registration may not be shared simultaneously among different clubs, a player can only play for one club at a time, the economic rights being ordinary contract rights, may be partially assigned and thus apportioned among different right holders. The finds implicitly confirmation of the lawfulness of contracts trading portions of economic rights in both the 1997 and 2001 FIFA Regulations".

[30] See, in this respect, sub-section 2.5 of this Chapter on "The UEFA's Financial FairPlay Regulations and TPO".

fair – possibly obtain a financial or sportive return that they would not have had without external support. Within this context, risk sharing is also an important feature of the TPO practice, allowing clubs to have a partner – for good or for bad – in a potentially risky investment on a certain player.

On the other side, TPO has been for years an unregulated market in which a few wealthy and powerful funds managed to acquire a certain preponderance and thus impose unbalanced financial and contractual conditions on indebted or ill-managed clubs. This has, in turn, given rise to a series of ethical and moral concerns that finally determined FIFA's decision to ban the practice.

The main – and most founded in the authors' opinion – argument is the risk of jeopardizing the clubs' independency in their decision-making process. Investors that put their money into a club will be willing to have a say over how such investment is managed. It is often also the case that the TPO holder is somehow linked to the player and/or his agent and will thus be in a position to exercise a certain pressure over the club. Similar circumstances may have a negative influence on the sporting aspects of the player-club relationship, which is highly undesirable.[31]

TPO opponents also argue that the practice puts in risk the fairness and integrity of the competitions, since third-parties may hold percentages in players registered with different clubs eventually playing against each other, and thus have an interest to push towards a certain result, although this argument seems a bit far-fetched, particularly when compared to other situations of potential conflict of interest accepted in the football industry.[32]

From a financial point of view, detractors allege that receiving funds from third-party investors would be an attractive strategy on the short term but counter-productive in the long one, since it would deprive clubs of their most meaningful resources (i.e. a share of their most talented players). Also, because of the potential return obtained by the investors, critics say that TPO would bring money out of the so-called "football family"; an argument against which TPO supporters mainly oppose that said third-parties are normally investors which may

[31] This is exactly what art. 18-bis of the FIFA Regulations aimed to avoid when introduced for the first time in 2007. However, the provision itself had an insufficient deterrent effect (which led FIFA to the decision of banning the practice as a whole), although it remains undetermined whether this was due to the inefficiency of the rule per *se*, or rather because of the lack of a proper enforcement.

See in this respect sub-section 2.1 of this Chapter on "Introduction" to the legal framework.

[32] For instance the case of the German club RB Leipzig and the Austrian club FC Red Bull Salzburg, admitted by the Adjudicatory Chamber of the UEFA Club Financial Control Body (decision AC-01/2017) to participate to the UEFA Champions League in spite of their common links with the company Red Bull.

Also, the case of Gazprom, a company sponsoring at the same time the competition organizer (UEFA) as well as several clubs participating in the same competition (Schalke 04, Red Star Belgrade and Chelsea FC), while owing another one (Zenit St. Petersburg).

reinvest into football, at least in part, their capital gains (for instance by acquiring other TPOs).[33]

Finally, the opacity of certain TPO arrangements and the unclear and undisclosed origin of the money invested has led to criticism and to the association of the TPO practice to money laundering and tax evasion; an argument worth of consideration which, however, may in the authors' opinion be raised with respect to a variety of other football-related transactions, such as investments into clubs or sponsorships agreements.[34]

1.6 The football stakeholders points of view

FIFA's regulatory approach to ban TPO was based upon the findings of two independent studies commissioned by FIFA in order to gain further information on the topic,[35] as well as on the results of the meetings of a dedicated working group created by FIFA under the auspices of the FIFA Players' Status Committee, composed of representatives of the football community at confederation, member association, league and club level, as well as by representatives of FIFPro, the organisation representing all professional football players ("the Working Group").

FIFA states that on 23 September 2014 the Players' Status Committee received an update from the chairman of the Working Group, who outlined the tendency of the Working Group to support a ban on TPO with a transition period. On 26 September 2014, the FIFA Executive Committee took the decision of principle to ban TPO.

This seems contradicted by the minutes of the only meeting held by the Working Group on 2 September 2014 before the FIFA Executive Committee's decision, where the conclusions were that "given the wide-ranging views of the stakeholders, due to the varied global relevance of TPO, there was no unanimity regarding one specific regulatory approach". As a matter of fact, the positions of the different football stakeholders were and are not, even today, unanimous.

UEFA and FIFPro have taken a clear stance in favour of the outright ban of TPO. Already in 2012, UEFA had introduced in its Club Licensing and Financial Play Regulations provisions which, while regulating economic rights for accounting purposes within the context of UEFA clubs licensing for UEFA competitions, had the effect of discouraging recourse to TPO in order to balance

[33] Another relevant consideration is that even millionaire salaries paid to managers, footballers and club executives do not necessarily have a positive effect on the rest of the football family, when not redistributed to those on the lower scale.

[34] In essence, opacity seems not to be necessarily a feature of TPO itself, appearing rather due, first, to a lack of regulation of the matter and, second, to the predominance of certain TPO funds with unclear and undisclosed funding in the market.

[35] FIFA, "Third-party ownership of players' economic rights: Background information", April 2015, available at https://img.fifa.com/image/upload/w1tltvr7omt2mqt1cobd.pdf.

club's financial books.[36] On 11 December 2012, the UEFA Executive Committee took a firm stance on TPO, deciding that it should be prohibited as a matter of principle. For UEFA, TPO "is seen in particular as potentially distorting the integrity of competitions, and leads to money being taken out of the game by parties who invest in players and who profit from transfers of these players as a result".[37]

Similarly, FIFPro's official position is "against this form of trade in players" since it "hinders the player's freedom, who is dependent on this investor in his attempt to find a new club". For FIFPro, TPO is undesirable because a player "can only change clubs with the approval of this investor,[38] and the latter wants to gain as high a return as possible for his 'investment'".[39]

The European Club Association ("ECA") – also due to its membership structure, which includes associated clubs interested in recurring to the TPO practice – took a more balanced approach. As such, whilst ECA agreed that TPO practices may have a number of negative implications, it also recognized the complications and consequences of the TPO ban to a variety of member clubs.[40] In order to better understand how TPOs operate, the ECA commissioned KPMG to prepare an independent study ("Project TPO Report");[41] at the meetings of the TPO Working Group, ECA's position was that it would prefer regulation instead of a complete ban.

Similarly, the European Leagues also includes affiliated members with contrasting views on the matter:[42] the English Premier League banned the practice already in 2008;[43] on the other side, the Spanish and Portuguese Leagues are openly in favour of regulating TPO and, for this reason, they even lodged a complaint with the European Commission, alleging that, by banning the practice, FIFA would be in breach of European Union competition law.[44]

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[36] In this respect, see sub-section 2.5 of this Chapter on "The UEFA's Financial FairPlay Regulations and TPO".

[37] UEFA, "Call for ban on third-party ownership", UEFA, 11 December 2013, available at https://de.uefa.com/insideuefa/about-uefa/executive-committee/news/newsid=1906435.html.

[38] Legally speaking, said affirmation is inaccurate, since the only required approval for a transfer between clubs is, beyond that of the clubs involved, that of the player himself.

[39] Following FIFA's decision not to consider the player as a third-party in the sense of art. 18-ter of the FIFA Regulations, it will be interesting to see whether FIFPro will maintain its strict position in favour of a "blanket" ban of the TPO practice, or whether it will adopt a softer stance, at least in those cases where economic rights are assigned to the player himself.

[40] European Club Association (ECA), "Third-party ownership study", 11 December 2013, available at www.ecaeurope.com/news/third-party-ownership-study/.

[41] The KPMG study, available at www.ecaeurope.com/news/third-party-ownership-study/, intended to purely present an overview of the situation of the TPO practice in European football, and not to represent a judgment as to whether or not it would be beneficial for the football clubs to adopt it as a business model.

[42] At the meetings of the TPO Working Group, the representative of the leagues Mr. Javier Tebas said to be in favour of "regulating TPI" as it was considered a "very useful tool for small- and medium-sized clubs to finance their operations". However, to the best of the authors' knowledge, this does not seem to represent the position of the European Leagues as an association as such.

[43] See sub-section 2.1 of this Chapter on "Introduction" to the legal framework.

[44] See sub-section 4.3 of this Chapter on "The proceedings before the European Commission".

Other position of football stakeholders as reported in the minute of the meetings of the Working Group: (i) Asian associations: in favour of banning TPO in the long term, even though an immediate ban would not be the answer; (ii) South American and North and Central American associations: TPO ban not necessary, as TPO is a useful tool that can help developing club to finance their operations; (iii) CONMEBOL: TPO needs regulation but it's an opportunity to develop football and a total ban would affect the resources of the clubs; (iv) CAF: in favour of a total ban since, due to TPO, significant amounts of money were flowing out of the game; (v) Portuguese and Brazilian club representatives: in favour of regulating TPO rather than prohibiting it; (vi) English club representative: TPO affects football and it was not unthinkable that the economic power in football would gradually shift away from clubs towards investment funds.

Finally, even though not participating as a formal member to the meetings of the TPO Working Group, the European Football Agents Association (EFAA) expressed its position against banning TPO.[45]

2. The legal framework

2.1 Introduction

FIFA's current rules on third-party ownership are the result of a long regulatory evolution, which followed years of discussions, reforms and proposals.

The FIFA Regulations on the Status and Transfer of Players, which govern "the status of players, their eligibility to participate in organised football, and their transfer between clubs belonging to different associations",[46] were introduced for the first time in 1991 and did not include any provision on TPO until their 2008 edition.

As it often happens, a high-profile case was needed to first draw the attention of the international football community on the need for regulation. This happened in 2006, in the context of the transfers of the Argentinean players Carlos Tevez and Javier Mascherano, whose economic rights were held by third-parties, from Sport Club Corinthians Paulista (Brazil) to West Ham United Football Club (England).

At the time, the regulations of the English Premier League only prohibited "undue influence" by third-party investors,[47] but not the TPO practice itself. However, the contracts entered into between the investors and West Ham blatantly breached such regulations, granting the third-parties essentially a complete control over the club's choices in respect of the two players. The Premier League thus

[45] Robert Jansen, EFAA Chairman: "If you have third party ownership as long as it's in control of the club, then the club has to decide what will happen. There is nothing wrong with that... When you take everything out, you destroy Portugal, Spain, Holland, Belgium. You destroy entire competitions".

[46] Art. 1 para. 1, FIFA Regulations on the Status and Transfer of Players.

[47] See The F.A. Rule18.

investigated the matter and finally imposed a sanction of a GBP 5,5m fine upon West Ham[48] for breaching "the duty of utmost good faith" owed by clubs to one another under its regulations, for failing to declare the contracts and for the undue influence exercised by the third-parties over the players.

It was, however, shocking for the football community as a whole to learn that a high-profile Premier League club had waived its right to have a say over the future of two of its main players to some third-parties, the identity of which was unclear. The repercussion of the case was such that it led, at a national level, the English Premier League and the FA to amend their regulations and introduce a complete ban on TPO effective as of the 2008/2009 season and, at an international one, FIFA to introduce in its regulations a provision which reflected those already in place in England forbidding the exercise of an "undue influence" over the club's policies.

As such, in 2007, FIFA adopted article 18-bis FIFA RSTP which stated, in its first version (in force from 1 January 2008 until 31 December 2014):
"*1. No Club shall enter into a contract which enables any other party to that contract or any third party to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams.*
2. The FIFA Disciplinary Committee may impose disciplinary measures on clubs that do not observe the obligations set out in this article".

The introduction of art. 18-bis, while not representing a ban of third-party ownership – which immediate introduction was hardly feasible since the FIFA Regulations establish binding rules applicable at a global level and thus to all associations affiliated to FIFA – intended to prevent "Tevez-like" cases, outlawing those situations where third parties were able to "influence" the policies of a club and thus compromise a club's independence to take its own decisions in employment and transfer-related matters.

Indeed, FIFA noted in its 2008 Activity Report that:
"*In the past, certain third parties have been able to influence transfers because they "owned" the rights to a player, either in whole or in part. Under the new regulations, clubs are no longer allowed to grant third parties a say in transfer agreements or professional contracts, thus denying them the opportunity to influence the autonomy and internal operations of the clubs or the performance of the teams concerned*".[49]

In the following years, recourse to TPO became more and more frequent and it was often the case that third-parties would exercise, whether formally or not, significant influence over the club's choices in spite of the prohibition included into art. 18-bis FIFA RSTP.

[48] The only party involved in the transaction affiliated to the Premier League and therefore obliged to respect its rules.
[49] FIFA Activity Report 2008, available at http://resources.fifa.com/mm/document/affederation/administration/01/53/04/34/ar08_e.pdf.

In January and August 2013 FIFA mandated, first, the International Centre for Sports Studies (CIES) and then the Centre de Droit et d'Economie du Sport (CDES) to conduct two studies on third-party ownership of players' economic rights. The second CDES Report concluded that it seemed very important to consider an alternative TPO regulatory framework and suggested a three-stage procedure, consisting of:

1. The identification of the potential alternative regulatory approaches;
2. The evaluation of the alternative regulatory approaches by football stakeholders; and
3. The analysis of economic implications of such approaches.

FIFA thus instituted the TPO Working Group, whose conclusions, as seen above, pointed towards the lack of an existing consensus over a certain regulatory approach. This notwithstanding, on 25 September 2014, the FIFA Executive Committee determined that article 18-bis alone was not enough to deter third party influence in organized football and thus took the decision of general principle that TPO shall be banned with a transitional period, referring the matter back to the Working Group for the relevant technical regulations to be drafted.

The Working Group then met on 30 October 2014, discussed a set of regulations and adjourned the meeting for 22 January 2015 for further discussion on the specific wording and extent of the rules. [50]

On 18 and 19 December 2014, the FIFA Executive Committee approved new provisions, addressed to the members of FIFA on 22 December 2014 through Circular 1464, that: *(i)* defined "third party"; *(ii)* slightly amended article 18-bis; and *(iii)* added article 18-ter to the Regulations.

2.2 The concept of "third-party"

The first step in the legal analyses of the rules on "third-party" influence and "third-party" ownership – to which articles 18-bis and 18-ter FIFA RSTP are respectively dedicated – is that of defining who is a "third-party" (and who is not).

The FIFA Regulations define "third party" as "*a party other than the player being transferred, the two clubs transferring the player from one to the other, or any previous club, with which the player has been registered*".[51]

According to the text of Regulations, a third-party is therefore any natural or legal person other than:

I. the player's new club in the context of a transfer (i.e. the "buying club");
II. the player's old club in the context of a transfer (i.e. the "selling club");
III. any other previous club, with which the player has been registered; and
IV. the player.

[50] The meeting, however, never took place, since it became moot after FIFA issued Circular n. 1464 on 22 December 2014.

[51] Para. 14 of the "Definitions" section of the FIFA RSTP. Other versions of the RSTP, prior to the 2015 edition, did not contain any definition of a third party.

As to the first two categories of clubs, it was never disputed that the two clubs transferring the registration of a player between each other cannot be considered as a third-party. Clubs belonging to the third category were excluded from the definition of third-parties since they include:

– clubs entitled to solidarity mechanism pursuant to art. 21 of the FIFA Regulations; and
– clubs which, having transferred the registration rights of a player to another club, are granted the right to participate to part of the transfer compensation in case of a subsequent transfer of the player ("sell-on clauses").

FIFA thus considered said situations as worth of legal protection and decided to exclude them from the definition of "third-party". In particular, while similar to TPO deals for certain aspects,[52] the inclusion of sell-on clauses in transfer agreements maintain the circulation of money exclusively within the football family and allow, for instance, a club that has contributed to train a player to transfer him while retaining a potential reward in the event that his value would increase in the future.

As said, except for the categories listed above, all natural and legal persons are included in the concept of third-parties: this includes, in particular, intermediaries and football clubs not expressly excluded from the definition. Also, the provision did not in its original version mention the players, which, according to a literal interpretation that was initially offered also by FIFA's representatives, were to be considered as included in the prohibition.[53]

This first interpretation clashed against considerations of logical, legal and regulatory nature. From a logical point of view, it felt awkward to treat the player as a "third-party" himself, whose consent is always a *sine qua non* condition for any transfer deal. Also, many of the reasons that motivated FIFA's decision of prohibiting TPO do not apply to footballers: for example, income earned by players does not (in principle) leave the "football family", there is (always in principle) no risk of external interference and no issues arise as to the opacity of the transaction or the origin of the money.

Secondly, the national legislation of many countries entitles the player – by law or collecting bargaining agreement – to a percentage of the amount paid by the new club in the case of his transfer.[54] Art. 18-ter FIFA RSTP would have

[52] See sub-section 3.3 of this Chapter on "TPO, sell-on clauses and bridge clubs".

[53] See answer given by Mr. O. Ongaro - former FIFA Head of Players' Status Committee - in a Q&A with the European Professional Football Leagues: "*Possibility of players to have a percentage of the of future transfer fee? Player able to own part of his economic rights? No, a player cannot have a percentage of his future transfer fee, because the player is considered as third party under the new regulations. Reasoning: If the player owns e.g. 20% of his future transfer, the player will most likely not stay with the club until the end of the contract, which is against the fundamental principle of contractual stability (but lump sum should be in line with the regulations. To this end, see above (2.3) example of payment to intermediary in relation to a future transfer)*".

[54] In Argentina the minimum percentage is 15% according to art. 8 of the CBA 557/2009 (http://infoleg. mecon.gov.ar/infolegInternet/anexos/155000-159999/158453/norma.htm), in

therefore been partially inapplicable in all such countries (since in breach of mandatory national law) if players were to be included in the concept of "third-party" in light of the FIFA Regulations.

Thirdly, the interpretation was hardly compatible with the own wording of the regulations, for the reason that art. 18-ter FIFA RSTP prohibits clubs and players from assigning a player's economic rights to a third-party, which seemed to indicate that the player himself could, first, hold such rights (as it otherwise would have made no sense forbidding him to further assign them to a third-party).

Conversely however, considerations of a systematic nature spoke in favour of maintaining players within the definition of third-party, since excluding them would bear the risk of re-introducing a wide spread use of the TPO through the "back door".[55]

The FIFA Disciplinary Committee settled the question by deciding, in four decisions taken on June 2018, that players are not to be considered a "third party" in the sense of definition 14 and art. 18-ter FIFA RSTP. The cases involved the clubs SV Werder Bremen (Germany), Panathinaikos FC (Greece), CSD Colo-Colo (Chile) and Club Universitario de Deportes (Peru), which had entered into agreements with some of their respective players that entitled said players to receive a specific compensation – a lump sum or a percentage – in case of their future transfer to another club.

A FIFA press release issued on 26 June 2018 explained that the amounts promised to the players were "seen as part of the remuneration due to the players under their employment relationships with their clubs". For this reason, "the Disciplinary Committee found that the players could not be considered a third party with respect to their own future transfers and, therefore, the fact that they may receive a specific compensation – regardless of it being a lump sum or a percentage – in relation to their future transfer to a new club is not considered a violation of FIFA's rules on third-party ownership of players' economic rights".[56]

Paraguay 20% for international transfers, art. 12 law 5322 from 29 October 2014 www.escritosdederecho.com/2014/11/ ley-5322-del-29-10-2014-estatuto-del-futbolista-profesional.html), in Uruguay 20%, art. 34 of the Professional Footballers Statute (www.mutual.com.uy/index.php?option=com_ content&view=arti cle&id=49&Itemid=83) in Ecuador 15%, Chile 10% law 20.178 (www.sifup.cl/wp-content/uploads/2014/12/Ley-20178-Esta tuto-Laboral-del-Futbolista-Profesional-Chileno.pdf), and Colombia 8% art. 14 Colombian Players Status Regulations (http://fcf.com.co/ index.php/la-federacion-inferior/normatividad-y-reglamento/ 158-esta tuto-del-jugador).

A. Reck, "*The impact of the TPO ban on South American football*", in *"Debating FIFA's TPO ban: ASSER International Sports Law Blog symposium"*, International Sports Law Journal (2016) 15:233–252.

[55] See the authors' considerations included into the "Conclusion" of this Chapter.

[56] FIFA, "Latest decisions of the FIFA Disciplinary Committee in relation to third-party rules", 26 June 2018, available at www.fifa.com/governance/news/y=2018/m=6/news=latest-decisions-of-the-fifa-disciplinary-committee-in-relation-to-third-party-r.html.

On 15 March 2019, the FIFA Council approved the 2019 edition of the FIFA Regulations, which entered into force on 1 June 2019 and formally excluded "the player being transferred" from the definition of "third-party".[57]

Interestingly, FIFA's press release qualified the amounts as "remuneration" due to the players; a legal qualification that might have implications under a tax perspective, although it remains to be seen whether tax authorities would equally consider such payments as remuneration. Also, according to a literal interpretation of the provision, the player would seem to be entitled to hold such economic rights as a natural person only, whereas practice suggests that such rights are often assigned, for tax purposes, to a company (eventually fully owned by the player) and it may not be excluded that considerations of a different legal nature may lead to a more extensive interpretation.

2.3 Art. 18-bis FIFA RSTP and relevant jurisprudence

Article 18-bis of the FIFA Regulations aims at preventing clubs from entering into agreements which would grant third parties the possibility to "influence in employment and transfer-related matters" and to thereby influence the independence of a club, its policies or the performance of its teams.

The provision, included for the first time into the 2008 edition of the FIFA Regulations, is binding at the national level[58] and was slightly amended by Circular n. 1464 (published on 22 December 2014) and then included, in its current version, into the 2015 edition of the FIFA Regulations, which entered into force on 1 April 2015[59] and, having remained unchanged since, reads as follows:

"*1. No club shall enter into a contract which enables the counter club/counter clubs, and vice versa, or any third party to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams.*

2. The FIFA Disciplinary Committee may impose disciplinary measures on clubs that do not observe the obligations set out in this article".

The article therefore contains a prohibition of a disciplinary nature which is directed to clubs (only);[60] on the other side, and as we will see more in detail in continuation, a violation of art. 18-bis FIFA RSTP does not necessarily *per se* entail the invalidity of the underlying contract. The competence to rule on violations of art. 18-bis FIFA RSTP rests with the FIFA Disciplinary Committee and, in

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[57] The 2019 FIFA Regulations on Status and Transfer of Players are available at https://resources.fifa.com/image/upload/regulations-on-the-status-and-transfer-of-players-june-2019.pdf?cloudid=ao68trzk4bbaezlipx9u.

[58] Art. 1 para. 1 lit. a), FIFA Regulations on the Status and Transfer of Players.

[59] Subject to what stated *infra* in sub-section 2.4 of this Chapter on "Art. 18-ter FIFA RSTP and relevant jurisprudence".

[60] Art. 18-bis is thus not applicable to players, which means that no sanctions would be imposed on a player who entered into an agreement granting a third-party influence in the terms of art. 18-bis.

appeal, with the FIFA Appeal Committee and then the Court of Arbitration for Sports (CAS).

The rationale of the prohibition included into art. 18-bis is mainly to counter what we have seen is one of the main potential negative features of third-party ownership, the external interference, often for mere financial and not sporting-related purposes, of third-parties into the player-club relationship. With this, the provision aims at preserving contractual stability, while protecting players' and clubs' freedom to freely negotiate the terms of their contractual relationships.

The original version of the article, included into the 2008 Edition of the FIFA Regulations, only prohibited clubs from "assigning" to any other party to that contract or any third party the ability to influence in that club employment or transfer policies (i.e. the prohibition was directed against the "influenced" club), but no sanction was applicable to the club eventually exercising such influence.

However, FIFA Circular n. 1464 of 22 December 2014 amended this by including the wording "and viceversa" into the current version of the article, which since 1 May 2015 also provides for sanctions against the "influencer" club.[61]

In essence, a violation of art. 18-bis FIFA RSTP is triggered when (i) a club enters into (ii) an agreement with (iii) a counter-club(s) or a third-party to that agreement (*or viceversa*) granting the latter (iv) the ability to influence in the context of employment and transfer-related matters and has an impact on the club's independence, policies or the performance of the teams.

The key-aspect for the imposition (or not) of disciplinary sanctions is therefore the determination of whether an ability to exercise an undue "influence" exists or not. The FIFA Regulations do not define the concept of "influence", which, for being rather broad and generic, demands to be construed in accordance with the Swiss law principles applicable to the interpretation of the regulations of a sports association.[62]

To the best of the authors' knowledge, the only reported jurisprudence of the CAS on the matter is the award CAS 2017/A/5463 *Sevilla Fc. v. FIFA*.

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[61] For instance, an "influencer" club would be, in the case of a loan, the loaning club contractually entitled to determine (or influence) the number of times that the loaned player is fielded; or, in the case of definitive transfer agreement with a sell-on clause, the selling club contractually entitled to determine (or influence) the conditions of the future transfer of the player to a third-club.

[62] "The interpretation of the statutes and rules of a sport association has to be rather objective and always to start with the wording of the rule, which falls to be interpreted. The adjudicating body will have to consider the meaning of the rule, looking at the language used, and the appropriate grammar and syntax. In its search, the adjudicating body will have further to identify the intentions (objectively construed) of the association which drafted the rule, and such body may also take account of any relevant historical background which illuminates its derivation, as well as the entirely regulatory context in which the particular rule is located", CAS 2010/A/2071, at para. 20. See also CAS 2008/A/1673, para. 33; CAS 2009/A/1810; CAS 2009/A/1811, para. 73; Swiss Federal Tribunal, decision 87 II 95, at para. 3; Swiss Federal Tribunal, decision 114 II 193, at para. 5.a; decision of the Swiss Federal Court of 3 May 2005, 7B.10/2005, at para. 2.3; decision of the Swiss Federal Court of 25 February 2003, at para. 3.2; P. Zen-Ruffinen, *Droit du Sport*, Zurich/Basel/Geneva 2002, at para. 168.

The case revolved around, from one side, whether art. 18-bis FIFA RSTP is compatible with European Union and Swiss law and, from the other, the interpretation of art. 18-bis FIFA RSTP and whether the provision had been breached by Sevilla Fc ("Sevilla") in the circumstances of the matter.

In the case, Sevilla Fc and the company Doyen Sports Investment Ltd ("Doyen"), had entered into agreements whereby Doyen had *inter alia* acquired 50% of a player's[63] economic rights in exchange for financing, having also agreed on:

– The transfer fee that Sevilla would offer to FC Lens for the player (EUR 3,000,000);
– The economic and employment conditions that Sevilla was going to offer the player, including his salary and the duration of his contract;
– The commission that Sevilla had to pay to the player's agent; and
– Certain conditions under which Sevilla would have to transfer the player in the future.

Sevilla, which had been sanctioned by the FIFA Disciplinary Committee with a CHF 55,000 fine for breaches of arts. 18bis and 4.2 of Annexe 3 of the FIFA RSTP[64] since the agreement with Doyen granted the latter "an effective ability to influence the club",[65] appealed the decision to the CAS.

The CAS dismissed Sevilla's arguments of an alleged incompatibility of art. 18-bis FIFA RSTP with EU and Swiss law in light of the specificity of sport mentioned in art. 165 of the Treaty on the Functioning of the European Union ("TFUE")[66] and of previous decisions of the CAS and the Swiss Federal Tribunal ("STF").[67] On the merits of the violation, the Panel interpreted art. 18-bis in the sense that, for a sanction to be imposed under such provision, the agreement entered into by the club shall have a specific and effective binding content granting to the third-party (or counter-club) real capacity to produce effects or predominate over the club's independence, even though it is not necessary for the influence to have been materially exerted.

Having found that Doyen could genuinely influence Sevilla regarding aspects such as the transfer fee that was payable to FC Lens, the conditions under which the player could be released and the employment conditions of the player, the Panel dismissed the appeal and confirmed FIFA's decision.

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[63] Geoffrey Kondogbia.

[64] Art. 4.2, Annexe 3, FIFA Regulations on the Status and Transfer of Players: "Clubs must use TMS for international transfers of players".

[65] Decision subsequently confirmed by the FIFA Appeal Committee on 28 February 2017 with the consideration that "the Contract signed by the Club and Doyen granted the latter the ability to significantly influence Sevilla FC, which was not free to make decisions independently in a variety of scenarios".

[66] "The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function".

[67] See Section 4 of this Chapter on "Challenges before national and international courts".

In particular, the Panel found that Doyen could exercise influence over *(i)* transfer-related matters, since Sevilla could not transfer its 50% of the player's economic rights without Doyen's prior consent and, if an offer for at least 6 million euros was received, Sevilla was obliged to either accept it and transfer the player, or to pay to Doyen 50% of the offered amount; and *(ii)* employment-related matters, in light of the contractual prohibition for Sevilla to reduce the player's buy-out clause (considered as a key aspect of a player's employment contract) and of Sevilla's obligation to buy Doyen's share of the player's economic rights if the club significantly improved the player's employment conditions.

Conversely, the Panel specifically listed certain clauses, which it found to be art. 18-bis compliant since they did not grant Doyen the ability to influence on Sevilla's independence, such as *(i)* Sevilla's obligation of insuring the player against death or permanent invalidity; *(ii)* Sevilla's obligation of informing Doyen about any significant event related to the player's health or physical condition; and *(iii)* the authorization granted to Doyen to promote the transfer of the player through intermediaries.

Other than the award in CAS 2017/A/5463, decisions taken by the FIFA Disciplinary Committee (and, in appeal, by the FIFA Appeal Committee) in other cases are not published;[68] the only information made available to the public by FIFA is the name of the club involved, the violation committed and the sanction imposed;[69] as such it is only possible to comment on them by means of a generic overview.

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[68] A policy that seems undesirable when the publication of disciplinary decisions would help increasing knowledge on the subject and give to the stakeholders indications on which kind of conducts are tolerated and on which are, on the contrary, considered as serious violations.

[69] List of the sanctions imposed (or confirmed by) the FIFA Disciplinary, FIFA Appeal Committee and CAS in relation to a breach of art. 18-bis of the FIFA RSTP (exclusively; sanctions imposed in relation to a breach of art. 18-bis *and* 18-ter of the FIFA RSTP will be analysed in sub-section 2.4 "18-ter FIFA RSTP and relevant jurisprudence" *infra*):

Santos Futebol Clube (Brazil): CHF 75,000 fine (FIFA Disciplinary Committee); violation: entering into a contract that enabled third parties to influence the club's independence in employment and transfer related matters, failing to declare mandatory information in the International Transfer Matching System (iTMS) and failing to cooperate with an investigation (2016).

SE Palmeiras (Brazil): warning and CHF 50,000 fine (FIFA Disciplinary Committee); violation: entering into a contract that enabled the other party to the contract, LDU Quito, to influence the club's independence in employment and transfer-related matters (2016).

Sevilla (Spain): warning and CHF 55,000 fine (CAS); violation: entering into a contract that enabled a third party to influence the club's independence in employment and transfer related matters and failing to enter mandatory information into the iTMS (2018).

Rayo Vallecano (Spain): CHF 55,000 fine (FIFA Disciplinary Committee); violation: entering into 2 contracts that enabled a third party to influence the club's independence, failing to record an existing third party ownership agreement in ITMS and failing to enter correct and mandatory information into the ITMS (2018).

RD Celta De Vigo (Spain): CHF 65,000 fine (FIFA Disciplinary Committee); violation: entering into a contract that enabled SL Benfica to influence the club's independence (FIFA RSTP, 2012 edition) and misusing ITMS as a negotiation tool. (2018).

It is remarkable that, even though certain decisions relate to facts which took place when the old version of art. 18-bis FIFA RSTP was into force, all of them were passed after FIFA issued Circular n. 1464 of 22 December 2014 and the entry into of the new provisions on TPO.

This is partly due to the fact that, with the introduction of art. 18-ter, FIFA obligated all clubs to upload into the FIFA TMS any pre-existing TPO agreements by 30 April 2015,[70] thereby increasing the chances of FIFA detecting a possible violation of the regulations. On the other side, the complete lack of any sanction imposed under the old edition of art. 18-bis between 2008 and 2015 suggests an insufficient concern or scarce resources allocated by FIFA to the enforcement of the provision during that period of time.[71]

Available jurisprudence indicates that a violation of art. 18-bis FIFA RSTP is not *per se*[72] considered as a serious infringement by the FIFA Disciplinary Committee; sanctions applied only include fines – ranging from CHF 30,000 to CHF 150,000 – and warnings, whereas no transfer bans were ever applied for a violation of art. 18-bis of the FIFA RSTP (alone).

Case-law also confirms that, under the original version of art. 18-bis FIFA RSTP, only the "influenced" club – and not the "influencer" – could be sanctioned. For instance, in the case of the sanction imposed in 2018 against the Spanish club RD Celta De Vigo, all charges against SL Benfica in relation to a violation of art. 18-bis FIFA RSTP were dismissed given that SL Benfica did not grant RC Celta de Vigo any ability to influence its independence in employment and transfer-related matter.[73]

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Sporting CP (Portugal): CHF 110,000 fine (FIFA Disciplinary Committee); violation: entering into 2 contracts that enabled a third party to influence the club's independence, failing to record an existing third-party ownership agreement in iTMS and failing to enter a correct instruction and correct and mandatory information in iTMS (2018).

SL Benfica (Portugal): CHF 150,000 fine (FIFA Disciplinary Committee); violation: entering into two contracts which enabled a third party to influence the club's independence (2018).

CSD Colo-Colo (Chile): warning and a CHF 40,000 fine (FIFA Disciplinary Committee); violation: entering into a contract that enabled a counter club (i.e. Universitario de Deportes) to influence the club's independence and failing to enter the correct instructions in iTMS (2018).

Universitario de Deportes (Peru): warning and a CHF 30,000 fine (FIFA Disciplinary Committee); violation: entering into a contract that enabled it to influence a counter club's independence (i.e. CSD Colo-Colo) (2018).

FC Porto (Portugal): CHF 50,000 fine (FIFA Disciplinary Committee); violation: entering into a contract that enabled third parties to influence the club's independence and policies on transfer related matters and failing for provide correct data in the iTMS in relation to a transfer of a player (2019).

[70] See in this respect sub-section 2.4 of this Chapter on "Art. 18-ter FIFA RSTP and relevant jurisprudence".

[71] Investigations may have been opened, for instance, on the basis of the numerous media reports of undue influence by third-parties (e.g. newspapers reporting that "investor X refused the transfer of the Player Y to club Z").

[72] I.e.: when not in conjunction with a violation of art. 18-ter FIFA RSTP – see footnote n. 92 *infra*.

[73] The decision was passed on the basis that art. 18-bis of the 2012 edition of the RSTP (unlike the current edition) did not provide for any legal basis to sanction a club that acquired the ability to

Decisions based on the amended version of art. 18-bis FIFA RSTP indicate that FIFA, even after introducing the possibility of imposing sanctions against the "influencer" club, still considers more serious the violation committed by the "influenced" one. As such, in the case involving the Chilean club CSD Colo Colo ("influenced" club) and the Peruvian club Universitario de Deportes ("influencer" club), the former was imposed a higher sanction than the latter.

All in all, as said, the sanctions imposed are relatively mild and possibly insufficient to deter clubs from entering into agreements prohibited by art. 18-bis FIFA RSTP,[74] at least when a first violation is concerned.[75]

In addition, and as said above, a contract containing provisions in violation of art. 18-bis FIFA RSTP is not necessarily null and void or ineffective, since the article in itself only provides for consequences of disciplinary nature.[76]

This is mainly for three reasons. First, "third-parties" are normally not (direct or indirect) FIFA members and thus are not bound to respect the FIFA regulations (or regulations issued by national associations).[77] Second, the contract between the club and the third-party is one of a commercial nature, where parties are at freedom to establish the applicable law, which will not necessarily include the FIFA Regulations: assuming that Swiss law applies,[78] a contract is only null and void if it is either impossible to perform, illicit or contrary to good customs.[79] Third, even when the FIFA Regulations would be applicable, not every violation of those regulations renders the contract invalid.[80]

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influence. Nevertheless, SL Benfica was sanctioned with a fine of CHF 15,000 for misusing ITMS as a negotiation tool.

Similarly, in the case of the sanction imposed to the Brazilian club SE Palmeiras on 27 January 2017, all charges against the club LDU Quito of Ecuador were dismissed given that SE Palmeiras was not granted any ability to influence LDU Quito's independence in employment and transfer-related matters: this is only possible when an edition of the FIFA Regulations prior to the Edition 2015 was applicable.

[74] In other words, clubs might prefer running the risk of incurring into a "moderate" sanction, rather than renouncing to a specific deal or to certain contractual conditions.

[75] Since stronger sanctions may be imposed to repeated offenders.

[76] Art. 18-bis para. 2, FIFA Regulations on the Status and Transfer of Players: "2. The FIFA Disciplinary Committee may impose disciplinary measures on clubs that do not observe the obligations set out in this article".

[77] In CAS 2014/O/3781&3782 *Sporting CP v. Doyen Sports Investment Limited* the Panel listed, as one of the reasons to dismiss Sporting's arguments in relation to the alleged invalidity of the TPO agreement because of an alleged violation of FIFA regulations, that "Doyen is not a direct or indirect member of FIFA".

[78] Art. R45 of the Code of Sports-Related Arbitration: "The Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The parties may authorize the Panel to decide *ex aequo et bono*".

[79] Art. 20 para. 1, Swiss Code of Obligations: "A contract is void if its terms are impossible, unlawful or immoral".

[80] See CAS 2012/A/2988 P*FC CSKA Sofia v. Loïc Bensaïd*, according to which "an agency contract is not to be declared null and void because of an alleged violation by an agent of the ban of double representation provided by the FIFA PAR".

Also CAS 2011/A/2660 *Vincenzo D'Ippolito v/ Danubio FC*, 14, § 8.21.

This is confirmed by CAS jurisprudence: in CAS 2011/O/2136 *Onsoccer International – Gestão Careiras Desportivas S.A. v. Football Club Anzhi Makhachkala*, the Panel explicitly stated that "regardless of any violation of art. 18bis as a result of the Economic Rights Contract, such contract and any contract based thereon are not prevented from being valid and enforceable between the parties thereto".[81] More recently, the Panel in CAS 2014/O/3781&3782 *Sporting CP v. Doyen Sports Investment Limited* dismissed Sporting arguments that the TPO contract between the parties would be invalid, ruling that "as regards the unlawfulness sanctioned by Article 20 CO, a contract may only be deemed null and void if it contravenes a mandatory provision of Swiss private or public law (including criminal law) and that "provisions issued by private organisations are irrelevant for the purposes of Articles 19 and 20 CO".[82]

2.4 Art. 18-ter FIFA RSTP and relevant jurisprudence

With the introduction of article 18-ter, FIFA put into effect a complete ban of third-party ownership. The article prohibits clubs and players from assigning to a third-party any rights or participation in the compensation payable for the future transfer of a player.

The provision is binding at the national level[83] and reads as follows:

"*1. No club or player shall enter into an agreement with a third party whereby a third party is being entitled to participate, either in full or in part, in compensation payable in relation to the future transfer of a player from one club to another, or is being assigned any rights in relation to a future transfer or transfer compensation.*

2. The interdiction as per paragraph 1 comes into force on 1 May 2015.

3. Agreements covered by paragraph 1, which predate 1 May 2015 may continue to be in place until their contractual expiration. However, their duration may not be extended.

4. The validity of any agreement covered by paragraph 1 signed between one January 2015 and 30 April 2015 may not have a contractual duration of more than one year beyond the effective date.

5. By the end of April 2015, all existing agreements covered by paragraph 1 need to be recorded within the Transfer Matching System (TMS). All clubs that have signed such agreements are required to upload them in their entirety, including possible annexes or amendments, in TMS, specifying the details of the third party concerned, the full name of the player as well as the duration of the agreement.

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[81] CAS 2011/O/2136 *Onsoccer International – Gestão Careiras Desportivas S.A. v. Football Club Anzhi Makhachkala*, § 86.

[82] CAS 2014/O/3781&3782 *Sporting Clube de Portugal Futebol SAD v. Doyen Sports Investment Limited*, 62, § 224.

[83] Art. 1 para. 1 lit. a), FIFA Regulations on the Status and Transfer of Players.

6. The FIFA Disciplinary Committee may impose disciplinary measures on clubs or players that do not observe the obligations set out in this article".[84]

Contrary to art. 18-bis, the provision is not restricted to clubs but also applies to players. As such, and bearing in mind the recent amendment of the definition of third-party pursuant to the FIFA Regulations, players are entitled to hold a percentage over their own future transfer but are prohibited from further assigning it to any other third party.

The provision was introduced with an extraordinary short transitional period, which presented some critical aspects. In fact, the introduction of art. 18-ter into the FIFA Regulations was announced through FIFA Circular n. 1464 published on 22 December 2014 which stated that the new art. 18-bis and art. 18-ter would come into force already on 1 January 2015; however, the 2015 edition of the FIFA Regulations, the first edition of the FIFA RSTP into which the two provisions were included, only entered into force on 01 April 2015.[85] This was relatively not problematic[86] in respect of the interdiction established by art.18-ter para. 1, which, according to art. 18-ter para. 2, entered into force on 1 May 2015.

However, pursuant to art. 18-ter para. 3 and 4, any agreements that predated 1 May 2015 remained valid until their ordinary contractual expiration unless the contract was signed between 1 January 2015 and 30 April 2015, in which case the agreement may not have lasted for more than one year.

This was critical for agreements entered into between 1 January and 31 March 2015 – period during which the prohibition would be in place only according to the terms of a FIFA Circular (n. 1464). In CAS 2016/A/4490 – *RFC Seraing v. Fédération Internationale de Football Association*, the Panel analysed an appeal against a sanction imposed by FIFA for violation of art. 18-bis and art. 18-ter in respect of a TPO contract entered into by the club with Doyen on 29 January 2015 (i.e. during the period in which a one-year long TPO agreement could be signed). The Panel confirmed the sanction imposed by FIFA on the Belgian club, however reduced it from 4 (four) to 3 (three) registration period bans, in consideration of the fact that "the violations were committed during a transitional regulatory period for the TPO"[87] and that "if those contracts had been concluded a month earlier, they would not have in no way violated the RSTP".[88]

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[84] As for art. 18-bis, the competence to rule on violations of art. 18-ter FIFA RSTP rests with the FIFA Disciplinary Committee and, in appeal, with the FIFA Appeal Committee and then the Court of Arbitration for Sports (CAS).

[85] Art. 29, FIFA Regulations on the Status and Transfer of Players. (2015 Edition): "Enforcement. These regulations were approved by the FIFA Executive Committee on 20 and 21 March 2014, respectively 18 and 19 December 2014 and come into force on 1 April 2015".

[86] Except for the fact of the transitional period being extremely short as such for clubs and third-parties to adapt to the new regulations.

[87] CAS 2016/A/4490 *RFC Seraing v. Fédération Internationale de Football Association*, § 179. Translation from "*les infractions commises l'ont été au cours d'une période transitoire en matière de réglementation sur la TPO*".

[88] CAS 2016/A/4490 *RFC Seraing v. Fédération Internationale de Football Association*, § 178. Translation from "*Il convient également d'ajouter que si lesdits contrats avaient été conclus un mois plus tôt, ils n'auraient aucunement enfreint le RSTJ*".

Art. 18-ter para. 5 established that any existing agreements covered by art. 18-ter para. 1 had to be recorded in their entirety in the Transfer Matching System ("TMS") by the end of April 2015. Specifically, clubs with existing third-party agreements had to upload them to TMS and specify the details of the third party concerned, the full name of the player, and the duration of the agreement,[89] which, as seen above, is probably the reason for the increase of the detection of violations of art. 18-bis in last years.

A violation of art. 18-ter thus requires *(i)* a club or a player who enters into *(ii)* an agreement with *(iii)* a third-party *(iv)* granting the latter a participation in the compensation payable in relation to a future transfer of a player or an assignment of rights in relation to a future transfer or transfer compensation.

As such, as of 1 April 2015, clubs and players are strictly prohibited from entering into agreements with a third party in which a third party is entitled to receive any compensation in connection with the future transfer of a player, or an assignment of rights in connection with the same.

To the best of the authors' knowledge, there have been only 4 (four) cases of clubs sanctioned by the FIFA Disciplinary Committee for violating art. 18-ter FIFA RSTP and only one of them reached the Court of Arbitration for Sports.[90]

As for art. 18-bis FIFA RSTP, the possibility of commenting on jurisprudence is limited since FIFA only publishes the name of the club involved, the violation committed and the sanction imposed.[91]

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[89] If clubs and players previously and/or between 01 January 2015 and 30 April 2015 entered into such agreements but failed to upload them to TMS, they could both face sanction from the FIFA Disciplinary Committee.

[90] CAS 2016/A/4490 *RFC Seraing v. Fédération Internationale de Football Association*, analysed more in depth in sub-section 4.3 of this Chapter on "The proceedings before the Court of Arbitration for Sports and Swiss Federal Tribunal".

[91] List of the sanctions imposed (or confirmed by) the FIFA Disciplinary, FIFA Appeal Committee and CAS in relation to a breach of art. 18-ter of the FIFA RSTP (always in conjunction with a breach of art. 18-bis of the FIFA RSTP):

Al Arabi (Qatar): CHF 187,000 fine (FIFA Disciplinary Committee); violation: entering into several contracts that enabled a third party to influence the club's independence, concluding third party ownership agreements in breach of Articles 18ter (4) and (5), breach of confidentiality and failure to enter correct and mandatory information into the iTMS in respect of 7 players (2018).

Sint-Truidense VV (Belgium): CHF 60,000 fine, warning and reprimand (FIFA Disciplinary Committee); violation: entering into contracts that enabled a third party to influence the club's independence in employment and transfer-related matters and entering into an agreement that assigns rights to a third party in relation to the future transfer of a player (2018).

FC Twente (Netherlands): CHF 185,000 fine (FIFA Disciplinary Committee); violation: entering into contracts that enabled a third party to influence the club in employment and transfer-related matters, failing to upload a TPO agreement into the library in TMS, breaching confidentiality rules and failing to declare mandatory information in iTMS (2018).

RFC Seraing (Belgium): transfer ban during three complete and consecutive registration periods, CHF 150,000 fine, warning and reprimand (CAS); violation: having sold part of the economic rights of several players to a third party and having entered into contracts that enabled the third party to have influence on the club's independence and policies in transfer-related matters (2017).

With the limitations imposed by this restricted knowledge, what emerges from the analyses of the available information is the clear contrast between *(i)* the sanction imposed by the FIFA Disciplinary Committee to the Belgian club Seraing for violation of articles 18-bis and 18-ter, corresponding to a prohibition from registering new players during 4 (four) registration periods (subsequently reduced to three by the CAS); *(ii)* the sanction imposed by the FIFA Disciplinary Committee to Sint-Truidense VV (Belgium), FC Twente (Netherlands) and Al Arabi (Qatar) for violations of the same provisions, even though under different, although unknown, factual circumstances – corresponding to a fine ranging from CHF 60,000 to CHF 187,500, a warning and a reprimand.

The case of Seraing, which is the only one about which more information is available for having reached the CAS, confirmed the validity of articles 18bis and 18ter FIFA RSTP in the context of EU and Swiss law and will, for this reason, be analysed separately under the section dedicated to the legal challenges brought against the validity of said provisions.

2.5 The UEFA's Financial FairPlay Regulations and TPO

UEFA had arguably been the strongest voice in favour of prohibiting TPO in the debate preceding FIFA's decision to do so.[92] It is therefore unsurprising that, before FIFA enacted its Circular n. 1464, it had already regulated the matter within its own competence.

In 2012, UEFA introduced two specific changes to its Club Licensing and Financial Play Regulations, which, with some minor changes, have remained in the regulations since.

The first provision is contained in Annex VI section (E) of the regulations, which relates to mandatory notes[93] to be included as minimum disclosure requirements for the financial statements. In respect of TPO, Annex VI (E)(m)(ii) includes a disclosure requirement which intends to guarantee a sound representation of the club's entitlement in relation to players as assets, as follows:

"*...ii) Players' economic rights (or similar) For any player for whom the economic rights or similar are not fully owned by the licence applicant, the name of the player and the percentage of economic rights or similar held by the licence applicant at the beginning of the period (or on acquisition of the registration) and at the end of the period must be disclosed...*".

UEFA thus requires the licence applicant to disclose the exact percentage of economic rights it holds in respect of those players in relation to which a TPO agreement exists.

The second provision is included into Annex X, which deals with the calculation of break – even result; Section (B) includes certain definitions for the calculation of "relevant income":

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[92] See sub-section 1.6 of this Chapter on "The football stakeholders points of view".

[93] Related to "Notes to the financial statements".

"*...m) Income in respect of a player for whom the licensee retains the registration.*
Appropriate adjustments must be made such that any income/profit in respect of a player for whom the licensee retains the registration is excluded from the calculation of the break-even result. For the avoidance of doubt, any income/profit arising from the disposal of a player's economic rights can only be included as relevant income for the calculation of the break-even result following the permanent transfer of the player's registration to another club...".

In other words, when a club assigns to a third-party a percentage over the player's economic rights, without transferring the player to another club on a definitive basis, the club cannot rely on the income obtained for the purposes of the calculation of the break-even result.

As such, revenue obtained from the disposal of player's economic rights can only be accounted for once the full and permanent transfer of the player has occurred.

On one hand this impedes a club from transferring a percentage of the economic rights over a certain player to merely "adjust" its account; on the other hand, however, it also means that a club that needs to obtain a certain income in order to be break-even compliant will be "forced" to transfer the player with definitive effect to another club, being thus deprived of the alternative of maintaining him in its team while merely transferring a part of his economic rights ("retaining TPO").

2.6 De lege ferenda: the Brazilian sports law proposal on TPO

In Brazil, the debate on whether third-party ownership should be banned or regulated has reached the Senate, where a draft of federal State law was presented (*Lei Geral do Desporto Brasileiro*),[94] which would replace and coordinate all existing sports-related laws and, in particular, introduce mandatory provisions on TPO.[95]

The draft of law includes a specific section on "*direitos econômicos*" (article 91). The cornerstone of the provisions on TPO is art. 91 para. 2, which declares as "valid" contracts involving the assignments of economic rights to athletes or third-parties.

This declaration of validity by federal law may, if the project is finally approved, have the effect of rendering inapplicable the prohibition included by art. 18-ter FIFA RSTP within the territory of Brazil.[96]

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[94] The *Projeto de Lei* was approved on 27 June 2017 by the responsible rapporteur and now it is awaiting the assessment of a special commission before being put to vote in the Plenary.

[95] The co-author of this contribution Marcos Motta is among those who participated to the discussion and draft of the *Lei Geral do Desporto Brasileiro*, with a particular emphasis to the part dedicated to the *direitos econômicos*.

[96] Similar to the inapplicability in the French territory of the FIFA Regulations on Working with Intermediaries, in light of the mandatory provisions of the *Code du Sports* on agents.

The project of law is however far from being a "blank" reintroduction and authorization on a wide spread use of the TPO, but rather contains detailed provisions regulating the matter. To start, any of the following violations determines the nullity of the relevant clauses in the TPO contract:[97] *(i)* undue influence in the eventual transfer of the athlete or in his performances; *(ii)* relate to an athlete who is non-professional or under 16 (sixteen) years old; *(iii)* are not registered within 60 (sixty) days from their signature; *(iv)* are entered into with a non-registered agent; *(v)* are entered into by a third-party (or an entity related to such third-party) who already holds economic rights over 4 (four) athletes in the same club; *(vi)* lack the explicit written consent of the athlete.

The said provisions therefore ensure the validity of TPO contracts, but only so long as the requirements established by the Federal law are complied with.

Transparency and legal certainty are guaranteed by the obligation of registering the contract before the competent national association under the sanction of nullity. Furthermore, the national associations shall publish a list every two months indicating the percentage of economic rights assigned for every athlete and the names of all third-parties having entered into contracts with clubs.

Clubs would be prohibited from assigning to third-parties *(i)* a percentage higher than 25% of the economic rights of a player aged between 16 (sixteen) and 18 (eighteen); *(ii)* a percentage higher than 45% of any other professional athlete; *(iii)* economic rights in relation to more than 5 professional athletes aged between 16 (sixteen) and 18 (eighteen) and to more than 15 (fifteen) athletes older than 18 (eighteen) years old.

The consequence for exceeding any of these limitations is the nullity of the assignment of the part in excess, a legal mechanism that facilitates compliance with the provisions, since, if the third-party breaches it acquiring any such rights in excess, it is deprived of any legal protection and thus impeded from enforcing those rights.

Finally, the draft also innovates in providing for the application of the Brazilian national solidarity mechanism to the payment realized by the third-party for the acquisition of the economic rights.

3. Contractual provisions and main issues

The present chapter is dedicated to the analysis of TPO contractual-related practices, with the obvious preliminary clarification that – subject to the exceptions exposed in the previous chapters (such as when the assignment is made to a player) – trade of players' economic rights is today a banned practice. Unsurprisingly, alternative solutions were sought by practitioners to replace TPO structures, which will be addressed after an overview of "traditional" contracts of assignment of economic rights.

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[97] A legal consequence which seems more effective than the imposition of mere disciplinary sanctions, since the interest of the third-party itself is achieved and the latter is thus encouraged to respect the rules.

3.1 TPO provisions

3.1.1 Main clauses

A TPO agreement consists in a contractual arrangement whereby a third party acquires from a club, whether in exchange for a payment of an economic consideration or not, a participation or a future credit related to the eventual transfer of a certain football player.

At a contractual level, this is done through a private civil law agreement between a club and a natural or legal person, such as another club, a player, an investment fund, a company, a sports agency, an agent and/or private investor.

The contract will assign to the investor (part of) the club's future credit over the transfer of a certain athlete – in most cases in exchange for the payment of a certain financial value (e.g. the investor acquires 10% [ten per cent] of the economic rights of the player against the payment of EUR 100,000.00) – and will often include clauses defining the concepts of federative[98] and economic[99] rights over the player.

The essence of the TPO agreement will be the determination of the third party's entitlement to receive the agreed percentage over the amounts received by the club upon the definitive transfer of the player's federative rights to another club.

The contract may also grant such entitlement to the investor in circumstances such as:

(i) temporary transfer (i.e. loan) – whether single, multiple or followed by a definitive transfer (i.e. right of option);
(ii) breach of contract committed by the player (the entitlement will thus be in respect of the compensation granted to the club by the competent bodies); or
(iii) exchange of players, in which case the contract shall define the criteria adopted to assign a value to the players involved (e.g. by reference to average value of the last transactions in which they were involved, to specialized websites, to insurance contracts, etc.).

3.1.2 Additional provisions

Parties to TPO agreements are at freedom for including additional clauses including different rights and obligations, the exact content of which will also largely depend on the precise details of their agreement and of the specific type of TPO (for

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[98] For instance a definition such as "The exclusive rights to hold the registration of a specific player with the relevant national or international governing body / Federation".

[99] For instance a definition such as "The exclusive right to fully exploit all of the commercial and economic interests in, over, of and to the Federative Rights of a specific player including, without limitation, the rights over the economic result of a future, whether temporary or definitive, transfer of the respective player to another club".

instance investment TPO or financing TPO will tend to include clauses granting a certain financial return to the investor).

TPO contracts may for instance include clauses establishing:

i. the club's obligation to repurchase the percentage transferred to the investor, in the event that the club receives a transfer offer for a determined amount of money and it rejects it (so-called "put option");
ii. a minimum guaranteed return for the third-party – normally corresponding to an amount equal to the initial investment plus interest at a certain rate – payable under certain circumstances, such as when the player's employment contract expires without a transfer, or if the club is responsible for breach of contract without just cause towards the player, or, more in general, any circumstances under which the player is not transferred within the term of the TPO agreement (or within any other pre-defined term);
iii. the option or obligation for the club to reacquire the economic rights percentage, whether with the consent of the third-party or not;
iv. the club's obligation to insure the player and, in the event of death or permanent disability, pay back to the investor an amount corresponding to the initial investment plus interests at a certain rate;
v. the authorization granted by the club to the third-party to promote the definitive transfer of the player through authorised intermediaries.[100]

Since the receipt of money in the hands of the third-party will ultimately depend on its counterparty being duly paid by the new club of the player, the parties may also be willing to regulate their relationship in the event of default of such club; as such, they might opt for regulating how eventual costs of the litigation may be shared, or agree the procedure for the indication of (the club's) attorneys, or even the obligation for the club to open legal proceedings against the club in breach within a certain time limit after the latter's failure to pay.

Also, the third-party might be willing to further guarantee its investment with the inclusion of additional clauses for the protection of the creditor, such as a bank guarantee, the application of a penalty clause and interest in the event of delay in the payment, or the characterization of the credit as a privileged one.

Finally, as for any other football agreement, the choice of applicable law and competent forum in the case of dispute represents an essential contractual aspect, where Swiss law and the CAS may represent a safe harbour for the third-party in light of CAS case-law such as the Award in CAS 2014/O/3781&3782 *Sporting CP v. Doyen Sports Investment Limited*.

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[100] In CAS 2017/A/5463 *Sevilla Fc. v. FIFA*, the Panel found a clause such as that listed at point (i) to be potentially in violation of art. 18-bis FIFA RSTP, whereas clauses such as those listed at points (iv) and (v) to be, in principle, acceptable.

3.1.3 The concept of influence

Whether the share of economic rights held by the third-party will finally turn into a profit or not – and the amount and size of such an eventual profit – will ultimately largely depend on (besides the quality of the player and thus of the choices and analysis made at the moment of investing) the club's sporting decisions, such as how many times the player is fielded, in which position, etc., which will have a direct influence on the player's economic value. Out of the field, the club also has a fundamental and essential say in all decisions related to the player's career.

The third-party's natural interest would thus obviously be to exercise direct control, or at least to influence, all club's decisions in respect of the player, in order to protect its financial stake.

This initially led to the inclusion of clauses in TPO contracts granting the investor ample power *vis-à-vis* the club such as *(i)* "Club and player acknowledge and confirm that the investor has the sole, exclusive and unilateral right to terminate the employment contract at any time…"; *(ii)* "Club and player irrevocably accept that only the investor may exercise the right of termination which cannot be exercised directly or indirectly by the club or by the player…"; *(iii)* "Any sort of transaction related to the player's rights shall only take place pursuant the Investors instructions…"; *(iv)* "Club and player cannot vary, amend, repudiate or terminate the employment contract without the agreement of the investor. . ."; *(v)* "Club agrees to transfer to the player's agent x% of the player's economic rights in case of any sort of transaction of his federative rights. . ."; *(vi)* "Player shall (or not) be selected in a certain match as per instructions of the investor…"; *(vii)* "Club and player shall terminate the employment agreement and player shall into a new employment contract with a club of the investor's free choice…".

However, similar clauses are since 2008 forbidden by art. 18-bis FIFA RSTP and may lead to the imposition of sanctions against the club for having granted to the third-party the ability to exert an undue influence in the sense of art. 18-bis FIFA RSTP.

To counter this, a recurrent clause included in TPO agreements determines the club's exclusive entitlement to agree the contractual provisions applicable to the employment relation with the player, including but not limited to amendments to the buyout clause, contract renewals, etc., inserted with the purpose of avoiding the possible imposition of disciplinary sanctions against the club.

However, the inclusion of a similar clause is *per se* not sufficient to exclude a violation of art. 18-bis FIFA RSTP. As established by the Panel in CAS 2017/A/5463, irrespective of the inclusion of such a clause, what is pertinent is to determine whether the third-party was granted an effective capacity to produce effects over the club's independence (whether materially exercised or not).

3.2 TPO and agents/intermediary' commissions

Intermediaries[101] were already prohibited from holding percentages over the future transfer of a player before the introduction of FIFA Circular 1464.[102]

The rationale behind the prohibition was that an inherent (and non disposable) conflict of interest exists in the fact of a player's agent also holding TPO stakes – at least when acting for the player and/or the buying club – since the natural interest of a TPO owner is that of having the player's transfer market value raised (so as to correspondingly receiving a higher amount). This, however, collides with the intermediary's client interest of acquiring the player at the lower possible price (if the client is the buying club) or earning the highest possible salary (if the client is the player).

However, before FIFA's decision to ban TPO through FIFA Circular n. 1464, certain types of TPO represented a direct or indirect way of remunerating the player's agent and/or persons in charge of managing the player's career; this happened, for instance, when a club could not immediately remunerate the player agent at the moment of a transfer or renewal of an employment contract and thus assigned him a percentage of the player's economic rights (recruiting TPO) *in lieu of* the remuneration.

While the TPO ban has evidently affected this kind of practice, contractual arrangements may significantly reduce, in the practice, the theoretically clear distinction between an intermediary commission and a TPO stake.

In fact, intermediaries are entitled to receive lump-sum amounts in relation to the transaction in which they participate, which may be established in relation to the value of the future transfer compensation.[103] Considering this, practitioners

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[101] Previously agents.

[102] Currently, the rule is established by art. 7, para. 4 of the FIFA Regulations on Working with Intermediaries: "Clubs shall ensure that payments to be made by one club to another club in connection with a transfer, such as transfer compensation, training compensation or solidarity contributions, are not paid to intermediaries and that the payment is not made by intermediaries. This includes, but is not limited to, owning any interest in any transfer compensation or future transfer value of a player. The assignment of claims is also prohibited".
Previously, the relevant provision was art. 29 of the FIFA Players' Agents Regulations, which established that: "No compensation payment, including transfer compensation, training compensation or solidarity contribution, that is payable in connection with a player's transfer between clubs, may be paid in full or part, by the debtor (club) to the players' agent, not even to clear an amount owed to the players' agent by the club by which he was engaged in its capacity as a creditor. This includes, but is not limited to, owning any interest in any transfer compensation or future transfer value of a player".

[103] See answer given by Mr. Omar Ongaro – former FIFA Head of Players' Status Committee – in a Q&A with the EPFL: "lump sum agreements in relation to future transfer compensation should be compatible with the new provisions (e.g. commission is 500K, and in case of transfer of the player for a fee of 1Mio the intermediary is entitled to another 100K commission, and if the transfer value is 1.5Mio then the intermediary shall receive additional 150K), subject to the graduation not being that small that it becomes actually equal to a percentual participation, however, only in cases where the intermediary is intervening on behalf of the releasing club (i.e. relevant representation

have recurred to intermediary agreements with "graduated" lump-sum commissions, with varying amounts of remuneration payable to intermediaries, according to the range of the transfer fee agreed. The potential inclusion of an exclusivity clause and of a clause granting payment of the agreed commission irrespective of the intervention of the intermediary in the deal, further assimilates the intermediary agreement to a recruiting TPO arrangement.[104]

The legitimacy (at least in principle) of similar arrangements was confirmed by the CAS in the award 2016/A/4517 *Bologna FC v. Gonzalo Luis Madrid Pineiro*, where, in essence, an additional (and substantial) commission fee was agreed between the parties in the event of a future transfer of the player to a new club, which was related to the amount of the transfer fee received by the club – and which the latter contented to be a "covert scheme" of TPO and thus "illegal under Swiss law".[105]

In this respect, the CAS Panel characterized the additional fee as a "well-defined payment obligation agreed upon in advance" finding therefore that "the remuneration owed to the Agent in all events was sufficiently quantified as a lump sum in advance, as required under Article 20 par. 5 of the FIFA PAR".[106]

The legal qualification of the additional fee is that of compensation for agency services and not a purely commercial arrangement such as a TPO share; for this reason, rules on the proportionality of the commission assigned to the intermediary may apply and thus impose limitations on the amount of the agreed fee: for instance, in the same CAS 2016/A/4517, the Panel reduced the amount of the commission granted to the agent, in application of art. 417 of the Swiss Code of Obligation.[107]

3.3 TPO, sell-on clauses and bridge clubs

Notwithstanding article 18-ter's absolute prohibition on third-party ownership, an investor interested in investing in organized football is still entitled to do so through a professional club.[108]

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agreement and terms of payment of commission are concluded between the intermediary and the releasing club, for which the intermediary worked)".

[104] Restrictions might, however, be imposed by the applicable national law.

See, for a limitation on the amount of commission payable imposed by Swiss law, CAS 2016/A/4517 Bologna FC v. Gonzalo Luis Madrid Pineiro, discussed *infra*.

[105] CAS 2016/A/4517 *Bologna FC v. Gonzalo Luis Madrid Pineiro*, 8, § 28.

[106] CAS 2016/A/4517 *Bologna FC v. Gonzalo Luis Madrid Pineiro*, 12, § 50.

[107] Art. 417, Swiss Code of Obligation: "Where an excessive fee has been agreed for identifying an opportunity to enter into or facilitating the conclusion of an individual employment contract or a purchase of land or buildings, on application by the debtor the court may reduce the fee to an appropriate amount".

[108] This has also being one of the reasons relied upon by the STF, the CAS and the European Commission to uphold the legitimacy of the TPO ban, since, although the prohibition restricts the economic freedom of the clubs for certain types of investment, it does not suppress it and the thus investors remain, for instance, free to invest in clubs, as long as they do not secure them by assigning the economic rights of the players to third party investors. See considerations

In fact, as seen above, the FIFA Regulations exclude from the concept of third-party both "the two clubs transferring a player from one to the other" as well as "any previous club, with which the player has been registered".[109]

This legitimacy allows thus for instance an investor to purchase shares in a club which is owned and established as a company, so as to acquire a claim to the economic rights of some or all the players legally registered to the team. The investor then withdraws revenues in the form of dividends/profits just like an ordinary business owner and without the threat of being labelled a "third-party" owner.

Furthermore, not only the club that is directly transferring the player, but also "any previous club with which the player has been registered" is not considered as a third-party. The determining criteria in this respect is that the player was "registered" with such club, whereas it is not required that he was "registered for a pre-determined period of time" or otherwise linked to any other sporting criteria such as, for instance, having played one or more matches.

As such, the mere registration (even for a few hours) of a player with a certain club is sufficient to entitle such club to maintain, when it subsequently transfers such player to a new club, a percentage over the future transfer of such player. The rationale of the exception is to exclude from the prohibition those clubs who legitimately hold the player's registration and intend to maintain, when transferring him, an entitlement to a part of his transfer value ("sell-on clause"). However, the amplitude of the given definition which merely conditions such exception to the "registration" of a player and not to any sporting criteria – which might guarantee the "genuine and effective" sporting interest of the club in the player – opened the door to possible misuses.

An investor may for instance own a club (even a second or third category club in a minor country) where it registers one or more players (for any period of time and even without the players effectively participating to the club's activities); the investor may then obtain a profit by transferring the player on a definitive basis to another club while maintaining a sell-on percentage over future transfer values; or otherwise by loaning him (even repeatedly) to other clubs during a certain period of time so as to expose him (against payment of a "loan fee" or not) and at the end potentially transfer him on a definitive bases after the player's transfer value increased.

The investor – in its capacity of legitimate holder of the player's federative rights – will further benefit from the protection granted by the FIFA regulatory system to clubs, such as access to the FIFA and CAS jurisdiction in case of disputes with other clubs as well as the legal measures granted by the FIFA (or other governing bodies such as UEFA) regulations in case of the next club's failure to comply with its obligations (unavailable to third-parties).[110]

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in section 4 of this Chapter on "The challenges before national and international courts".

[109] See sub-section 2.2 of this Chapter on "The concept of "third-party".

[110] Unlike clubs, third-party owners are not subject to FIFA's jurisdiction; instead, third-party owners who have their contractual rights violated must resort to an alternative tribunal, like ordinary courts or the CAS, in order to have their rights restored.

The prohibition included in art. 18-ter thus resulted in an increase in the utilization of similar "bridge clubs"[111] structure to facilitate TPO-like agreements which, while legitimate under a purely regulatory perspective,[112] raise the same concerns of TPO and should thus in the authors' opinion be addressed.[113]

4. Challenges before national and international courts

The lawfulness of the FIFA Circular no. 1464 and of articles 18-bis and 18-ter of the FIFA Regulations (together, "the TPO Provisions") has been challenged before various courts in Europe.

The principal complainant behind all proceedings is Doyen Sports Investment Limited (Doyen), a Malta based subsidiary of a hedge fund, whose primary activity was providing alternate funding to football clubs by the acquisition of economic rights of players. Other complaints were filed by the Belgian club RFC Seraing, a partner of Doyen, and the Spanish and Portuguese Leagues.

The arguments raised in all different proceedings are similar, relating to an alleged incompatibility of the TPO Provisions with the "four freedoms" of the European Union as well as with fundamental principles of competition law and proportionality under European Union and Swiss law.

The key legal analysis to be made in this respect, according to well-established jurisprudence of the European Court of Justice[114] is whether, once a restriction to a freedom guaranteed by the TFEU is established, the restrictive measure "…pursues a legitimate aim and is justified by overriding reasons of interest…" and "…that the application of such a measure is appropriate to guarantee the achievement of the objective and does not go beyond what is necessary to achieve this objective…".

As of the moment of writing this article, the complainants were unable to prove the violation of any of those principles before various courts in Europe; to

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[111] In general, bridge transfers involve clubs collaborating to transfer a player through the use of a "bridge" club, to a destination club where the player was never fielded by the bridge club. In other words, a player is transferred to the desired club indirectly (i.e., through the interposition of a third club) and for non-sporting reasons. Non-sporting reasons include using the bridge club as a way of attaching the economic rights of a player.

[112] The current FIFA rules do not, in fact, contain any prohibition against "bridge transfers" *per se*. As said by the Panel in CAS 2014/A/3536 *Racing Club Asociación Civil v. FIFA* "the current TMS rules represent neither an appropriate nor an effective tool for combating and/or anctioning bridge transfers".

However, according to Annex 3 of the RSTP, all users of the TMS shall act in good faith and "sanctions may be imposed on any association or club found to have entered untrue or false data into the system or for having misused the TMS for illegitimate purposes". As a consequence, clubs found to have used the TMS for non-sporting reasons may face sanctions by FIFA.

[113] The Brazilian Football Confederation (CBF) enacted specific regulations against the "bridge club" practice. See V. Eleuterio and A. Galdeano, Andre, chapter on "Domestic transfers in Brazil" in this book.

[114] Among others, ECJ 15 December 1995, 415/93 "Bosman", §§104.

the contrary, as a consequence of the proceedings initiated by Doyen and RFC Seraing, the Court of Arbitration for Sport and the Swiss Federal Tribunal have both independently held that the TPO Provisions are not contrary to EU law or Swiss law.

4.1 The proceedings before ordinary Belgian courts

The first challenge to the TPO Provisions was brought by Doyen already in March 2015, when it requested to the Brussels Court of First Instance to grant a temporary injunction precluding FIFA, UEFA and the Royal Belgian Football Federation (URBSFA) from implementing the TPO ban since allegedly in breach of EU competition law.[115]

The request, which aimed to a temporary suspension of the FIFA Circular no. 1464, was rejected by the Belgian judge in consideration of Doyen's failure to establish one of the two conditions required under Belgian law for the grant of provisional measure, i.e. the likelihood of success (*fumus boni iuris*).

The Court of First Instance essentially found that, contrary to what argued by Doyen, a total ban on TPO structures is *prima facie* a proportionate and non-excessive measure which pursues legitimate objectives such as preventing conflicts of interest and potential competition manipulation, also considering that the existing regime prohibiting third party influence had failed to properly address similar issues.

The Court equally rejected Doyen's request that the alleged incompatibility of the TPO Provisions with EU law principles be referred to the European Court of Justice.

The decision was confirmed on 10 March 2016 by the Brussels Appeal Court following an appeal lodged by Doyen and Seraing.

Following the decision in CAS 2016/A /4490 – *RFC Seraing v. Fédération Internationale de Football Association*,[116] RFC Seraing also filed to the Liège Court of First Instance a request against the URBFSA and FIFA to suspend the disciplinary sanction pronounced by CAS, which was dismissed on 27 June 2017 by the President of the Court for lack of urgency.

Doyen then sought to re-open the case based on the alleged appearance of new elements. On 29 August 2018, the 18th Chamber of the Brussels Court of Appeal issued a new interlocutory decision once more dismissing the request for provisional measures due to a lack of new elements that would constitute a change of circumstances likely to question the decision of the Court of 10 March 2016.[117]

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[115] For more information, see A. Duval, "*Doyen's Crusade Against FIFA's TPO Ban: The Ruling of the Appeal Court of Brussels*", available at www.asser.nl/SportsLaw/Blog/post/doyen-s-crusade-against-fifa-s-tpo-ban-the-ruling-of-the-appeal-court-of-brussels.

[116] See sub-section 4.3 of this Chapter on "The proceedings before the Court of Arbitration for Sports and Swiss Federal Tribunal".

[117] The decision is interesting since, while FIFA opposed that the court would not have jurisdiction in light of the arbitration clause enshrined in Article 59(1) of the FIFA Statutes, the Court of Appeals dismissed the exception and accepted jurisdiction, finding that such arbitration clause is

More recently, following a decision taken in March 2019 by the Maltese Financial Authority to sanction Doyen Sports for having concluded agreements violating Maltese legislation on financial services, UEFA requested for the hearing of the proceedings to be reopened.

The Brussels Appeal Court has re–opened the proceedings granting an additional 10-minute hearing on 9 May 2019.

4.2 The proceedings before The European Commission

Early in 2015, Doyen and, in separate, the Spanish and Portuguese leagues, filed two complaints with the Directorate General for Competition of the European Commission against the TPO provisions. The complaints were based on an alleged infringement of EU competition law and directed against FIFA, UEFA, the English Premier League, the French football league and the Polish football federation.

In May 2015, the European Commission requested Doyen to submit its recommendations for a proportionate regulatory regime to govern TPO arrangements. Doyen submitted a proposal pursuant to which the player remained free to accept or refuse an offer for a transfer and in which neither the club nor the investor had any power to exercise pressure or control over the player in case of refusal.[118]

After investigating the matter, the European Commission sent on September 2017 a letter to Doyen Sports proposing to reject its complaint and not to initiate formal proceedings against FIFA.

The Commission found, from a more procedural standpoint, that it was not in the interest of the European Union to investigate cases that were pending before national courts and, in the merits, that it was unlikely to establish any existence of infringement of EU competition law since:

– The TPO ban did not preclude clubs from recourse to other forms of financing; it merely prohibited financing that would likely have an influence upon the independence of the club or linked to the future transfer of a player;
– The TPO structure gives inherently rise to a conflict of interest between clubs, players and investors, because of *(i)* the lack of transparency or control over TPO entities, *(ii)* the influence that TPO investors are capable of exercising over clubs for recruitment of players not linked to sporting reasons and *(iii)* the fact that TPO investors were permitted to invest in multiple players in the same competition;

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too broad and that it does not refer to any specific legal relationship; the Court thus considered that it could hear the case to the extent that its effects are limited to the Belgian territory (based on Article 6(1) Lugano Convention). For more information, see http://sportlegis.com/2018/09/10/brussels-court-of-appeal-decision-in-the-matter-doyen-et-al-v-fifa-et-al-legality-of-the-arbitration-clause-in-the-fifa-statutes/.

[118] Presentation by Benoit Keane Solicitor and Advocat, "End of the Party for TPO in Football?", 7th international congress on football law, Madrid, 17th and 18th November 2017.

– The proposal suggested by Doyen was unrealistic; and
– Neither FIFA nor national federations are competent to regulate or even capable of determining the identity of TPO investors.

Doyen did not respond to this letter and the case was closed on 9 November 2017 based on the European Commission's initial findings.

The complaint filed by the Spanish and Portuguese leagues is still under assessment; upon rejection (the most likely scenario in light of the similarities in the grounds invoked by Doyen Sports), it is possible that the leagues bring the question to the European Union General Court.

4.3 The proceedings before the Court of Arbitration for Sports and Swiss Federal Tribunal

At a CAS level, the leading case is CAS 2016/A /4490 – *RFC Seraing v. Fédération Internationale de Football Association*, in which the Court of Arbitration for Sports confirmed the validity of the TPO ban under several provisions of EU and Swiss law.

The case relates to an appeal lodged by the Belgian club RFC Seraing against a decision of the FIFA Disciplinary Committee[119] (confirmed by the FIFA Appeal Committee),[120] which found the club to be in violation of articles 18-bis and 18-ter of the FIFA RSTP and sanctioned it with a transfer ban of four registration periods and a fine of CHF 150,000.

The breach committed by the Belgian club was rather clear[121] and is thus not the main aspect of interest of the decision, which rather revolved around the Panel's examination of the compliance of the TPO ban with all relevant legal provisions, mainly of EU law, invoked by RFC Seraing.

The Belgian club alleged that the TPO provisions constituted a breach of article 63 (freedom of movement of capital) of the TFEU, since, by determining that the flows generated by player transfers remain within football clubs, FIFA would be effectively monopolizing a given market, to the exclusion of other potential competitors, as well as of articles 45 (freedom of movement of workers) and 56 (freedom to provide services) of the TFEU.

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[119] Decision of 4 September 2015, see FIFA, "Belgian club FC Seraing sanctioned under third-party influence and third-party ownership rules", 17 September 2015, available at www.fifa.com/governance/news/y=2015/m=9/news=belgian-club-fc-seraing-sanctioned-under-third-party-influence-and-thi-2678395.html.

[120] Decision of 7 January 2016, see FIFA, "FIFA rejects appeal of Belgian club sanctioned under third-party influence and third-party ownership rules", 22 February 2016, available at www.fifa.com/governance/news/y=2016/m=2/news=fifa-rejects-appeal-of-belgian-club-sanctioned-under-third-party-influ-2766428.html.

[121] On 30 January 2015 (i.e. after notification of art. 18-ter), RFC Seraing and Doyen executed a third party ownership agreement pursuant to which Doyen acquired 30% of the economic rights of 3 players registered with Seraing. Seraing and Doyen also entered an ERPA pursuant to which the club sold 25% of the economic rights of a player to Doyen for a sum of 50,000 euros.

The CAS found, in this respect, that the TPO ban imposed by FIFA pursues legitimate objectives within the meaning of European Union case law and are thus justified since it aims at (i) preserving the stability of player contracts, (ii) guaranteeing the independence and autonomy of clubs and players in terms of recruitment and transfers, (iii) safeguarding the integrity in football and the fair and equitable nature of competitions, (iv) preventing conflicts of interest, and (v) maintaining the transparency in transactions related to player transfers.[122]

The CAS also determined that the restrictions imposed do not go beyond what is necessary to achieve the legitimate objectives pursued, to the extent that they only prohibit TPO investments and not all investments by third parties in football clubs. In other words, the Panel held that it remains possible for investors to invest in football following multiple other funding schemes and even that the financing of certain transfer operations in football remains possible, as long as they do not violate the TPO Provisions.

The Panel also rejected Seraing arguments that the ban on TPO would constitute a prohibited agreement under art. 101 of the TFEU and an abuse of dominant position under art. 102 of the TFEU, since the TPO provisions do not have the purpose of restricting, preventing or distorting competition, but rather regulate the player transfer market in the pursue of legitimate objectives. On similar grounds, the Panel dismissed Seraing arguments under Swiss Federal Law on Cartels and Other Restraints on Competition of 6 October 1995 (LFCRC).

The CAS also concluded that Seraing offered no arguments and was unable to demonstrate how the TPO Provisions constituted a violation of the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union and the economic freedom and right to property granted by the Swiss Federal Constitution.

However, the Panel reduced the sanction of the transfer ban imposed from four to three complete and consecutive registration period in light of considerations of proportionality mainly taking into account that the violation took place within a transitional regulatory period.

Seraing appealed the Award before the Swiss Federal Tribunal under art. 190 para. 2 lit a) of Switzerland's Federal Code on Private International Act (PILA) on the basis that: *(i)* the arbitral tribunal was constituted irregularly; *(ii)* the award was incompatible with Swiss public policy; *(iii)* a violation of its right to be heard resulting from certain statements made by the President of the Panel during the hearing at CAS.

While the STF dismissed the appeal in its entirety, the most interesting part of the decision for the purposes of this contribution (since linked to the "merits"

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[122] CAS analysed the practice of TPOs, specifically with respect to the risks raised by the practice in relation to the "…opacity of investors who are beyond the control of the regulatory bodies of football and who can freely dispose of their investment, uncontrolled…conflicts of interest…integrity of the competition…" .

of the prohibition) is the one dealing with the alleged incompatibility of the CAS Award with Swiss public policy.

In this respect, the Swiss Supreme Court found that provisions of competition law such as those invoked by the club do not form part of the fundamental legal values in the meaning of Swiss substantive public policy.

The Swiss Federal Tribunal also rejected Seraing arguments that the TPO Provisions would represent an excessive legal commitment in the sense of art. 27 para. 2 of the Swiss Civil Code as they restricted economic freedom. According to Swiss law, a contractual restriction of economic freedom is only considered excessive if a party is placed at the mercy of its contractual counterpart, if it suppresses economic freedom or if it restricts freedom in such a way that the economic existence is jeopardized. These conditions were not met in the case, as the TPO Provisions only restricted the economic freedom of clubs but did not supress it as clubs are free to pursue investments, as long as they do not secure them by assigning the economic rights of the players to third party investors. The STF also referred to the fact that clubs in those countries where TPO had already been prohibited had proven to be able to survive financially, which excluded that the prohibition of TPO would have such a detrimental effect on their economic liberty.

Finally, the STF declared inadmissible the arguments brought by Seraing on grounds of proportionality, since, in the context of a Civil Law Appeal, the STF does not act as an appeal instance in the classic sense, i.e. it is not in a position to freely review a decision, or sanction, rendered or imposed by a lower instance and it is bound by the facts established in the arbitral award.

4.4 Other proceedings

Doyen also initiated proceedings in France against FIFA and the Ligue de Football Professionnel (LPF). On 8th September 2016, the Tribunal de Grande Instance of Paris issued its ruling accepting the objections raised by FIFA and the LPF and dismissed proceedings on the grounds that it lacked the jurisdiction to adjudicate on the matter.

In Spain, the La Liga filed a challenge to the TPO ban before the Madrid Commercial Court, which rejected it on 9 February 2017 for lack of territorial jurisdiction and, to the best of the authors' knowledge, is currently on appeal.

5. Conclusion

Investment in third-party ownership is currently a practice forbidden by the FIFA Regulations. Several courts in Europe have confirmed the validity of the TPO ban under different jurisdictions. Sanctions imposed on clubs that violate the provisions can go as far to result in the imposition of a ban from registering players during several registration periods.

Despite this scenario, FIFA is currently going through a major reform of its transfer regulations which might open a new perspective on the future of the practice.

With respect to TPO (and related practices), FIFA recently amended its regulations so that as of 1 June 2019, the player being transferred will not be considered "third party" in the context of article 18-ter of the FIFA Regulations.[123] Also, FIFA announced that bridge transfers will be prohibited[124] and that limitations will be imposed on loans and possibly squad size that would have an indirect effect over, in general, financial investments made in football for speculative purposes.

Excluding players from the definition of "third party", although essentially representing codification of existing jurisprudence,[125] will undoubtedly have repercussions on the football transfer market already as of the next transfer windows.

Indeed, the (confirmed or rather reopened) possibility for players to hold a percentage of their own economic rights opens alternative negotiating scenarios for clubs interested in acquiring or retaining a certain footballer.

Furthermore, as players are included in the prohibition of art. 18-ter FIFA RSTP , they will therefore not be entitled to re-transfer the portion of economic rights they are assigned to other third parties. However, this part of the prohibition will be more difficult to monitor since, contrary to football clubs, players are not subject to a number of disclosure and/or reporting obligations (either towards their shareholders, fans, football regulatory organizations or State entities).

Also, when a club is involved into a TPO deal, this normally goes through a significant number of people (from finance, legal, etc.) with increased chances of the regulatory breach being leaked and consequently detected, whereas a smaller circle of people (his agent, advisors, etc.) is involved on the player's side.

Furthermore, a simple look at the FIFA and CAS jurisprudence in matters related to breaches of art. 18-ter FIFA RSTP suggests that the football governing bodies may take a softer stance in relation to regulatory breaches committed by a player. In fact, the only case in which a "significant" sanction was imposed (i.e. a sanction other than a warning and a fine) was the case of Seraing, which was banned from registering new players during a period of three registration periods. However, Searing had entered into TPO agreements involving 4 (four) different players, committing a striking breach of the regulations. In all other cases, the sanction imposed was a mere fine or a warning. As such, since a violation committed by a player would by definition involve his economic rights only, a (first) sanction harsher than a warning or a fine would be surprising.

Also, imposing a sanction on a player (and not on the third party itself) may not necessarily have a sufficient deterrent effect to prevent the practice

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[123] FIFA Regulations on the Status and Transfer of Players (2019 edition), published on 8 May 2019, that will enter into force on 1 June 2019.

[124] Although it remains to be seen how the relevant provisions will be drafted.

[125] See sub-section 2.2 of this Chapter on "The concept of "third-party".

since most players may not have sufficient knowledge of the risks connected. It is also for this reason that the authors of this article are in favour of regulating rather than prohibiting the TPO practice, including third-parties within the "football family" through a system of registration/affiliation, subjecting them to federative obligations such as that of respecting transfer regulations.[126]

In light of all these factors, the announced "end of the party"[127] for TPO in football seems, at least, postponed for the moment, whereas, on the contrary, the authors of this contribution expect third-party ownership to reacquire a substantial importance in the football transfer market in the months to come, while governing bodies and regulators will face the harder task of monitoring players (in addition to clubs), if they intend to ensure effectiveness of the ban (which remains) in place in accordance with art.18-ter of the Regulations.

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[126] This is the system adopted, for instance, in the Brazilian *projeto de lei* discussed in sub-section 2.6 of this Chapter on "De lege ferenda: the Brazilian sports law proposal on TPO".

[127] Presentation by Benoit Keane Solicitor and Advocat, "End of the Party for TPO in Football?", 7th international congress on football law, Madrid, 17th and 18th November 2017.

UNDERSTANDING THE FIFA RULES ON INTERNATIONAL TRANSFER AND FIRST REGISTRATIONS OF MINORS

by *Lucas Ferrer*[*]

When considering what have been the most meaningful developments in football in recent history, one that may or may not come to mind is the restrictions placed upon young football players seeking playing opportunities outside of their place of birth. Hardly any other sport in the world has such restrictive approach when it comes to the mobility of minors in comparison to Football and, as it will be explained below, there have been very few developments in the FIFA Regulations that can be said to have had such a transcendental effect on the sport as the enactment and enforcement of the regulatory framework on the protection of minors has had. In recent years, for example, a number of clubs have been handed weighty sanctions for failing to comply with said regulations, which are by no means simple. However, what can currently appear to be inflexible rules should not be judged as such without understanding where they came from, how they have evolved and the details of where things currently stand. Such is the purpose of this article.

1. The protection of minors in football: the origin of the FIFA regulations

The emergence of the provisions aimed at regulating the transfer of minor players was based on the need to tackle a worrying phenomenon that had been taking place in the football market at the end of the last century. Many times, certain football clubs, mostly European, recruited a large number of underage players from more disadvantaged countries with the idea that such minor players could have the chance to prove their worth and conditions in a football club. Once these

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minors had travelled thousands of kilometers and therefore, were displaced from their place of origin (and in many cases, from their family environment), it often happened that clubs, upon noticing that they did not have interest in a minor player, simply proceeded to cancel his registration without providing him any solution or alternative proposal. This repeated scenario caused situations of abandonment of young players who were living in foreign countries, separated from their families and without financial resources. Indeed, the number of minors moving away from their home countries to another to pursue a footballing career has only increased along the years. By way of comparison, in 2011 a total of 1.460 registration of minors were submitted to FIFA, and in 2018 this number increased to 3.754 applications for the registration of underage players.[1]

Logically, FIFA could not overlook this outrageous reality that transcended the sport and became a social problem that even affected the migratory movement of people, traffic of minors, parental authority… In this sense, FIFA, with the intention of remedying such shameful and global problem published Circular no. 769, where it *inter alia* informed that FIFA and the European Commission had entered into an agreement in March 2001 to include in its regulatory framework provisions on the protection of minors. Indeed, these amendments to the Regulations on the Status and Transfer of Players ("RSTP") entered into force in September 2001[2] and were aimed at imposing strict conditions to safeguard young players. These amendments were of an eminently protectionist nature, given the very serious situation that the highest football governing body was facing at that time, as described above. In this edition of the RSTP (and with greater clarity in the following version in 2005) FIFA starts from the principle of prohibition of international transfer of minors (*i.e.* under-18 players), unless certain and limited exceptions concur. With this provision, the aim was to protect the adequate and healthy development of minors, a group particularly vulnerable to exploitation and to the adverse consequences for their personal development in foreign countries. FIFA understood (and understands) that, although an international transfer may, in certain cases, favor a minor football player, there are higher general interests related to the minors that deserve further protection and justify the prohibition regime provided in the RSTP.

As far as the technical registration of minors is concerned, the FIFA RSTP, succinctly, requires that the International Transfer Matching System ("ITMS") must also be used in the context of so-called minor applications. The term 'minor' indicates a player (female or male) who has not yet reached the age of 18, while 'application' refers to the submission of a request through ITMS by the engaging member association for: 1. *International transfer* – a minor of any

[1] Global Transfer Market Report 2018 - A Review of All International Football Transfers In 2018 Men's Football, www.fifatms.com/wp-content/uploads/dlm_uploads/2019/01/GTM-2018_Men_online_v1.2.pdf.

[2] These specific objectives were outlined by FIFA in its Circular no. 769 that introduced the provisions in the RSTP 2001, https://resources.fifa.com/mm/document/affederation/administration/ps_769_en_68.pdf.

nationality who has previously been registered with a club at one association seeking to be registered with a club at a new association; and 2. *First registration* – a minor who has never previously been registered with a club and is not a national of the country in which he/she wishes to be registered for the first time. As a general rule, international transfers and first registrations of foreign players are only permitted if the player is over the age of 18. However, there are exceptions to this rule, which will be extensively addressed in the present article.

2. *Evolution of the provisions governing the registration of underage players*

Although the provisions of the RSTP regarding the international transfer of minors have undergone certain changes over the years, the pillar of the regulations since their implementation has always been the general prohibition of transferring minors (article 19(1) of the RSTP). Nevertheless, this general prohibition may be overturned in case an exception foreseen in article 19(2) of the RSTP is fulfilled considering the particularities of each case. These exceptions – initially – were the following: a) The parents of the player moved for reasons not linked to football; b) The player is over 16 and is moving within the territory of the EU/EEA; c) Both player and club are within 50km of their common borders and the distance between the two is less than 100km; d) The player flees his country of origin for humanitarian reasons; and e) The player is a student and moves without his parents to another country temporarily for academic reasons.[3]

The starting point of the regulatory framework concerning the transfer of minors was the amendments introduced by FIFA related to aspects such as the reference to football academies (article 19bis – included in 2009), the establishment of a specific procedure to request the application of exceptions to the general prohibition of international transfers of minors (article 19(4) and Annex 2 – included also in 2009, when the so-called "Subcommittee" appointed by the Players' Status Committee was created as the body entrusted with the task of approving international transfers of minors and first registrations).

In addition to the above-mentioned modifications and improvements of the system, FIFA formally introduced in 2016 another exception to the general prohibition in those cases in which a first registration of a foreign player who has been living continuously for 5 years in the country where he intends to register is requested by the relevant association. This exception was incorporated in article 19(3) of the RSTP.[4]

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[3] The third exception was actually included in March 2002 through the FIFA Circular no. 801. Available at: https://resources.fifa.com/mm/document/affederation/administration/ps_801_en_78.pdf. Also, the fourth and fifth exemptions have been recently codified in the RSTP by means of the FIFA Circular no. 1709 dated 13 February 2020. Available at: https://resources.fifa.com/image/upload/circular-no-1709-amendments-to-the-regulations-on-the-status-and-transfer-of-pla.pdf?cloudid=ywr4rcralhyoqtfrqyai.

[4] Even if FIFA bodies were already applying such exception in its practice for a long time.

Also, it is worth mentioning that, the exceptions foreseen in the recently included articles 19(2)(d) and (e) of the RSTP to the prohibition of the international transfer of minors, which have been codified after being accepted by the FIFA Subcommittee's jurisprudence.[5] Specifically, the Subcommittee exceptionally admitted applications regarding unaccompanied refugee players and exchange student players under certain criteria, which will be developed below. However, in summary, as described by Yilmaz,[6] the unaccompanied refugee players are those who move to another country without their parents due to humanitarian reasons and cannot be expected to return to their country of origin because of a danger to their life or freedom.

Finally, it shall be pointed out that in the revisions to the RSTP that have happened since 2001 (versions 2005, 2008, 2009, 2010, 2012, 2015, 2016, 2016, 2019 and 2020), the prohibition on the transfer of underage players and its exceptions has not suffered substantial changes, with the exception of the amendments included by FIFA Circular no. 1709 regarding articles 19(2)(d) and (e) of the RSTP, despite the fact that many things have changed in the world of football in the last 15 years, which at least put us in a position to reflect on whether or not the system's immobility is adequate to the current times and whether this system has proved its correct functioning.

3. FIFA regulatory framework on protection of minors

a. The general rule and its exceptions

As introduced *ut supra*, FIFA created a mechanism to combat the problems emerging from the minor players leaving their homes with the intention of pursuing a professional football career, which did not always, if ever, end how these kids had dreamt. This mechanism was the well-known prohibition on internationally transferring underage players foreseen in article 19 of the RSTP. This provision is the pillar of the FIFA regulatory framework for minors that set the essential values and principles of the FIFA framework in this regard.

In order to establish a proper system aimed at securing the protection of minors, FIFA developed a central, substantive provision (article 19 of the RSTP) to regulate the requirements and the process for a player to be granted an exception to being internationally transferred from one association to another. Additionally, FIFA gave its regulations additional tools with the objective of strengthening the procedure for registering minors; these regulatory tools were Annexe 2 RSTP: the procedure governing applications for first registration and international transfer, and Annexe 3 RSTP: the use of the Transfer Matching System (TMS) for the

[5] These two exceptions were explained by FIFA in "FIFA, Minor Player Application Guide", 23rd February 2017, http://resources.fifa.com/mm/document/affederation/footballgovernance/02/86/35/28/protectionofminors–"minorplayerapplicationguide"_neutral.pdf.

[6] Yilmaz, S. Int Sports Law J (2018) 18:15. https://doi.org/10.1007/s40318-018-0126-y.

purposes of the protection of minors). The goal of this system was to observe and control FIFA's main objective of safeguarding underage players from any abuse and uncertain future away from their home.

Say it, one shall draw one basic premise, the international transfer of underage players is prohibited[7] and only if the prerequisites for an exception to this general rule are fulfilled and approved by the competent body (the Subcommittee), the minor player can be registered with a club belonging to an association different from his club of origin's association. These exceptions are prescribed in article 19(2) of the RSTP (ed. March 2020) and are the following:

"*2. The following three exceptions to this rule apply:*

a) The player's parents move to the country in which the new club is located for reasons not linked to football.

b) The transfer takes place within the territory of the European Union (EU) or European Economic Area (EEA) and the player is aged between 16 and 18. In this case, the new club must fulfil the following minimum obligations:

i. It shall provide the player with an adequate football education and/or training in line with the highest national standards.

ii. It shall guarantee the player an academic and/or school and/or vocational education and/or training, in addition to his football education and/or training, which will allow the player to pursue a career other than football should he cease playing professional football.

iii. It shall make all necessary arrangements to ensure that the player is looked after in the best possible way (optimum living standards with a host family or in club accommodation, appointment of a mentor at the club, etc.).

iv. It shall, on registration of such a player, provide the relevant association with proof that it is complying with the aforementioned obligations.

c) The player lives no further than 50km from a national border and the club with which the player wishes to be registered in the neighboring association is also within 50km of that border. The maximum distance between the player's domicile and the club's headquarters shall be 100km. In such cases, the player must continue to live at home and the two associations concerned must give their explicit consent.

d) The player flees his country of origin for humanitarian reasons, specifically related to his life or freedom being threatened on account of race, religion, nationality, belonging to a particular social group, or political opinion, without his parents and is therefore at least temporarily permitted to reside in the country of arrival.

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[7] Article 19(1) RSTP: "*International transfers of players are only permitted if the player is over the age of 18*".

e) *The player is a student and moves without his parents to another country temporarily for academic reasons in order to undertake an exchange programme. The duration of the player's registration for the new club until he turns 18 or until the end of the academic or school programme cannot exceed one year. The player's new club may only be a purely amateur club without a professional team or without a legal, financial or de facto link to a professional club*".

Moreover, and as mentioned above, article 19(3)[8] of the RSTP provides, from its 2016 edition onward, another exception to the general principle: an underage player can be registered if he is able to demonstrate that he (i) has never previously been registered with a club (*i.e.* it is his/her first registration), (ii) is not a national of the country in which he wishes to be registered for the first time, and (iii) has lived continuously for at least the last five years in said country.

These aforementioned six exceptions are the ones that the RSTP explicitly foresees in order to register a minor in a different association. It shall be noted that FIFA has recently decided to include the exceptions foreseen in articles 19(2)(d) and (e) of the RSTP, exceptions which FIFA had previously developed through its constant and well-established jurisprudence.

Therefore, one can summarize the above-mentioned exceptions as follows: (1) The parents of the player moved for reasons not linked to football (the "*parents' exception*"); (2) The player is over 16 and is moving within the territory of the EU/EEA (the "*EU/EEA exception*"); (3) Both player and club are within 50km of their common border and the distance between the two is less than 100km (the "*border exception*"); (4) It is the first registration of the player in a club in a foreign country where he has lived continuously for at least the last five years (the "*5-year exception*"); (5) The player is an exchange student undertaking an academic program abroad (the "*exchange student exception*"); and (6) The player is moving for humanitarian reasons (the "*humanitarian reasons exception*"). This last exception is also divided by FIFA in two different ones, depending whether the minor is accompanied by his parents or, if the player is moving for humanitarian reasons without his parents.

The general prohibition on international transfers of a minor player is also extended to first registrations of non-national minors of the country where he wishes to be registered. Article 19(3) states that in case a minor has never previously been registered with a club and is not a national of the country in which he wishes to be registered with a club for the first time, then that first registration is also prohibited unless one of the exceptions explained *ut supra* is fulfilled.

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[8] Article 19(3) RSTP: "*The conditions of this article shall also apply to any player who has never previously been registered with a club, is not a national of the country in which he wishes to be registered for the first time and has not lived continuously for at least the last five years in said country*".

b. The process to approve the application for registering minor players

In 2009[9] FIFA introduced one of the most significant changes in the regulations by creating the so-called "Subcommittee appointed by its Players' Status Committee" (the "Subcommittee") to supervise the international transfer of minors. This body was incorporated into the FIFA legal framework because several national associations, which were the governing bodies responsible for the application of the exceptions to the general prohibition on internationally transferring minors, still neglected to strictly apply the rules.[10]

In response to the aforesaid failure in the application of the FIFA regulations on protection of minors, in October 2009, FIFA decided to create this Subcommittee, which has been clearly demonstrated to be a fundamental tool in order to apply and decide whether the FIFA regulations are respected or not. In other words, the Subcommittee became the supervising body concerning the examination – and potential approval – of every international transfer and first registration of a minor player.[11] A minor player cannot be registered if the Subcommittee does not give its approval beforehand.

Specifically, article 19(4) of the RSTP regulates the Subcommittee's task and establishes that "*[e]very international transfer according to paragraph 2 and every first registration according to paragraph 3, as well as every first registration of a foreign minor player who has lived continuously for at least the last five years in the country in which he wishes to be registered, is subject to the approval of the Subcommittee appointed by the Players' Status Committee for that purpose*".

In this sense, the application for the required approval of the Subcommittee shall be made through the association that wishes to register the underage player and the aforesaid application is the first step in order to register an underage player, even prior to any request from an association of the International Transfer Certificate and/or a first registration itself.

Therefore, article 19(4) of the RSTP shall be seen as an instrument that FIFA incorporated in its legal framework in order to strengthen the system built around the protection of minors' principle by establishing specific procedural paths for the national association to register an underage player who has been internationally transferred or when a non-national minor wishes to be registered in a national association different from his nationality.

Lastly, article 19(5) of the RSTP refers to Annexe 2 of the RSTP, which is the set of provisions that governs the procedures for applying to the Subcommittee for a first registration and an international transfer of a minor. Specifically, Annex 2 rules on the applications submitted to the Subcommittee for the international

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[9] See Circular no. 1190, dated 20 May 2009.

[10] FIFA's provision on the protection of minors - Part 2: The 2009 reform and its aftermath. By Kester Mekenkamp at Asser Instituut blog.

[11] *Ibid*.

transfer of a minor under article 19(2) and the first registration of a minor established in article 19(3), as well as the exchange student and humanitarian reasons exceptions. Article 1(1) of Annex 2 obliges the associations to lodge any application for the approval of the Subcommittee through the TMS, which also plays a fundamental role in the process for the approval of applications to register underage players.[12] An important aspect to underline is that the responsibility to enter these applications into TMS lies with the national associations, not with the clubs, which in turn, shall provide all the necessary information to the associations to make sure the application is properly made and all the required documentation is presented in accordance with article 5 of Annex 2.

c. The academies

Article 19bis of the RSTP compels clubs to report all minors who attend their academy to the association upon whose territory the academy operates. Article 19bis is another tool used by FIFA to continue safeguarding the protection of minors in football. Indeed, clubs shall inform the association if the academy operates with legal, financial or de facto links to said club.

A football academy is defined by the regulations as "*an organisation or an independent legal entity whose primary, long-term objective is to provide players with long-term training through the provision of the necessary training facilities and infrastructure. This shall primarily include, but not be limited to, football training centres, football camps, football schools, etc.*".

The aim of this provision is that all minor players that attend any academy, irrespective of whether or not such academy takes part in a national championship or has a legal, financial or *de facto* link to a club participating in a national championship, must be reported to the association upon whose territory the academy operates.

4. Jurisprudence of the Subcommittee appointed by the Players' Status Committee

Throughout the present section, we will proceed to analyze the jurisprudence of the Subcommittee appointed by the Players' Status Committee regarding the applications for the registration's approval of underage players. As described above, the procedures for applying before the Sub-committee for a first registration and an international transfer of a minor shall be initiated by the national association wishing to register the minor player. In this sense, when the associations submit an

[12] Article 1(3) Annex 3 of the RSTP: "*TMS helps safeguard the protection of minors. If a minor is being registered as a non-national for the first time or is involved in an international transfer, an approval must be given by a sub-committee appointed by the Players' Status Committee for that purpose (cf. article 19 paragraph 4). The request for approval by the association that wishes to register the minor on the basis of article 19 paragraphs 2 and 3 and the subsequent decision-making workflow must be conducted through TMS (cf. Annex 2)*".

application for approval, they shall first request the registration of the player under one of the exceptions explained above, in addition to substantiating and proving the requirements outlined in the FIFA regulations and the jurisprudence for each exception. Therefore, the author will proceed to separately explain the jurisprudence of the Subcommittee[13] concerning every exception and the specificities that the Subcommittee takes into account when it examines the applications for approval lodged by the national associations.

a. The parents' exception (Article 19(2)(a) of the RSTP)

The *parents' exception* represented 42.9% out of the total 3.754 applications submitted and decided by the Subcommittee in 2018. It is, by far, the most common exception used to apply for the registration of a minor before the Subcommittee.

In summary, this exception applies when the parents of the player move to the new country in which the new club is located for reasons not linked to football. In other words, the Subcommittee will evaluate the application with the information and documentation at its disposal (i.e. not only that which is provided by the national association to which the club wishing to register the player belongs, but also information gathered from FIFA's own research on the internet and social media) and will scrutinize whether the parents' decision of moving to the country in which the new club is located is linked to the footballing career of the underage player.

In determining whether the parents' decision to move to another country is motivated, in any way, by the footballing career of their child, the Subcommittee will typically take into consideration factors such as: (i) when the family settled in their new place of residence; (ii) when the family entered the new country for the first time; or (iii) the date when the parents started the new employment contracts.

The aforesaid raises an important element onto the table, which is the standard of proof that the Subcommittee applies for the approval of an exception to the article 19(1) of the RSTP. FIFA regulations neither set nor define the standard of proof to be applied in procedures governing the application for approval for the international transfer of a minor football player. FIFA's understanding in this respect comes from the attentive observation of the language contained in the decisions of the Subcommittee, where phrases like "beyond doubt," "beyond all doubt" and "without a doubt", can be found repeatedly. Indeed, it is quite common to read sentences in the Subcommittee decisions such: "*it must undoubtedly be established that the move of the player's parents to the country in which the new club is located is for reasons not linked to football*". Following FIFA's interpretation of its own regulations, the requesting party must overcome any and all potential explanations that a party can come up with for justifying a finding that the player's parents moved to the new country for reasons linked to football. The

[13] All the explanations in this section are based on decisions passed by the Subcommittee; however they are confidential and will not be referenced or quoted.

justification FIFA gives for this high standard of proof that the Subcommittee applies is obviously FIFA's aim to achieve its main objective and interest to protect minors and safeguarding their interests as children.

Another point of controversy regarding this specific exception is how the Subcommittee treats single-parent families or children without parents where their custody lies with a third person (family relatives or not). As a preliminary note, it shall be firstly noted how FIFA interferes in its decisions with such a delicate aspect as the consideration of a "family" or "parents" may be. As a matter of fact, the Subcommittee, in some of its decisions, has overseen every aspect surrounding the nuclear family of the minor and its smallest detail to decide whether it accepts the application of an exception or not. In this regard, the jurisprudence of the Subcommittee establishes that, as a general rule, the possible delegation of a minor's custody to a relative or a third person does not permit the application of the exception to the general prohibition on internationally transferring underage players contained in article 19(2)(a) of the RSTP. A different question is the case where the minor moves to another country only with one of his/her parents. Under this scenario, the Subcommittee has acknowledged, sometimes and depending on the specific circumstances of the case, the possibility that the other parent accepts and consents in writing the player's new place of residency. In addition, the Subcommittee has accepted situations where a Court has ruled that a player has adoptive parents and therefore, those are treated as "parents" in the sense of the article 19 of the RSTP.

Last but not least, it is worth mentioning that some of the Subcommittee decisions seem to have adopted a more flexible approach with regards the parents' exception when the parents (together with the player) are returning to their home country, *i.e.* where they had already lived for a substantial part of their lives. In those cases, an international transfer would be needed for a minor player if s/he was playing organized football in his/her last country of residence, but one can notice a more lenient approach by the Subcommittee when analyzing the specific cases and the circumstances surrounding the family's reasons for the move.

b. The EU/EEA exception (Article 19.2.b) of the RSTP)

As far as the *EU/EEA exception* is concerned, according to FIFA,[14] 9.8% of the applications submitted before the Subcommittee in 2018 were intended to register a minor player under this exception foreseen in article 19(2)(b) of the RSTP.

In this sense, the jurisprudence of the Subcommittee demonstrates that, in order to evaluate whether or not the application should be accepted, the applicant must prove the existence of several conditions.

[14] Global Transfer Market Report 2018 - A Review of All International Football Transfers In 2018 Men's Football, www.fifatms.com/wp-content/uploads/dlm_uploads/2019/01/GTM-2018_Men_online_v1.2.pdf.

The first factor that the Subcommittee considers regarding this exception is the age of the player. As the wording of the article 19(2)(b) of the RSTP establishes, it will have to be demonstrated that the player is aged between 16 and 18 and the transfers takes place within the European Union (EU) or European Economic Area (EEA). While the requirement of acknowledging whether the player is between 16 and 18 is straightforward, the same cannot be said of the aforementioned second requirement regarding the connection of the player's transfer with the EU/EEA. If one reads the literal text of the provision at stake, there is no hesitation that the principle of territoriality plays a fundamental role when it comes to this exception as "*[t]he transfer takes place within the territory of the European Union (EU) or European Economic Area (EEA) ...*". In other words, the origin of article19.2.b) of the RSTP was clearly aimed at accepting the exception in cases where the transfer of the underage player occurred between countries of the EU or EEA. Nonetheless, both the Subcommittee and CAS have widely discussed whether a movement of a player with an EU passport from a non-EU association to a EU association has to be considered as compliant with the requirements set out in article 19(2)(b) of the RSTP. The recent jurisprudence of the Subcommittee shows that it takes into account the decision *TAS 2012/A/2862* (which will be properly analyzed below) to conclude that the citizens of the EU member states must hold the same rights with respect to the free movement, whether or not they are currently registered in a EU/EEA country and therefore, in principle, the transfer of an underage EU player from outside the EU should be treated in the same way as the transfer of an underage EU player moving within the EU.

After examining the above-mentioned aspects, the Subcommittee proceeds to evaluate the three requirements stipulated in article 19(2)(b)(i.-iii.) of the RSTP relating to academic and football education, suitable accommodation and care. Specifically, the Subcommittee will grant the application for the registration only in case the three following requirements are duly fulfilled:

(i) The new club shall provide the player with an adequate football education and/or training in line with the highest national standards. In this case, the Subcommittee takes into consideration the classification of the club according to article 4 of Annexe 4 of the RSTP[15] and FIFA circular no. 1627, which obliges the national associations to divide their affiliated club in four categories depending on the formative training costs incurred by said clubs. In this regard, the Subcommittee evaluates whether the new club complies with the category for formative training costs, and if

[15] Annexe 4 - Article 4 (Training costs): *"1. In order to calculate the compensation due for training and education costs, associations are instructed to divide their clubs into a maximum of four categories in accordance with the clubs' financial investment in training players. The training costs are set for each category and correspond to the amount needed to train one player for one year multiplied by an average "player factor", which is the ratio of players who need to be trained to produce one professional player".*

it deems that the football education and/or training is in line with the highest possible national standards, the Subcommittee will consider that this requirement is fulfilled.

(ii) The new club shall guarantee that the player receives an academic and/or school and/or vocational education and/or training, in addition to his football education and/or training, which will allow the player to pursue a career other than football should he cease playing professional football. In this case, it would be essential that the association requesting the player's registration shows that the education plan provided to the player puts him in a position to achieve this.

(iii) The new club shall also make all necessary arrangements to ensure that the player is looked after in the best possible way (optimum living standards with a host family or in club accommodation, appointment of a mentor at the club, etc.).

The jurisprudence is clear in this regard: if any of the above-listed requirements is not proven to the satisfaction of the Subcommittee, the application for the approval of the registration will be rejected.

c. The border exception (Article 19(2)(c) of the RSTP)

The *border exception*, which represented 15.2% of the total 3.754 applications lodged in 2018, is a much easier exception for the Subcommittee to assess since it will take into consideration an objective factor: the distance between the (documented) place of residence of the underage player and location of the club where the minor intends to be registered. Both player and club are within 50 km of the common border and the maximum distance between the two shall be 100 km.

The Subcommittee calculates the distance with the "as the crow flies" method (i.e. a straight line between two points), (i) for the 50 km requirement, between the club's location and the closest common border between the two countries, and also between the player's residence and the closest common border between the two countries; and (ii) for the 100 km requirement, between the club's location and the player's domicile.

Article 19(2)(c) of the RSTP also requires that when these criteria are fulfilled, the minor player must continue living thereafter in that reported home. Moreover, the two associations of the two countries concerned must give their explicit consent.

d. The humanitarian reasons exception (Article 19(2)(d) of the RSTP)

It has been previously pointed out that this exception is in turn divided in two different ones: when "the player is moving for humanitarian reasons without their parents" (2.3% of the total 3.754 applications); and when "the player is moving for humanitarian reasons together with their parents" (4.3% of the total 3.754 applications in 2018).

In any case, this exception requires an independent evaluation on a case-by-case basis to ensure the protection of the minor players who leave their countries for humanitarian reasons. In this sense, the Subcommittee will proceed to assess whether the moving of the player (and his/her parents, if that's the case) is due to humanitarian reasons and is not linked to football.

The Subcommittee examines all elements at its disposal and in particular it considers whether the player in question has been formally granted the status of a person in need of protection by the authorities of his/her new country. From the Subcommittee's decisions available to the author, it is noted that the Subcommittee takes into account the status of the application for asylum of the minor at stake in order to decide if the application is in accordance with the purpose of this particular exception. The aforesaid may create an imbalance in the acceptance of the players' applications since each country has its own laws to grant "official protection" to refugees. In other words, it may happen that a person applying for asylum in Germany has greater chances to be granted such right than in Italy (54% rejection rate for asylum applications in Germany against 82% in Italy in the first quarter of 2019[16]), which is concerning because this "official status" granted by the national authorities of the country is fundamental for the Subcommittee in the examination of the applications under this exception and their final outcome.

e. The exchange student exception (Article 19(2)(e) of the RSTP)

This exception was created by the Subcommittee's jurisprudence in relation with the moving of underage students. It is only accepted under strict conditions when the minor player is studying abroad and remains in the new country only for academic reasons without his/her parents, and thereafter wishes to participate in organized football as recreational activity during his/her academic program abroad. In 2018, the Subcommittee received 109 applications (out of 3.754) based on this non-statutory exception; thus, representing only 2.9% of the total applications in this regard.

In addition to the above, with the aim of avoiding any abuse, the Subcommittee would only accept this application if the new club wishing to register the player is an amateur club (without a professional team and with no relation whatsoever – legal, *de facto* or economic – with a professional club).

Furthermore, the Subcommittee, in principle, only accepts applications in which the maximum duration of the study program abroad is one year, after which the player is required to return to his home country. However, in order to accommodate the various academic programs available throughout the world, the Subcommittee has also, from time to time, accepted academic studies abroad exceeding one year, provided that the maximum duration of the minor player's registration for the club concerned does not exceed one year and the minor player

[16] European Commission – 'Asylum quarterly report', 10. Available at: https://ec.europa.eu/eurostat/statistics-explained/pdfscache/13562.pdf.

immediately returns home after the end of the program or turns 18 before the end of said program.

f. The 5-year exception (Article 19(3) of the RSTP)

The *5-year exception* is the second-most requested exception, only surpassed by the *parents' exception*. In fact, 22.5% of the applications in 2018 were submitted based on the article 19(3) of the RSTP, thus, clearly evidencing that this exception was a real need even before FIFA incorporated it into the RSTP in 2016.

In order for the Subcommittee to accept an application based on this exception, several conditions shall be met: (i) the player is being registered for the first time; (ii) is not a national of the country in which he wishes to be registered for such first time; and (iii) has lived continuously for at least five years in the country where he intends to be registered prior to this request.

The crucial point to prove is that the minor player has effectively been living continuously for the last 5 years in the country where the club in which he is wishing to be registered is located. Therefore, any piece of evidence able to demonstrate the aforesaid prerequisite during the 5 years will be decisive.

5. CAS jurisprudence

The decisions of the Subcommittee have been subject to revision along the years by the Court of Arbitration for Sport ("CAS") and have helped to create a vast jurisprudence on the criteria used to accept or reject applications for transfer of minors depending on the exception adduced. In this sense, the CAS landmark cases regarding transfer of minors may be divided in two different groups: (i) the group disciplinary files, whereby FIFA sanctions a club for breaching the rules on registration and transfer of a number of minors and then this club appeals the Subcommittee's decision to CAS. These cases are of a disciplinary nature, where FIFA applies its disciplinary powers against breaching clubs; and (ii) the individual cases, when the Subcommittee evaluates each application on a case-by-case basis in a separate and differentiated procedure.

In the present section, the relevant CAS jurisprudence regarding minors will be analysed in detail to provide a complete overview on this complex matter.

a. The group disciplinary files

As the reader may anticipate, the Spanish saga involving the top three Spanish Clubs (FC Barcelona, Real Madrid and Atlético de Madrid) have a guaranteed front seat in the latest developments in the world of football, not only because they involved the three biggest Spanish clubs but also because those decisions impliedseveral major setbacks for each club's management and sporting strategy, since all of them were finally sanctioned by FIFA.

The CAS decision *CAS 2014/A/3793 FC Barcelona vs FIFA*[17] (the "FC Barcelona case") was undoubtedly the milestone that guided FIFA and the CAS itself in these specific group disciplinary procedures on protection of minors. It was the first time that FIFA (and subsequently CAS) dealt with a procedure of such complexity where several minors were involved (a total of 31). After the FC Barcelona case, Real Madrid and Atlético de Madrid also had a legal fight in front of CAS in similar proceedings – *CAS 2016/A/4785 Real Madrid Club de Fútbol vs FIFA*[18] (the "Real Madrid case") and *CAS 2016/A/4805 Club Atlético de Madrid vs FIFA*[19] (the "Atlético de Madrid case"), respectively.

The main aspects of those three landmark CAS appeals, where the FIFA Disciplinary Committee and, subsequently, the FIFA Appeal Committee, sanctioned the three clubs will be summarized below. In fact, even if the cases were substantially different, the breaches attributed to the Spanish clubs by the FIFA Disciplinary Committee and confirmed by the FIFA Appeal Committee referred to the same provisions:

- Article 5(1) RSTP: the players who were object of the investigations were not registered within the RFEF;
- Article 9 RSTP: there was no issuance of an ITC concerning several players;
- Article 19 and Annexes 2 and 3 RSTP: FIFA considered that there was a violation of several material and procedural rules of FIFA RSTP regarding the registration of several players involved in this case;
- Article 19bis RSTP: breach of the obligation to notify the association of the presence of all the players attending the academy.

i. Violation of article 5(1) RSTP and the Spanish Licensing System

In Spain, the competence to issue the licenses concerning the regional competitions is vested in the Autonomic Federations, which FIFA does not recognize as "associations" in the sense of article 5 RSTP. The clubs have to follow the Spanish internal rules to obtain the adequate players' licenses. Therefore, in the case of minors who are participating in a regional competition, the Spanish Autonomic Federations are the competent entities to issue the aforesaid licenses.

In this sense, it was FIFA's opinion that this is a violation of article 5 RSTP. However, all CAS awards established that FC Barcelona, Real Madrid CF and Club Atlético de Madrid could not be held responsible for the violation of article 5 FIFA RSTP based on the applicable rules of the Spanish licensing system with which they were obliged to comply.

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[17] Available at https://jurisprudence.tas-cas.org/Shared%20Documents/3793.pdf.

[18] Available at www.tas-cas.org/fileadmin/user_upload/Award_4785__FINAL__with_signature_for_publication.pdf.

[19] See in CAS Bulletin 2/2017, 64 available at https://www.tas-cas.org/fileadmin/user_upload/Bulletin_2017_2.pdf.

ii. Violation of article 19 RSTP – international transfers of minors and first registrations

As far as the violations attributed to the Spanish clubs for breaching article 19 of the RSTP, CAS found violations in ten out of the thirty-one cases in the FC Barcelona matter. The Catalan club submitted all the requests for registration involving underage players to the Catalonian Football Federation (FCF), which was not competent and did not verify if the requirements of article 19 RSTP were met.

According to the CAS, the competence laid with the RFEF, whoever received any application or request to apply for the transfer of an underage player. This was the case of nine minors; the other case was related to a first registration of a minor player where FC Barcelona failed to invoke any exception mentioned therein.

Regarding Real Madrid's case and article 19, in connection with Annexes 2 and 3 of the RSTP, FIFA in the previous instances decided that Real Madrid had breached the material and procedural provisions of the RSTP regarding minors in the registration of eight underage players. However, CAS decided that only two out of the eight cases were to be considered a violation of article 19 of the RSTP. One of them was related to a Dutch minor, over 16 years old in which Real Madrid "deposited" the license within the Football Federation of Madrid ("FFM") before obtaining the correspondent approval from the Subcommittee. The other case concerned a Romanian minor player that had been living in Spain for several years for whom Real Madrid obtained a "provisional registration" from the FFM, prior to obtaining the official approval of the Subcommittee. On the other hand, concerning the remaining six cases that, according to the CAS, did not involve a violation of the provisions regarding transfer of minors: four of them referred to players under 12 years old with respect to which, according to article 9(4) of the applicable RSTP (editions between 2008 and 2014), there was no obligation to request for any approval; and in the other two cases, it was understood that the players had only trained with the club during a trial period and that neither of them took part in "organized football" according to the RSTP.

Finally, concerning Atlético de Madrid's case, FIFA found the club liable to have breached article 19 and Annexes 2 and 3 of the RSTP in sixty-five occasions. However, CAS, after a thorough analysis of the case, decided to reduce the number of infractions of article 19 RSTP to twenty-six out of the sixty-five cases. The Panel held that Atlético de Madrid had infringed the aforesaid provision eleven times in cases where minors were registered in Atlético Madrileño[20] under the limited exemption[21] granted by FIFA to the RFEF. The Panel decided that (i)

[20] It was proven to the satisfaction of the Panel that Atlético Madrileño was a separate entity from Atlético de Madrid, but both acted in fact as a unit. The Panel found that Atlético de Madrid could be held liable for the infringements committed by Atlético Madrileño (see paras. 117 *et seq*. of the Atlético de Madrid case).

[21] The Limited Minor Exemption ("LME") was put in place by FIFA to discharge some workload onto the national associations, specifically concerning those registrations of "solely amateur minor

Atlético Madrileño and Atlético de Madrid should be considered as "the same club" given their close relationship and (ii) Atlético de Madrid took advantage of the registration of these players through Atlético Madrileño and avoided the FIFA procedure through the Subcommittee with the aim of circumventing the applicable regulations. Another eleven offences were related to U-12 year minors that were registered with Atlético Madrileño and Atlético de Madrid without complying with the requirements of article 19 of the RSTP (this aspect will be further explained below). In the other two cases, Atlético de Madrid, did not even argue that the players were not correctly registered; and in the last two other cases in which the Subcommittee rejected the registration of the underage players, the players were nonetheless registered with the FFM. As far as the thirty-nine other minors that CAS considered whose applications complied with the regulations, it was because although the Club failed to receive the approval of the Subcommittee regarding several minor players at the relevant moment in time, the approval was obtained afterwards. Therefore, the Panel concluded that the fact that an approval exists, in spite of its retroactive nature, shows that ATM committed no material violation of article 19 (1) or (3) in relation with thirty-nine out of sixty-five players.

iii. The specificity on the registration of foreign minor players under 12 years old (currently 10 years old)

This specific aspect was the subject of long and interesting discussions in the three cases of the Spanish saga and the CAS Panels in FC Barcelona and Atlético de Madrid cases and the Sole Arbitrator in the Real Madrid case did not share the same opinion in this regard.

The main points of discussion in this matter were based on (i) the interpretation of article 9(4) of the RSTP which established that an International Transfer Certificate ("ITC") was not required for a player under the age of 12 years at that time (FIFA amended in 2015 the rule and set this limit at the age of 10[22]), as those players were not under the scope of the RSTP and (ii) whether

players" in "purely amateur clubs". For more information, see FIFA Circular no. 1576, available at: https://resources.fifa.com/mm/document/affederation/administration/02/87/55/50/circularno.1576-limitedminorexemption(lme)_neutral.pdf.

[22] Due to an increasing number of international transfers of players younger than 12 years, FIFA decided to reduce the age limit for the requirement of the ITC to 10 years with an effect from 1st March 2015. In addition, in the Circular no. 1468 (dated 23 January 2015) outlining the rule change, FIFA reemphasized the duty of national associations to verify and ensure the regulatory framework for the protection of minors is fully respected at the national level. It especially clarified that the exceptions of article 19(2) of the RSTP should be also fulfilled in the case of the international transfer or first registration of any minor under the age of 10 despite the ITC or the approval of the Subcommittee are not required. In addition to the aforesaid, FIFA Circular no. 1709 has also clarified the assessment of whether club provides player with adequate football education and/or training in line with the highest national standard; codify the existing age threshold from which approval of the sub-committee is required; and incorporate the principles of the limited minor exemption that can be granted to an association as well as the corresponding responsibilities of the associations; modifying article 19(4) of the RSTP (ed. March 2020) accordingly.

or not, in light of such article, there was the obligation to request the approval of the Subcommittee for the transfer of U-12 players as foreseen in article 19 of the RSTP.

The three appellants argued the inapplicability of article 19 of the RSTP to the players under the age of 12 considering that such minors were outside the scope of the RSTP. To support the validity of their arguments, all clubs relied upon the commentary to article 9 of the RSTP carried out by FIFA itself in 2005. The commentary stated that: "*for the player younger than 12, the Regulations do not provide for an obligation to issue an ITC for international transfers. This avoids placing a supplementary burden on the association. Furthermore, the age of 12 have no effect in relation to the provisions of the regulations, since the training compensation and solidarity mechanism are calculated only as from this age*".[23]

Under the above-mentioned context, the Panels of FC Barcelona and Atlético de Madrid cases went on to share the same opinion and confirmed the applicability of article 19 RSTP to U-12 players in the same line as FIFA disciplinary bodies. The FC Barcelona case award stated that article 9(4) regarding the issuance of ITC does not preclude the obligation to comply with article 19 RSTP when a transfer or first registration of a U-12 takes place, regardless of the confusion raised by FIFA with its Commentary on the RSTP. For its part, the Panel in Atlético de Madrid case based its reasoning on FIFA Circular no. 1468, which came after the FC Barcelona award, and where FIFA emphasized the obligation to submit applications to the Subcommittee for the approval of an exception even if the minor player was U-12. The Panel also based its consideration on the grounds set out in the FC Barcelona decision and confirmed that Atlético de Madrid was required to request approval from the RFEF before registering the U-12 players.

On the other hand, the CAS award on the Real Madrid case had a different point of view of this concrete issue. According to the Sole Arbitrator, based on the specific circumstances of the case, it was proved that (before the amendments in FIFA Circular no. 1468 came into force in March 2015) "*it was generally accepted (...) that neither national member associations nor FIFA had to verify and/or decide on the existence of an exception under Article 19.2 RSTP for the transfer or first registration of U-12 players*".[24] This different conclusion reached by the Sole Arbitrator was essentially based on the testimony given by the RFEF at the hearing and by the formal inquiry made by Real Madrid to the RFEF asking about this specific procedure to register U-12 players, both confirming that Real Madrid was correctly interpreting this rule. Hence, the Sole Arbitrator considered that Real Madrid did not violate article 19 of the RSTP in any of the U-12 minors registered by this Spanish club, contrary to what the Panels in FC Barcelona and Atlético de Madrid cases understood.

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[23] See for instance CAS 2014/A/3793, para. 9.7 or CAS 2016/A/4785, para. 36.b.

[24] CAS 2016/A/4785, para. 59.

iv. Violation of article 19bis RSTP - the concept of "academy" according to FIFA's interpretation

As outlined above, an "academy" in sense of the RSTP is "*an organization or an independent legal entity whose primary, long-term objective is to provide players with long-term training through the provision of the necessary training facilities and infrastructure. (...)".*

Article 19bis of the RSTP is the source of the clubs' obligation to notify the relevant association of all the minors who attend an academy of a football club.[25] The duty of notification established in article 19bis(1) RSTP shall not be considered as met by the mere fact that the federation issued licenses for the players in question. The obligation to notify established on art. 19bis(1) RSTP is different and additional to the obligation to register the players in the appropriate association.

In all three cases, the Panels opted for an extensive interpretation of the notion of academy and reached the conclusion that the clubs' youth academies were, in fact, an "academy" in the sense of article 19bis(1) RSTP and, therefore, all of them had failed to comply with the obligation to report the presence of the minors.

b. The individual cases

As introduced *ut supra*, there are some CAS landmark cases that have helped to consolidate the jurisprudence on the applicable rules to the transfer and first registrations of minors. The present section will provide a brief summary of CAS cases that have made an impact on how one may understand these regulations.

After analyzing the different decisions that CAS has rendered in this matter since 2004, we can identify two approaches adopted by the CAS Panels regarding the interpretation of the regulations: i) a restrictive interpretation in some cases and ii) a more flexible interpretation of the provisions in other cases.

i. The restrictive interpretation

1. CAS 2005/A/956 Carlos Javier Acuña Caballero v. FIFA & Asociación Paraguaya de Fútbol (the "Acuña case")[26]

Carlos Javier Acuña is a Paraguayan player, who at the age of 17 decided to move to Cádiz (Spain) in order to play for Cádiz FC by signing a professional employment contract with the Spanish club. Cádiz FC requested the player's ITC

[25] Art. 19bis(1) RSTP: "Clubs that operate an academy with legal, financial or de facto links to the club are obliged to report all minors attending the academy to their national association".

[26] Available at www.yumpu.com/en/document/view/12213719/cas-2005-a-955-cadiz-cf-sad-v-fifa-and-asociacion-paraguaya.

through the RFEF and FIFA rejected it based on the provisions governing the transfer of underage players which were not respected. The argument raised by the player for the application was that the mother had moved to Spain looking for a new employment opportunity.

This was the first case where a CAS Panel had to analyze article 19 RSTP and, in particular, the parent's exception. Unfortunately, the player failed to discharge his burden of proof as he was not able to present a solid case before CAS. During the hearing it was proven that when the player rejected other offers and accepted Cádiz CF's, his mother had not yet signed any employment contract. Therefore, CAS Panel considered that the FIFA decision was right when it stated the movement of the player and his mother was based on reasons linked to football and rejected the appeal brought by the player, thus rejecting the application for an exception (*i.e.* the parents' exception) to the prohibition of registering him before the Spanish club.

2. *CAS 2007/A/1403 Real Club Racing Santander v. Club Estudiantes de la Plata (Brian Óscar Sarmiento)*[27]

Brian Óscar Sarmiento, an Argentine player that traveled to Spain days before his father did so, signed an employment contract with the Spanish club Racing de Santander. According to the contract, he was entitled to a remuneration that exceeded almost 10 times what his father was entitled to receive in the employment contract he had signed with a company based in Santander (Spain). Moreover, Brian did not enroll in any educational institution, which the CAS Panel took as a final confirmation that the main reason for his move was to become a professional football player. Considering all the concurring circumstances, CAS confirmed FIFA's decision to reject the application.

3. *CAS 2011/A/2354 Elmir Muhic v. FIFA (the "Muhic case")*[28]

Elmir Muhic, from Bosnia Herzegovina, at age of 15 moved to Frankfurt (Germany) to pursue a training program that would later serve to be able to fill the position of "airport manager" at Sarajevo airport. While there, he decided to play football with the German club OFL Kickers Offenbach.

The German national association requested Elmir Muhic's registration before FIFA, alleging that the minor moved to Germany with his aunt for a reason not linked to football. FIFA rejected the request and the player appealed to CAS, which confirmed the decision issued in the first instance. The Panel concluded that the term "parents" could not be given a broad interpretation to be able to match it with another family member, in this case the player's aunt with whom he lived.

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[27] Award not published.

[28] Available at http://jurisprudence.tas-cas.org/Shared%20Documents/2354.pdf.

4. CAS 2015/A/4312 John Kenneth Hilton v. FIFA[29]

In 2014, John Kenneth Hilton, a promising American player, decided to move to Manchester (UK) together with his mother and the player started at the St Bede's high school. However, his father stayed in the USA for business reasons. After a year, again with his mother and his siblings, the player moved to Amstelveen (The Netherlands) and joined the "Amsterdam International Community School". The player started training with Ajax Amsterdam and thus, the KVNB (Dutch Football Association) requested the player's registration based on the parents' exception.

The Subcommittee adopted a restrictive approach and rejected the application because it considered that the movement of the player's mother was linked to football. Indeed, it was held in the FIFA decision that "*it could not be undoubtedly and clearly established that the player's mother had relocated for reasons that were not linked to football*".

CAS confirmed the decision rendered by FIFA and denied John Kenneth Hilton the possibility to be registered with the Dutch FA. The Panel in this case concluded the following: "*The Panel also agrees with CAS jurisprudence (CAS 2011/A/2494 – Vada I –, para. 63 et seq.) that it is not required that the parents' main objective in their decision to move is their child's football activity – it is rather sufficient that the move of the player's parents occurred due to reasons that are not independent from the football activity of the minor or are somehow linked to the football activity of the minor*".[30]

Rather than assessing the *rationale* of the regulations and determining whether the player's best interests were protected with the rejected application or not, the Panel ruled that: "*Article 19 FIFA RSTP sets key principles designed to protect the interest of minor players" which consequently requires «the need to apply the rules on the protection of minors in a strict, rigorous and consistent manner»*".[31] The Panel referred to *CAS 2007/A/1403, RC Racing de Santander SAD v. Club Estudiantes de la Plata* to conclude the following: "*Article 19 FIFA RSTP and its exceptions are clear and there is nothing else for the Panel but to apply them since this Panel does not have the task to legislate, but to apply the rules*".[32]

5. Conclusion on the restrictive interpretation

As it can be observed, most of the conflictive cases regarding the transfer of minors deal with the exception of article 19(2)(a) of the RSTP (i.e. the parents' exception) and the determination of what constitutes a "transfer for reasons not linked to football" remains the key issue. In this sense, the applicable standard of

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[29] Available at http://jurisprudence.tas-cas.org/Shared%20Documents/4312.pdf.
[30] CAS 2015/A/4312 *John Kenneth Hilton v. FIFA*, para. 79.
[31] *Ibid*, para. 78.
[32] *Ibid*, para. 79.

proof to meet this exception has been set quite high based on fact that the exception has been used as a tool or a vehicle to fraudulently circumvent the rule. The most common example is when the parents of the player (or only one of them) move to the city where the interested club is located and "find" a job quite quickly and almost instantly the minor player starts training with the interested club. Those types of cases reveal quite clearly that the main reason for the move is linked with player skills and the CAS Panels have consistently adopted a rigorous application of the rule denying the application for registration.

In addition to that, it is also noted that, on several occasions, the decision to deny the application for registration gives substantial weight to the fact that the player has moved to another country accompanied by a single parent or by a relative. The notion of "parents" present in article 19 RSTP has been traditionally interpreted in a very restrictive manner and the Acuña, Sarmiento and Muhic cases constitute a good example of CAS's approach in the past.

ii. The flexible interpretation

1. TAS 2012/A/2862 FC Girondins Bordeaux v. FIFA (Valentin Vada II)[33]

The first episode of Valentin Vada's saga took place with the case *CAS 2011/A/2494 FC Girondins de Bordeaux v. FIFA (Valentin Vada I*[34]*)*; at that time the player was a 15-year-old Argentinean player who moved with his family to France, after his father had sold all his properties in Argentina with the intention of moving in search of a job. The father began to work with the company that was the main sponsor of Girondins de Bordeaux. His work required a certain training that he did not have when arriving in France. The French club requested the player's ITC to FIFA based on the parent's exception, which was eventually rejected. The French club appealed to CAS and the Panel confirmed FIFA's decision.

However, as far as the second episode of this saga is concerned, after Valentin Vada turned 16 years old, FC Girondins de Bordeaux made a new request based on art. 19(2)(b) because the player had the dual Argentine-Italian nationality. Furthermore, this application was again rejected by FIFA. The French club did not give up and filed an appeal before CAS - *TAS 2012/A/2862 FC Girondins Bordeaux v. FIFA (Valentin Vada II)*; this time the Panel accepted the appeal and ordered that the player's registration.

The French club argued before FIFA that it could transfer the player from the Argentinean club to Girondins based on the EU/EEA exception foreseen in article 19(2)(b) of the RSTP. FIFA's single judge rejected the request, as it held that the transfer did not comply with the requirements set out in said provisions since the transfer did not occur between clubs within the EU/EEA. FIFA reasoned

[33] Available at http://jurisprudence.tas-cas.org/Shared%20Documents/2862.pdf.
[34] Available at http://jurisprudence.tas-cas.org/Shared%20Documents/2862-O.pdf.

that this exception was based on the criterion of territoriality, not nationality, as the article specifically refers to "a transfer taking place within the territory of the EU or EEA," which was not the case. Nonetheless, the CAS Panel did not share the same opinion as FIFA. It agreed that the "EU/EEA exception merely stipulates a criterion of territoriality, not nationality".[35] Still, it also noted that the FIFA's RSTP commentary revealed that this exception was included in the 2001 informal agreement between FIFA/UEFA and the European Commission in order for it to respect EU law on free movement. Moreover, a document submitted by Girondins showed that, in the majority of cases, the Subcommittee takes the free movement principle into consideration when "*assessing the transfer of a player who, with a passport from an EU or EEA country, wishes to register with a club in an EU or EEA country*".[36] Consequently, the Panel accepted an "unwritten exception" allowing a player such as Valentin Vada, a citizen of the EU wishing to exercise his right of free movement, to invoke Article 19(2)(b) RSTP and therefore, CAS granted him the possibility to be registered and transferred to Girondins de Bordeaux.

2. *CAS 2012/A/2839 C.A. Boca Juniors v. FIFA (Rodrigo Betancur Colman)*[37]

Rodrigo Betancur, a 15-year-old Uruguayan player whose parents were no longer together (his parents divorced and his mother passed away a few years after), moved with his father (who got remarried to an Argentine woman) to Nueva Helvetia (an Uruguayan town – 60 km from Buenos Aires). Shortly after, the family decided to move again, but this time to Buenos Aires (Argentina) where the stepmother's family was based. Four months after arriving to Argentina, the player took part in a public trial at Boca Juniors' facilities, where he was accepted. The club asked FIFA for the first registration of the player and FIFA rejected it as it did not consider that it was proven that the movement of the family was not linked to football. As a matter of fact, FIFA did not consider the stepmother as one of Rodrigo Betancur's "parents" as required by article 19(2)(a) of the RSTP. The club appealed to CAS, which accepted the appeal and ordered the first federative registration of Rodrigo Betancur.

The Panel in the Rodrigo Betancur case gave a slightly more flexible interpretation to the term "parents" and allowed the player's stepmother and the player's father to be considered jointly as the "parents" of the underage player, in the sense of article 19 RSTP. Indeed, the Panel took into consideration the point that the player's mother was deceased, the player's father had married the player's stepmother, and they already had two children in common, not to mention the fact that the whole family lived together in Buenos Aires. Therefore, CAS overturned FIFA decision and accepted the parents' exception invoked by Boca Juniors.

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[35] *Ibidem*, para. 94.
[36] *Ibidem,* para. 97.
[37] Award not published.

3. *CAS 2013/A/3140 Alex Daniel Reneau v. Club Atlético de Madrid SAD & RFEF & FIFA*[38]

Alex Daniel Reneau was an underage player who came from a wealthy family with American citizenship (his mother had also Colombian origins). The peculiarity of this family was based on the nature of the father's work and their healthy financial circumstances; he could carry out his work duties from anywhere in the world and therefore, the family decided to move to Madrid in July 2012. In September 2012, and after having already attended school, Alex Daniel Reneau went to a trial at Atlético de Madrid's facilities, which resulted in him being accepted by the Spanish club. The RFEF processed the registration of the minor through an application to FIFA that was rejected. The club appealed the decision to CAS and CAS admitted the appeal and ordered the player's first registration with Atlético de Madrid.

The CAS Panel in this case adopted a flexible approach with respect to the parent's exception and overturned FIFA's decision concluding that: "*In that respect, it is hard to conclude that an entire family, such as the family of the Player, would have made important choices as regards its place of location, for grounds linked to the footballing activity of the Player. As mentioned previously, it appears that the Appellant's family has many possibilities to live in different places in the United States and outside the United States, as they did already in the past, so that it is doubtful that the location of a particular football club would have played any role in the organization of the family life. Even if the family would be keen in favoring the football activities of the Player, one can think that such activities could have been performed in many other places all over the world*".[39]

4. *TAS 2015/A/4178 Zohran Bassong & Anderlecht v. FIFA*[40]

Zohran Bassong was a Canadian player who moved to Belgium to live with his grandparents, whilst his parents initially remained living in Canada. The Belgian FA lodged an application for the registration of the player with Anderlecht. However, the Subcommittee rejected the application since it considered that the player moved abroad without his parents and therefore, the requirements set out in article 19(2)(a) of the RSTP were not met.

When FIFA rejected this first application, the player's mother took the decision to join him in Belgium, allegedly with the aim of reobtaining her Belgian nationality. Afterwards, a second application was submitted to the Subcommittee, which was equally rejected by the FIFA on the basis that the mother of the minor

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[38] Available at http://jurisprudence.tas-cas.org/Shared%20Documents/3140.pdf.

[39] CAS 2013/A/3140 *Alex Daniel Reneau v. Club Atlético de Madrid SAD & RFEF & FIFA*, para. 8.31.

[40] Award not published.

player moved to Belgium for reasons related to football, given that she only moved to Belgium after her son was already living in Belgium and the Subcommittee had rejected a first application.

The player appealed this second rejection to CAS and the CAS Panel deciding the case ruled that indeed it appeared that the player's mother had moved to Belgium for reasons related to football and thus, from a literal interpretation of the rule, the application for registration should be rejected; however, in the Panel's view such finding did not mean that Zohran Bassong could not be registered in the Belgian FA. More precisely, CAS focused on the objectives of the prohibition of transfers of minors (*i.e.* to protect the safety of minors and avoid them from any form of abuse) and the Panel assessed the player's specific risk in moving to Belgium to finally authorize his registration. In reaching its conclusion, the Panel took into consideration the following factors:[41] i) the family's positive economic situation, which minimized the risk of the Player's commercial exploitation;[42] ii) the fact that the Player enjoyed a proper football and academic education while living in Belgium; iii) that the Player's father indicated that he would join and live with his family in Belgium in due course.

The Panel concluded that a mechanical application of the regulations, resulting in a rejection of the application, would have been against the player's best interests and consequently decided to approve the registration of the Player.[43]

5. CAS 2016/A/4903 Club Atlético Vélez Sarsfield v. The Football Association Ltd., Manchester City & FIFA (Benjamin Antonio Garré)[44]

Benjamin Garré is a player of Argentinean nationality who was registered with the Argentinean club Vélez Sarsfield at the age of 11. In June 2016, the Player obtained his Italian passport (in addition to his Argentinean passport) and a month later, in July 2016, on the day of his 16th birthday, he signed a contract with Manchester City valid until July 2018.

The FA requested the approval of the Subcommittee for the international transfer of the player based on the EU/EEA exception foreseen in article 19(2)(b) of the RSTP. Vélez Sarsfield opposed the request submitted by Manchester City, alleging that the requirements of article 19(2)(b) were not fulfilled and that the club had the expectation of signing a contract with the player when he was 16 years old.

FIFA accepted Manchester City's request for registration, echoing the findings of the Panel in the Vada II case and Vélez Sarsfield appealed the decision to CAS, which confirmed FIFA's holding that the requirements set out in article 19(2)(b) were met.

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[41] See ECA Legal Bulletin no. 7, September 2017.

[42] See in this regard the findings of the Panel in CAS 2013/A/3140 *Alex Daniel Reneau v. Club Atlético de Madrid SAD & RFEF & FIFA*.

[43] TAS 2015/A/4178 *Zohran Bassong & Anderlecht v. FIFA*, para. 86 et seq.

[44] Award available at http://jurisprudence.tas-cas.org/Shared%20Documents/4903.pdf.

The CAS Panel, following the rationale of CAS Panel in Vada II but going even further, proposed a wider and unrestricted interpretation of the provision, opening the possibility that the exception could be applicable to any territory:
"*The consequence of this finding is not that Article 19(2)(b) FIFA RSTP is invalid, because this would negatively affect players holding the EU/EEA citizenship that can legitimately rely on this exception. However, in the opinion of the Panel, this finding suggests that the territorial scope of the provision should no longer be restricted to transfers "within the territory of the European Union (EU) or European Economic Area (EEA).*
The application of Article 19(2)(b) FIFA RSTP beyond the scope of its clear wording was followed by FIFA as a consequence of CAS' interpretation in the Vada II case. Led by the same legal perception, this Panel considered lengthily whether to establish already in this case that Article 19(2)(6) FIFA RSTP should be applicable to all transfers worldwide, as long as the material requirements set out in Article 19(2)(b)(i)-(iv) FIFA RSTP are complied with. However, considering the implications of such decision, the Panel finds that the matter should be dealt with first by FIFA, which is expected to duly consider the findings of this award. FIFA will then be able to determine whether to amend the regulations, or to adopt a different interpretation of the rule through circular letters, or otherwise, which is of course its prerogative".[45]

6. Conclusion on the flexible interpretation

From the above-mentioned cases, one may conclude that, depending on the circumstances CAS is not reluctant to interpret the rule in the most favorable approach for the minor's individual best interest, since it is no secret that the restrictions of the provisions aimed at regulating the transfer of minors sometimes do not favor the underage player at all.

There is no doubt that, from a general point of view, article 19 of the RSTP protects a worthy legal interest: the safety and well-being of minors in football. However, when one of the beneficiaries of the protections afforded by this provision finds himself deprived of his fundamental right to participate in the organized sport of his choice, the general considerations of said provision shall give way to an analysis of the specific facts and circumstances of the case at hand.

A clear example of the above may be found in the *Zohran Bassong case* and the *Reneau case*, where the Panels concluded that if one strictly applies the regulations governing the international transfer of minors, it may entail a mechanical application of article 19 of the RSTP, which in turn could, in certain particular cases, be contrary to the best interests of the minor.

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[45] CAS 2016/A/4903 *Club Atlético Vélez Sarsfield v. The Football Association Ltd.*, Manchester City FC & FIFA, para. 105.

In these cases, although the players could not, in principle, benefit from the exception provided in article 19 of RSTP, their well-being and personal development supported the approval of his registration, as long as the aforesaid well-being and personal development are extensively demonstrated taking into consideration all the factors surrounding the case. In these cases, CAS Panels have opted for a case by case approach and a more lenient interpretation of the rule favoring the particular interest of the minor rather than the general protection that the rule is seeking.

7. Conclusions

There is no doubt that the protection of minors is a very serious issue to consider when one analyses FIFA's legal framework. Safeguarding children in football is and shall be one of the main objectives of the football governing bodies in order to keep minors safe and ensure that the involvement in football of underage players does not became dangerous for them.

Nevertheless, the key question still is: what happens when the international transfer of a minor poses little to no risk to his best interests? One may conclude that by rejecting an application for registering a minor when there are no doubts that his interests are properly protected may have the contrary effect and it may entail that the underage player may in fact be placed in a worse position than the one he would have been in if his application had been accepted by FIFA.

Traditionally, in many cases before the Subcommittee – and also before CAS –, it has been a constant practice that the deciding bodies would not change their restrictive approach to the exceptions contained in art. 19 RTSP, even if the specific circumstances of the case would guarantee the minor's wellbeing. One may look at the above mentioned *Vada I* case, where the Panel had to reject the appeal of the club for the registration of the player, but it expressed its disappointment regarding the result that was produced given the strict application of article 19 of the RSTP:

CAS 2011/A/2494 FC Girondins de Bordeaux v. FIFA: "La Formation a tenu compte des conséquences regrettables de cette sentence pour Valentin Vada, lequel se voit privé de licence alors même que ses deux frères peuvent, quant à eux, évoluer normalement au sein du FCGB. Il s'agit néanmoins de préciser que seul Valentin Vada tombe sous le coup de l'article 19 RSTJ, son frère aîné étant majeur et son frère cadet trop jeune pour devoir acquérir une licence. En outre, même si elle n'est bien entendue pas insensible à la frustration compréhensible que ressentira Valentin Vada, la Formation doit constater que ce seul facteur humain ne saurait à lui seul l'autoriser à faire fi des règles strictes imposées par l'article 19 RSTJ. Tout au plus peut-elle émettre le vœu que le jeune Valentin Vada conservera sa motivation ainsi que son talent et qu'il saura développer ce dernier jusqu'à ce qu'il atteigne l'âge requis pour permettre à son club d'obtenir les autorisations nécessaires.

En considérant les règles applicables, et en particulier celles applicables pour des joueurs européens, cette âge ne semble pas être situé trop loin dans le temps, d'ailleurs".[46]

Another clear example of these inefficient results from the application of article 19 RSTP can be also seen is the FC Barcelona case, where some minor players had already been playing for *Barça* and living in *La Masia* for years, enjoying one of the best academic programs, the best possible football training sessions with the top experts and, of course, those were players that had already settled in the city and adapted to the Spanish culture. Nevertheless, FIFA revoked the licenses of those underaged players and they saw themselves forced to return to their country of origin where, in some cases, they had problems readapting to a life that they had left behind years ago. Undoubtedly the club was sanctioned (ban on registering players and fine), but the harshest punishment was indirectly imposed on those young players who – without any wrongdoing on their part – saw their dream shattered and their lives changed.

After analyzing these cases one may wonder why football needs to be different from any other discipline (sportive, artistic or even scientific) when it comes to mobility of minors and whether or not the interventionist role that FIFA has adopted in this field is justified.

FIFA, on its part, has its best argument to maintain the *status quo* in the good results that the implementation of article 19 RSTP has had over the years. It maintains that no risk can be taken to repeat the misfortunes and abuses that occurred in the past and therefore, it cannot interpret these rules with flexibility or admit any exception to the strict application of said set of provisions, which are aimed at protecting all the underaged players in the world and not only a few privileged that have the good fortune of contacted by big clubs. FIFA is of the opinion that, with increasingly flexible interpretations of the exceptions, there may be a threat that the unwanted situations that occurred in the past are repeated. In light of this, FIFA's consistent approach on this matter has been rather simple: a strict and restrictive interpretation of the prohibition to transfer minors leaving no room for exceptions to the exceptions or a "case by case" analysis.

From the author's perspective, it shall be emphasized that there is an absolute agreement and conformity with FIFA to primarily protect such an important legal asset such as the interest of the minors. However, even if it has to be

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[46] "*The Panel has taken into account the unfortunate consequences of this decision for Valentin Vada, who is deprived of a license even though his two brothers can, as for them, evolve normally within the FCGB. However, it should be noted that only Valentin Vada falls under Article 19 RSTJ, his older brother being older and his younger brother too young to have to acquire a license. In addition, although it is well aware of Valentin Vada's understandable frustration, the Panel must recognize that this single human factor alone cannot allow it to ignore the strict rules imposed by the article. 19 RSTJ. At most, one can express the wish that young Valentin Vada will retain his motivation as well as his talent and that he will be able to develop it until he reaches the required age to allow his club to obtain the necessary authorizations. Considering the applicable rules, and in particular those applicable to European players, this age does not seem to be too far in time, by the way*".

recognized that the system put in place by FIFA twenty years ago has, in general, met the aimed target, it cannot be ignored that – as it has been revealed in this chapter – certain cases have obtained a rather unfair and unsatisfactory result by applying the legal framework in place. FIFA should not hide behind the statistics because, while it is true that along the years only 12%[47] of the applications for registering minors are rejected, it is also true that in some occasions the strict application of the rules has led to scenarios where the very legal right that is supposed to be safeguarded (minor's interest) has been clearly violated. This unwanted result cannot be accepted as collateral and deserves due consideration by the legislators since it reflects the need to revise the regulations.

The reality, from the beginning of this century until today's date, shows that football and society have changed considerably and a substantial revision of the rules on protection of minors seems to be advisable and a real need, according to the growing concerns that this legal framework is causing for the football stakeholders, and especially for the minors and their families. Still, it is fair to say that, as opposed to the first round of decisions adopted by CAS concerning article 19 RSTP and commented *ut supra*, the evolution of the jurisprudence (particularly of CAS) seems to be moving towards a more *"ad casum"* approach aimed to avoid certain unfair results for the minors resulting from the strict application of the rule. The CAS panels now seem to be ready to take into account specific situations where the strict application of the rule would automatically lead to the rejection of the application, but the specific circumstances of the case allow them to conclude that the protection of his personal interest is guaranteed at the same time that his wellbeing is safeguarded.

[47] Average of the rejections of applications between 2011 and 2018 (both years included). Figures taken from the Global Transfer Market Report 2018 - A Review of All International Football Transfers In 2018 Men's Football, www.fifatms.com/wp-content/uploads/dlm_uploads/2019/01/GTM-2018_Men_online_v1.2.pdf.

FIFA'S TRANSFER MATCHING SYSTEM USING TECHNOLOGY, TRAINING AND COMPLIANCE TO CREATE A LEVEL PLAYING FIELD

by *Kimberly T. Morris*[*]

Introduction

International transfers of professional footballers (both male and female) are processed through FIFA's International Transfer Matching System ("ITMS" or "The System") – a ground-breaking technological and regulatory development that has revolutionised the football transfer market. The System, which has been in place for almost 9 years, has recorded 119,025 professional football transfers. In ITMS clubs have declared USD 37.56 billion in total transfer fees, USD 421 million in solidarity contribution payments and USD 2.54 billion in commissions to intermediaries. 22,336 minor applications have been submitted in ITMS by FIFA's member associations.

The decision to create an electronic online transfer system was made in 2007, when the FIFA Council, at the 57th FIFA Congress, accepted a recommendation of the FIFA task force "For the Good of the Game". The recommendation was to develop an online player transfer system to increase integrity and transparency in the market and to enforce the rules on the protection of minors. Two years later, in 2009, FIFA's Transfer Matching System was rolled out to all FIFA's member associations (then numbering 207). The online technology platform was first made available to process minor applications that previously had been submitted in paper form to FIFA's Players Status department. In October 2010, the regulations relating to use of ITMS were included in annexe 3 of the FIFA Regulations on the Status and Transfer of Players (the "RSTP") making ITMS a mandatory step for all international transfers of professional male footballers through a secure, online and real-time system.

Today all 211 FIFA member associations and over 7,000 clubs in 6 confederations (UEFA, AFC, Concacaf, Conmebol, OFC and CAF) use ITMS to

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the international movement of professional players. In January 2018, the use of ITMS was extended to international transfers of professional female players.

1. Transfer Process

The transfer process is governed by FIFA's Regulations on the Status and Transfer of Players (the "RSTP"). Annexe 3 of the RSTP was drafted to reflect the technical functioning of the transfer matching system (ITMS or the System). Annexe 3 describes the scope and purpose of the System – to increase transparency of individual player transfers, to ensure that football authorities (i.e. FIFA as the global football regulator) has more details available to them on international players transfers, and to improve the credibility and standing of the global transfer system.

As prescribed by article 1 para 5 of Annexe 3, and at the time of writing, the use of ITMS is mandatory for all international transfers of professional male and female players within the scope of eleven-a-side football. Any registration of a player without the use of ITMS will be deemed invalid.

2. Role of the Clubs

For an international transfer to be processed through ITMS, clubs must enter certain detailed confidential information into the system. This confidential information is in two forms – (i) certain data that must be entered in designated fields in the System for a particular transfer and (ii) uploading the required documents in the System to support the information entered. For example, the full legal name, the date of birth and nationality (or nationalities if there are two nationalities) of the player must be typed in a free text field and a corresponding proof of identification issued by the relevant government must also be uploaded in ITMS in a particular transfer instruction. Similarly, details about the player's salary, how much will be paid, the type of currency of said payments and when the payments will be made (either a fixed amount or an amount based on the completion of a certain condition) all must be disclosed in designated fields in ITMS in the relevant transfer instruction. The complete employment contract, including all annexes and amendments must also be uploaded in the System. It is the club engaging the player (the new club) that must provide this information in a particular transfer.

Article 3.1 para. 1 of Annexe 3 of the RSTP identifies the obligations of clubs stating that clubs are responsible for entering and confirming transfer instructions in ITMS and, where applicable, for ensuring that the required information matches. Article 4 of Annexe 3 entitled 'Obligations of Clubs' outlines in detail the compulsory data a club must disclose when creating transfer instructions dependent on the transfer type. For example, when a player is transferred out of contract and there is no transfer or loan agreement, there is no need to declare or provide this information. The information required is as follows:

- Instruction type (Engage player or Release player),
- Indication of whether the transfer is on a permanent basis or on loan,
- Indication of whether there is a transfer agreement with the former club,
- Indication of whether the transfer relates to an exchange of players,
- If related to an earlier loan instruction, indication of whether:
  - it is a return from loan; or
  - it is a loan extension; or
  - the loan is being converted into a permanent transfer,
- Player's name, nationality(ies) and date of birth,
- Player's former club,
- Player's former association,
- Date of the transfer agreement,
- Start and end dates of the loan agreement,
- Club intermediary's name and commission,
- Start and end dates of player's contract with former club,
- Reason for termination of player's contract with former club,
- Start and end dates of player's contract with new club,
- Player's fixed remuneration as provided for in player's contract with new club,
- Player intermediary's name,
- Indication of whether the transfer is being made against any of the following
- payments:
  - Fixed transfer fee, including details of instalments, if any,
  - Any fee paid in execution of a clause in the player's contract with his/her
  - former club providing for compensation for termination of the relevant
  - contract,
  - Conditional transfer fee, including details of conditions,
  - Sell-on fees,
  - Solidarity contribution,
  - Training compensation,
- Payment currency,
- Amount(s), payment date(s) and recipient(s) for each of the above listed
- types of payments,
- Club's own banking details (name of bank or bank code; account number or IBAN;
- bank address; account holder),
- Declaration on third-party payments and influence,
- Declaration on third-party ownership of players' economic rights.

The table below explains which club (either the new club or the former club) must enter what information in a particular transfer.

New club	Former club[1]
Instruction type (Engage player)	Instruction type (Release player)
Indication of whether the transfer is on a permanent basis or on loan	Indication of whether the transfer is on a permanent basis or on loan
Indication of whether there is a transfer agreement with the former club	
Indication of whether the transfer relates to an exchange of players	Indication of whether the transfer relates to an exchange of players
If related to an earlier loan instruction, indication of whether: o it is a loan extension; or o the loan is being converted into a permanent transfer	If related to an earlier loan instruction, indication of whether: o it is a return from loan; or o it is a loan extension; or o the loan is being converted into a permanent transfer
Player's name, nationality(ies) and date of birth	Player's name, nationality(ies) and date of birth
Player's former club	
Player's former association	
Date of the transfer agreement	Date of the transfer agreement
Start and end dates of the loan agreement	Start and end dates of the loan agreement
Club intermediary's name and commission	Club intermediary's name and commission
Start and end dates of player's contract with former club	
Reason for termination of player's contract with former club	
Start and end dates of player's contract with new club	
Player's fixed remuneration as provided for in player's contract with new club	
Player intermediary's name	
Player intermediary's name	
Indication of whether the transfer is being made against any of the following payments: o Fixed transfer fee, including details of instalments, if any o Any fee paid in execution of a clause in the player's contract with his/her former club providing for compensation for termination of the relevant contract o Conditional transfer fee, including details of conditions o Sell-on fees o Solidarity contribution o Training compensation	Indication of whether the transfer is being made against any of the following payments: o Fixed transfer fee, including details of instalments, if any o Any fee paid in execution of a clause in the player's contract with his/her former club providing for compensation for termination of the relevant contract o Conditional transfer fee, including details of conditions o Sell-on fees o Solidarity contribution o Training compensation
Payment currency	Payment currency
Amount(s), payment date(s) and recipient(s) for each of the above listed types of payments.	Amount(s), payment date(s) and recipient(s) for each of the above listed types of payments.
Club's own banking details (name of bank or bank code; account number or IBAN; bank address; account holder)	Club's own banking details (name of bank or bank code; account number or IBAN; bank address; account holder)
Declaration on third-party payments and influence	Declaration on third-party payments and influence
Declaration on third-party ownership of players' economic rights	Declaration on third-party ownership of players' economic rights

[1] The former club only intervenes in the transfer process if there is an agreement with the player's former club to transfer her/him. For all players that are "out of contract", the former club does not enter any information in TMS.

Clubs are further obliged under Art. 4.4, annexe 3 to upload certain mandatory documents to support this information. As identified in Art. 8.2.1, annexe 3, it is the club engaging the player (i.e. the "new club") who must upload :

– a copy of the entire employment contract between the new club and the professional player;
– a copy of the entire transfer or loan agreement concluded between the new club and the former club, if applicable;
– a copy of proof of the player's identity, nationality(ies) and birth date, such as passport or identity card;
– proof signed by the player and his/her former club that there is no third-party ownership of the player's economic rights; and
– proof of player's last contract end date and reason for termination – this document is called *Proof of Last Contract End Date* and should be provided by the former club to the new club. The letter or document should be signed by an official of the former club, should be dated and should identify when the player's contract with the former club, expired, came to an end or was terminated and the reason for the termination – was it mutual or unilateral. It is this important document which identifies that the player is in fact a 'free agent' and can move from the former club to his or her new club.

Where there has been a declaration of third party ownership of the player by the former club then the former club is required to upload a copy of the relevant agreement with the third party. Other than this document, the former club has no obligation to upload any document in the transfer instruction.

Documents must be uploaded in a "format required by the relevant TMS department" – this means "*TMS Compliance*". Guidance as to the relevant format of a particular document can be found in the TMS HelpCentre which is available online to all registered TMS users. Only pdf documents can be uploaded into the System and there is a maximum size of 5MB per document. Description as to the relevant document is as follows:

Player Passport: A mandatory document that indicates the clubs with which the player has been registered since the season of his/her 12th birthday (cf. art. 7 of the RSTP). The player passport must be uploaded into TMS by the former association upon delivering the ITC. A sample template of a player passport in the form required by FIFA Players' Status department is located in the TMS "Document Library" to help member associations comply with their obligation.

Proof of Last Contract End Date: A mandatory document applicable to the instruction type "Engage permanently without transfer agreement". The Proof of Last Contract End Date or "POLCED" must state the date and reason for the termination of the player's employment with his/her former club. The letter should be on the letterhead of the former club and signed by a corporate officer of that entity. There is a sample template of this document in the "Document library" to help users comply with the requirement. The document must be uploaded into TMS by the new club before confirming the transfer instruction.

Employment contract: A mandatory document applicable to all transfer instruction types that indicates the club's name and address, the player's full name, his/her job description and remuneration details, the employment start and end dates, the general terms and conditions, the signatures of all parties involved in the negotiation (including the agent who assisted the player and or the club), the date of signature and all annexes and/or amendments that the contract refers to. This document must be uploaded into TMS by the new club before confirming the transfer.

As will be explained in more detail below, the TMS Compliance team checks the documents uploaded in a particular transfer instruction and if the document is not in the required format, TMS Compliance will write to the club concerned asking for a better or new document. If explicitly requested, a document that is not uploaded in one of the four official FIFA languages (English, French, Spanish and German), may be requested in one of these languages. As prescribed by article 8.2.1 of annexe 3, if the request for a translation is not complied with the document in question may be disregarded.

In certain instances, a transfer is blocked from proceeding because certain information submitted by the clubs does not match. There are three data types that must match in order for the System to proceed with the transfer. First, both clubs must select the same player from the TMS database. Second, both clubs must, independently of each other, select the same type of instruction (i.e. one club engaging the player and the other club releasing the player, either permanently or on loan, against payment or free of payment and third, each club must select the correct counterparty involved in the transfer.

If there is different information entered by the clubs in these three areas, the transfer will be blocked from proceeding. There will be no 'match'. To move the transfer along the clubs must resolve the mismatch themselves. The contact details of each TMS club user is listed in TMS under the stakeholder tab. The clubs processing a transfer must contact each other to resolve the match and to ensure that the transfer can proceed. (cf. article 4 para 5 of Annexe 3)

Payments between clubs are an important part of each international transfer. As noted above clubs must enter their own banking details in each transfer instruction where there is a payment between clubs. The RSTP (cf. article 4 para 7 of Annexe 3) requires clubs to declare in ITMS any payments made between the clubs. The club making the payment must upload evidence of the money transfer into ITMS. The System recognises that payments between clubs are often made in instalments over a period of time. Clubs can reflect these instalment payments in ITMS and are required to provide details of the amount of a specific payment, when it is to be made and in what currency type. The System will automatically calculate the total amount of the transfer or loan fee based on the instalments declared. Once an instalment payment has been made, the club making the payment must upload proof of that payment, evidence of the money transfer in ITMS in the relevant transfer instruction. The proofs of payment can be uploaded by the club

making the payment well after the transfer has been completed and the player has moved to his new club. These proofs of payment are checked against the instalment payments declared as well as against the banking details provided by the clubs involved – if there is a discrepancy or the payments do not match then the offending club will be required to explain and may be subject to a sanction.

The status of a transfer in ITMS remains 'Closed – Awaiting Payments' until all the declared transfer payments have been made. When the declared transfer payments have been made and the proofs of payments uploaded in the System match with the total transfer fee declared then the System will change the status of the transfer to 'Closed'. Internal FIFA processes reflect the practical reality that the deal made between clubs in the international transfer of a player may change over time. If the clubs reach a new commercial agreement before all the instalment payments have been made, the clubs can write to FIFA providing evidence that a new agreement has been reached between them and request that the status of the transfer be changed to 'Closed'.

ITMS has been designed to reflect the reality and existence of 'buy-out clauses' in the international transfer landscape. The relevant FIFA regulation, article 4 para. 7 of Annexe 3, states that the requirement to declare in ITMS any payments made also applies to payments made by the player's new club to the player's former club on the basis of contractual clauses contained in the player's contract with his/her former club and despite the fact that no transfer agreement has been concluded.

This regulatory requirement is reflected in the technology of ITMS. A 'buy-out clause' being triggered means that there is no transfer agreement between the clubs. The requirement to declare the 'buy-out' payment in ITMS is still however required as prescribed by the RSTP, and in this way helps to achieve one of the aims of ITMS to clearly distinguish the different payments being made in relation to international transfers and to ensure transparency with respect to the movement of money in international transfers.

3. Role of the Associations

Once this foundational data is confirmed by the club(s) in ITMS, the releasing association is requested to confirm the player's personal details against their own registration records, to verify that he was in fact registered with them (cf. 5.2.1, annexe 3). Where the player's details have already been verified in ITMS, the releasing association will be spared this particular step.

Following the matching of the club-level information and the verification of the player's details, the transfer process moves to its most crucial component: the transfer of the International Transfer Certificate ("ITC"). The ITC is the official document that allows the international transfer of the player's registration from one association to another and acts as proof of the player's registration. The ITC is generated electronically in ITMS after a three step process involving both

the former association and the new association. The ITC process is applicable regardless of whether the player is transferring to his/her new club for a fee (transfer agreement or loan agreement) or the player is out of contract and no transfer agreement exists. Strict regulatory time limits apply to avoid undue delay and to help ensure the smooth passage of the player's transfer. For instance, as the first step, the new association must request the ITC when they are prompted to do so by the System. This happens as soon as their affiliated club has completed the transfer in the System. The new association must request the ITC at the very latest, on the last day of its registration period.

In the second step, once the ITC has been requested, the former association must, within 7 days of the request, in accordance with article 8.2 par. 4 of annexe 3, either deliver the ITC in favour of the new association and entering the deregistration date of the player in their own registration system, or reject the ITC request. If the former association rejects the ITC request, for former association must indicate in TMS the reason for the rejection, which may be either that the contract between the former club and the professional player has not expired or that there has been no mutual agreement regarding the early termination of the contract. It is therefore the obligation of the releasing association, in an engage out of contract instruction, to carefully check the document uploaded in the transfer called the Proof of Last Contract End Date, to ensure that the club of the releasing association really no longer has a claim to the player.

The request and delivery of the ITC is done by clicking a button in ITMS. If the former association delivers the ITC, the new association must take a further step and 'confirm receipt of the ITC and complete the relevant player registration information in ITMS'. (cf. article 8.2 par 5 annexe 3). It is important to note that the System is built to reflect the language of the RSTP. For example, article 8 para 5 states: "*Once the ITC has been delivered, the new association shall confirm receipt and complete the relevant player registration information in TMS".*

This means that the new association must click the 'confirm ITC' button in TMS and in addition must manually type the date of player registration in the System. In this way the System brings life to the RSTP.

Often in the course of the three step ITC process, the associations identify that the wrong former club has been selected or the engaging club has selected the wrong reason for the player being "out of contract". An example of such an error is where the player has been an amateur player and is transferring for the first time as a professional, however, the club has selected the option in TMS that the player's contract has come to an end. In these cases, it is possible for the associations to cancel the transfer making a note of the error in the system and requesting that the clubs involved, in particular the new club, enter a new transfer correcting their error to reflect the reality of the situation of the player.

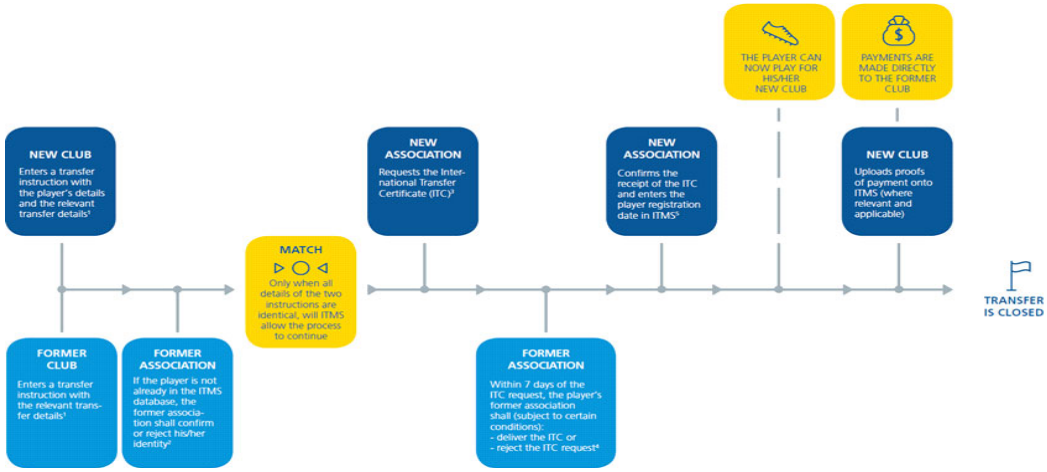
The transfer process therefore involves the participation of clubs and associations. In each and every transfer, it is the club who engages the player (the new club) who is the main actor in the system. In certain cases, where there is a

transfer agreement or a loan agreement both clubs, the new club and the former club must independently enter information in order for the transfer to match and proceed. In each and every transfer both associations, the new association and the former association are involved in the transfer process. It is the new association and the former association who are both responsible for the creation of the ITC. The ITC is only created once a request has been made, a response to that request has been delivered (either accepting or rejecting the request) and receipt of the response has been confirmed.

The visual on the next page is an example of an international permanent transfer with a transfer agreement. What is commonly called an "Engage/Release" Transfer.

In addition to the important tasks of player confirmation and the ITC process, associations have additional responsibilities in terms of keeping master data in ITMS up to date and in training their affiliated clubs in the use of ITMS. With respect to master data, associations in accordance with article 5.1 of Annexe 3 must enter the start and end dates of both registration periods and the applicable seasons for male and female players in ITMS at least 12 months before they come into force and must ensure that all their affiliated club mailing and email addresses, telephone details and most importantly training category are valid and kept up to date. As to training, article 5.3 of Annexe 3 states that associations are responsible for ongoing training of their affiliated clubs with respect to ITMS so

Figure 1: Example of an international permanent transfer with a transfer agreement[2]



Disclaimer:
The above illustration is for information purposes only and is not an exhaustive description of either the transfer process or the steps to be followed in a particular transfer. The illustration is not to be relied upon when processing a transfer. Each particular transfer is subject to and must be completed in accordance with the FIFA Regulations on the Status and Transfer of Players (RSTP)
1 See FIFA RSTP Annexe 3, art. 4, para. 2 and Annexe 3, art. 8.2, para. 1
2 See FIFA RSTP Annexe 3, art. 5.2, para. 1
3 See FIFA RSTP Annexe 3, art. 5.2, para. 2; Annexe 3, art. 8.1, para. 2 and Annexe 3, art. 8.2, para. 2
4 See FIFA RSTP Annexe 3, art. 8.2, paras. 3, 4 and 7
5 See FIFA RSTP Annexe 3, art. 8.2, para. 5

[2] Cf. figure 7 in GTM 2018 Men.

that their clubs are able to fulfil their obligations with respect to Annexe 3 of the RSTP.

4. *Types of Transfers*

There are a variety of types of transfers processed in the System. The transfers that receive the most press coverage and media attention are transfers where money changes hands between clubs. These types of transfers are commonly known as "Engage/ Release permanently" instructions. Other transfers where money is exchanged between clubs are "Buy-out Fee" instructions, some "Loan to Permanent" instructions and some "Loan and loan extension" instructions. All of these types of transfers make up approximately 15% of all transfers worldwide.

The majority of transfers (about 65% in 2018) are 'out of contract' transfers. Out of contract transfers are those where a professional player moves from a club at one association to a new club at another association but no transfer fee is paid between the clubs.

Figure 2: International transfers in men's football by type (2018)[3]

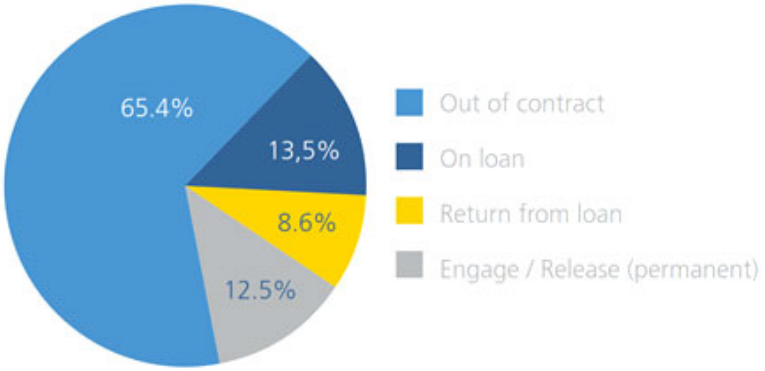


Figure 3: Distribution of transfer types in men's football by engaging confederation (2018)[4]

	Out of contract	Permanent	On loan	Return from loan
AFC	79.2%	7.5%	9.2%	4.2%
CAF	84.7%	7.9%	3.1%	4.3%
CONCACAF	70.2%	11.2%	11.6%	7.0%
CONMEBOL	65.8%	3.7%	14.8%	15.7%
OFC	85.7%	0.0%	14.3%	0.0%
UEFA	58.4%	16.6%	16.2%	8.8%
WORLWIDE	65.4%	12.5%	13.5%	8.6%

[3] Cf. figure 5 in GTM 2018 Men.
[4] Cf. figure 9 in GTM 2018 Men.

As can be seen from the above chart, out of contract transfers represent the majority of transfers worldwide across the various confederations. It is UEFA where most of the "permanent" transfers those involving payment between clubs occur.

Because so many transfers happen 'out of contract' – a transfer type that is most common across all the confederations – it is perhaps of interest to know there are a number of ways a player is defined as being 'out of contract'. The most common 'out of contract' transfer is where a player's contract has expired. The second most common is where the contract has been mutually terminated by the parties (i.e. the former club and the player himself/herself). The third most common is where the employment contract has been unilaterally terminated by either the former club or by the player. The visual below shows the out of contract transfers as defined by clubs who engage players each year. It is also important to note that players who are 'out of contract' may be engaged by new clubs in accordance with the exception as described in article 6.1 of the RSTP.[5] As a common rule players should only move during an open registration period. The registration period that must be open at the time of the move is the new association registration period. As an exception to this rule, where a player is 'out of contract' for any reason other than (a) unilateral termination or (b) where a player is moving from being an amateur player to his or her first registration as a professional player, the player may be engaged when the registration of the new association is closed provided that his/her former employment contract came to an end before the end of the new association's registration period.

Where a player is defined as being 'out of contract' because he or she had no prior contact because they were an amateur player then the registration period of the new association must be open at the time the ITC is requested by the new association. If the player had no previous contact because the player was an amateur and the registration period of the new association is closed, the System will prevent the transfer from proceeding and will indicate to the new club and the new association that the transfer is in 'validation exception'.

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[5] Pursuant to FIFA RSTP, Art. 6.1: "*Players may only be registered during one of the two annual registration periods fixed by the relevant association. Associations may fix different registration periods for their male and female competitions. As an exception to this rule, a professional whose contract has expired prior to the end of a registration period may be registered outside that registration period. Associations are authorised to register such professionals provided due consideration is given to the sporting integrity of the relevant competition. Where a contract has been terminated with just cause, FIFA may take provisional measures in order to avoid abuse, subject to article 22*".

Figure 4: Reasons for previous contract termination for transfers out of contract in men's football by year[6]

5. *Access to the System*

ITMS is not only a sophisticated system to regulate international transfers in a timely and transparent fashion, but also a repository of sensitive financial and contractual data. To protect the integrity of this data and to ensure the smooth processing of player transfers, all users with access to ITMS receive comprehensive training and are subject to a series of strict requirements concerning confidentiality and the proper use of the system.

FIFA is responsible for managing user access and defining criteria to be an authorised user of the system. Key among these requirements is the confidentiality obligation, which is rooted in art. 3.4, annexe 3 of the RSTP. This obligation is comprised of five key aspects.

Firstly, stakeholders will ensure that only authorised users have access to ITMS. All clubs are obliged to have at least one trained TMS user (art. 3.1.2, annexe 3), while associations must have a minimum of two (art. 3.2.2, annexe 3) and every user is subject to the 'one user, one account' rule whereby the sharing or transfer of individual user account details between users is strictly prohibited. Associations are required to provide ongoing training to the TMS users of their affiliated clubs to enable them to fulfil these and other regulatory obligations (art. 5.3, annexe 3). No individual may act as TMS user for more than one stakeholder.

Secondly, stakeholders are obliged to select, instruct and control the authorised users with the highest possible care. It is important to note that the obligation here rests on the stakeholders themselves – the associations and clubs – and that, correspondingly, liability for any breaches by these users will extend to the stakeholders. This is further emphasised by art. 9.1.3, annexe 3, which states

[6] Cf. figure 18 in GTM 2018 Men.

that "*Associations and clubs are liable for the actions and information entered by their TMS managers*". In pursuit of this goal, and to ensure that the stakeholder is in a position to 'control' its authorized user, clubs and associations are advised to ensure that their TMS user(s) is an employee (as opposed to a contractor or other related party such as an external lawyer or accountant). Conflicts of interest are also to be avoided – for example, an intermediary or a professional player may not be appointed as a user. When appointing a TMS user, then, clubs should ensure the following guidelines are adhered to:

– The individual is qualified, reliable and suitable for the role;
– The individual is an employee of the club;
– The individual has, at the very least, a good working knowledge of at least one of the four official FIFA languages (English, French, German, Spanish) and possesses the minimum computer skills and
– The individual is familiar with the transfer process as per the RSTP.

Thirdly, stakeholders will use the confidential information exclusively for the purpose of accomplishing player transactions in which they are directly involved. While ITMS already has a number of cyber-barriers in place which restrict user access to only those specific transfers involving their club or association, this obligation reinforces the protection against leaks of information to media or betting outlets, for instance, about any detail concerning a transfer of a football player.

Fourthly, stakeholders are bound by the RSTP to keep all data obtained based on access to ITMS strictly confidential. The impact of this section is that TMS users must refrain not only from disclosing the contractual and other information they access in ITMS, but also from sharing their unique username or password with others.

Finally, stakeholders are obliged to take all reasonable measures and apply the highest degree of care in order to guarantee at all times complete confidentiality. The exercise of this necessarily broad duty of care can take a number of forms, including users logging out of ITMS when leaving their workstation, avoiding use of the system in public places and refraining from discussing any sensitive information with unregistered users. Positive obligations also include promptly alerting FIFA TMS if any accidental or unauthorised access has occurred.

The protections outlined in the RSTP are further enhanced by a series of agreements and authorisations granted by the applicant as a pre-condition of his/her access to ITMS. As well as satisfying the criteria outlined above, any individual seeking to be authorized as a TMS user must agree to the following set of prerequisites:

– Terms and conditions regulating the use of ITMS;
– Data Protection Declaration ("DPD");
– Declaration of Confidentiality and Due Care ("DCDC") and
– Confirmation that he/she has been trained to use ITMS.

The DCDC agreed to by the individual applicant contains a number of important stipulations. The DCDC covers certain fundamental assurances on the part of the user – commitments to strict confidentiality and applying the highest degree of care – but also contains acceptance of any potential individual liability.

While art. 9.1.3, annexe 3 outlines the vicarious liability of the association or club for the actions of its TMS manager, the DCDC requires that the applicant acknowledge his/her awareness that "*any failure to comply with the obligations under this agreement may lead to personal liability*". Given that the DCDC also includes the applicant's acknowledgment that "*the misuse of confidential information… may cause substantial financial, personal or other damage to the parties involved in a transaction*", this acceptance of potential personal liability reflects the seriousness of the confidentiality obligation.

With the advent of GDPR, FIFA TMS took all necessary steps to ensure that all clubs and member associations who accessed TMS accepted new terms & conditions which ensured compliance with the new European legislation.

6. Teaching & Training

Each year, in accordance with article 7.2 of annexe 3 of the RSTP, to ensure that all associations are able to fulfil their obligations, FIFA organises conferences in four parts of the global to teach and train TMS users about the System. These "TMS Conferences" are held in the four official FIFA languages and include participants (TMS users) from both clubs and associations. Generally, the conferences are held in the CAF region, the AFC region, the UEFA region, and Conmebol/Concacaf region. Prior to organising conference, transfer streams between associations and confederations are analysed, to determine whether it would benefit the users to have them participate jointly in a conference. For example, in 2016, Brazil (the association and certain of their affiliated clubs) were invited to the TMS Conference in the AFC region as many transfers were taking place between Chinese and Brazilian clubs involving Brazilian players. Each year the TMS Conferences are tailored to the proficiency of the users and comprise both technical and compliance topics, include practical case studies and review the intersection between the way the technology operates with FIFA's Transfer regulations. In 2015 when FIFA introduced the ban on third party ownership and introduced article 18bis, ITMS underwent a technical change. In accordance with article 4.2 of annexe 3 the clubs who processed a transfer in the System are required to tick a box declaring there was or was not third party ownership (TPO) or third party influence (TPI). In addition, the new club was required to upload a document called the Proof of no TPO document signed by both the player and the former club. The TMS Conferences held in 2015 and in 2016 focused on teaching and training the user community on these new system requirements as well as the regulatory obligations of the clubs.

Annual TMS Conferences are only one element of the teaching and training offered by FIFA to its ITMS user community. The System itself has an interactive HelpCenter – available only to registered TMS users – where TMS users of clubs and member associations can review FAQ's, a glossary of terms, all the FIFA Circular letters published with respect to TMS and learn by reviewing text and screen shots how to process their transfers. The TMS HelpCenter is available in all four FIFA languages and includes an e-learning portal where users and improve their knowledge.

A TMS newsletter is published quarterly, again for the TMS user community, and includes details on new functionalities, guest articles by the FIFA Player Status department and a "Compliance Clinic" written by the TMS Compliance team explaining in practical terms how the regulations work in conjunction with the System and how to avoid a possible breach of the regulations in a player transfer.

The final element of teaching and training offered by FIFA is a telephone and email HelpCenter where TMS users can either call or email in one of the four official FIFA languages and speak with a Training & Support Coordinator who will assist with their inquiries and if necessary seek either technical assistance or assistance with the legal interpretation of the FIFA RSTP's as they relate to player transfers.

7. Ensuring Compliance – Creating a Level Playing Field

The task of ensuring that the 211 member associations and over 7,000 clubs who engage in the transfer of professional players all over the world adhere to the FIFA transfer rules (as set out in the RSTP's) – is the job of TMS Compliance. With over 16,000 international transfers of professional players completed in 2018 (and that number growing by the year), TMS Compliance is responsible for ensuring that all clubs and associations act in a fair, transparent and accountable manner throughout the transfer process.

Aside from setting out the obligations and procedures governing the international transfer process, annexe 3 also recognised the delegated authority of TMS Compliance to investigate, gather evidence and impose sanctions against non-compliant stakeholders. In particular, art. 7.3 of annexe 3 states that FIFA TMS shall investigate matters in relation to international transfers and that "*All parties are obliged to collaborate to establish the facts*". As mentioned above, this is echoed with regard to minor transfers at art. 4.4, annexe 2. This 'collaboration' is wide-ranging and includes compliance, on reasonable notice, with "*requests for any documents, information or any other material of any nature held by the parties*" as well as any such material which is "*not held by the parties but which the parties are entitled to obtain*". As a consequence, TMS Compliance investigates issues concerning the international transfers of all professional players

(male and female) aged 18 and over, as well as all players under the age of 18 – male and female, amateur and professional.

TMS Compliance has a broad variety of sources to draw upon when it comes to gathering information about possible breaches of the RSTP. Internal resources include weekly compliance checks on the data and documents entered in ITMS, information sharing from other FIFA legal departments and internally-generated reports on stakeholder activity and responsiveness. Media reporting and analysis, of course, are a valuable external source of leads and information, while FIFA also encourages the involvement of clubs and associations in the compliance process through an online 'non-compliance report form' which registered TMS users can access through ITMS to report suspicious activity.

While the FIFA Disciplinary Committee ("DisCo") remains the ultimate sanctioning body (art. 9.2.1, annexe 3), TMS Compliance is also authorised to impose sanctions in certain circumstances where its investigations expose evidence of non-compliance. Art. 9.2.3 of annexe 3 states that "*The relevant TMS department may also initiate sanction proceedings on its own initiative for non-compliance with the obligations under its jurisdiction (specifically with respect to the defined Administrative Sanction Procedure (cf. FIFA circular 1478)) and when authorised to so by the FIFA Disciplinary Committee for explicitly specified violations"*. The first 'authorisation' of this kind was formally approved in 2011, when the DisCo decided to delegate its competence to deal with certain infringements of a "*relatively minor or technical nature"* but which nonetheless have a significant impact on transfers – such as a club failing to enter a counter-instruction, or an association blocking a transfer by failing to confirm a player's personal details against its own registration records without delay. FIFA Circular Letter no. 1259 notified the members of FIFA of a new administrative sanction procedure ("ASP") under which FIFA TMS would investigate and potentially sanction clubs and associations for ten categories of "*explicitly specified"* violations of this type. Recognising the increased use of ITMS since 2011 and the attendant need to comprise all relevant offences under the same procedure, DisCo decided to expand the number of ASP categories from ten to fourteen. The revised list of infringements now encompasses, *inter alia,* breaches of confidentiality by stakeholders, as well as failures by releasing associations to respond correctly to an ITC request. The fourteen categories of ASP infringement's are described in FIFA Circular Letter no. 1478 dated 6 March 2015 and sent to all FIFA's member associations.

The fourteen categories of infringement under the ASP compliance process are as follows:

A.	Failure to train a club	Breach of article 5.3 of annexe 3
B.	Absence of a trained TMS Manager	Breach of articles 3.2.2 and 3.1.2 of annexe 3
C.	Breach of Confidentiality and Unauthorised Access to TMS	Breach of articles 3.4 and 9.1.3 of annexe 3
D.	Failure to maintain master data in TMS	Breach of articles 3.2.1, 4.1 and 5.1 of annexe 3
E.	Failure to enter counter-instruction within a reasonable time	Breach of articles 2.4, 3.1.1, 3.2 and 4.3 of annexe 3
F.	Failure to correctly confirm or reject player in a reasonable time	Breach of articles 3.2, 3.2.1 and 5.2.1 of annexe 3
G.	Failure to upload a mandatory document	Breach of articles 2.4, 3.1.1, 4.3, 8.1.3, 8.1.4 and 8.2.1 of annexe 3
H.	Failure to upload a conforming document	Breach of articles 3.1.1, 4.3, 4.4 and 8.2.1 of annexe 3
I.	Failure to upload a valid proof of payment	Breach of articles 1.2, 3.1 and 4.7 of annexe 3
J.	Failure to comply with a FIFA TMS investigation	Breach of articles 7.3 and 10 of annexe 3
K.	Failure to provide mandatory information in a TMS instruction	Breach of articles 4.3, 4.7, 8.3.1 and 8.3.3 of annexe 3
L.	Failure to enter correct information in a TMS instruction	Breach of articles 4.3, 4.4, 4.7, 5.2.4, 8.2.5, 8.3.1, 8.3.3 and 9.1.2 of annexe 3
M.	Improper International Transfer Certificate Request	Breach of articles 3.2 and 8.2.2 of annexe 3
N.	Improper Response to the International Transfer Certificate Request	Breach of articles 5.2.3 and 8.2.4 of annexe 3

There is a defined compliance process implemented by TMS Compliance with respect to the ASP offences. The process is designed to respect the principles of due process and to ensure that clubs and associations have opportunity to respond and make inquiries with respect to possible infringements of the RSTP as they relate to international transfers.

TMS Compliance will first contact the club or association by way of a letter sent to the email address provided in ITMS for the relevant TMS manager. This letter, written in one of the four FIFA official languages depending on the club or association, will identify the infringement and request that the stakeholder take specified remedial steps (such as uploading a document or other specified action to be taken in the system), as well as a statement of the stakeholder's position. These actions are subject to a defined deadline – typically seven days, but shorter for time-sensitive infringements which can block the transfer's progress such as, for example, the failure by the player's former club to enter a counter-instruction in ITMS after a transfer agreement has been formed (art. 2.4, annexe 3). One widely-publicised example of the consequences of this particular infringement was the decision in the *Genoa CFC and CA Independiente case*,[7] where the Argentinian club failed to enter a counter-instruction for the transfer of the player Julian Alberto Velazquez to Genoa CFC. This case also touched on broader issues such as the pre-conditioning of an ITC in breach of art. 9, RSTP – but the investigation initially started out through the ASP, opened by TMS Compliance.

[7] FIFA, *Clubs sanctioned for misuse of FIFA TMS*, [website], www.fifa.com/governance/news/y=2013/m=1/news=clubs-sanctioned-for-misuse-fifa-tms-1998807.html, (accessed 18 July 2019).

If the stakeholder fails to fully comply before the deadline with the directions given, then TMS Compliance will send an Administrative Sanction Letter ("ASL") recommending an appropriate sanction. FIFA TMS has the competence to directly impose sanctions which may consist of a warning, a reprimand and/or a fine up to a maximum of CHF 14,000. In cases where a fine has been imposed, and in order to remain consistent with the legal maxim of *audi alterem partem* (*listen to the other party*) at all stages of the ASP, the stakeholder may indicate its acceptance or refusal of the sanction imposed by signing the form. In the case of the latter, the stakeholder can request the opening of ordinary disciplinary proceedings before the DisCo, in accordance with the FIFA Disciplinary Code (the "FDC"). The matter is then transferred from TMS Compliance to the FIFA Disciplinary department ("Disciplinary") who will manage the opening of ordinary proceedings. The DisCo may impose a harsher fine or sanction than the one imposed by FIFA TMS.

Although concerned with "*relatively minor"* infringements, the ASP has proven to be an extremely effective 'rapid-response' tool in facilitating the bigger picture of a more fluid and smoothly-functioning international transfer system. With over 8620 such cases opened by TMS Compliance to date and with 8210 cases closed as a result of compliance by clubs and associations, the ASP continues to make a positive contribution to ensuring that international transfers happen in a timely, correct and fully transparent fashion.

Perhaps the better-known type of TMS Compliance investigation, however, is conducted through what is referred to as a 'traditional case file', or TCF. The TCF is essentially an inquiry into any form of alleged wrongdoing relating to an international transfer outside of the fourteen "*explicitly specified*" ASP infringements, and typically concerns egregious and substantive breaches of the RSTP. For instance, TCF investigations may inquire into third-party influence (art. 18bis, RSTP), third-party ownership (art. 18ter, RSTP) and the international transfer of minors (art. 19, RSTP) to name but a few examples. Numerous TMS Compliance investigations under the TCF have generated high-profile results, with the DisCo handing down substantial fines and, in some cases, transfer bans against a range of clubs and member associations for breaches of the RSTP.

In 2014, for instance, the DisCo imposed a fine of CHF 450,000 and a transfer ban for two consecutive registration periods against FC Barcelona for breaches of art. 19 in relation to a number of minor players.[8] The Real Federación Española de Fútbol was also sanctioned for related breaches, incurring a fine of CHF 500,000. This was followed by similar decisions against Atlético de Madrid and Real Madrid earlier this year, with fines of CHF 900,000 and CHF 360,000

[8] FIFA, *Spanish FA, FC Barcelona sanctioned for international transfers of minors,* [website], www.fifa.com/governance/news/y=2014/m=4/news=spanish-barcelona-sanctioned-for-international-transfers-minors-2313003.html, (accessed 18 July 2019). *Fútbol Club Barcelona v. Fédération Internationale de Football Association (FIFA),* CAS 2014/A/3793, http://jurisprudence.tas-cas.org/Shared%20Documents/3793.pdf.

imposed against the two clubs respectively, as well as transfer bans for two registration periods in each case. Exercising its investigative remit under art. 4.4 of annexe 2 of the RSTP, the TMS Compliance department was instrumental in detecting and investigating the breaches in question and, in so doing, helping "*safeguard the protection of minors"* as provided for in art. 1.3 of annexe 3.

The process followed in a TCF investigation is essentially identical to the ASP, with both procedures adhering to the principle of due process throughout. TMS Compliance will write to the relevant stakeholder outlining details of the alleged breach and requesting certain information and documentation before a deadline. Unlike the ASP, however, TMS Compliance will not directly sanction the stakeholder for any non-compliance in a TCF – instead, it will transfer the case to Disciplinary with a detailed and comprehensive case report. Disciplinary will then open a case, provide an opportunity for the stakeholder to respond again and if appropriate, present the matter to the DisCo which can impose sanctions against the stakeholder under the FDC.

Aside from the minors cases, several other TMS Compliance investigations under the TCF procedure have hit the headlines. In December 2014, for instance, FIFA published a media release regarding the sanctions imposed against three Indonesian clubs for publishing confidential data from ITMS on social media.[9] Fines of CHF 25,000 were imposed against two of the clubs for leaking the data on Twitter, while the third was fined CHF 15,000 for republishing the tweets as well as publishing a confidential letter sent to them by TMS Compliance. Noting that the decision followed preliminary investigations by FIFA TMS, FIFA remarked that these cases marked "*the first time the Disciplinary Committee has sanctioned clubs for such confidentiality breaches through the use of social media*".

Further high-profile DisCo decisions followed in recent years, with sanctions imposed following TMS Compliance inquiries into clubs and associations for their involvement in the improper transfer of minor players. In addition, TMS Compliance launched a number of significant investigations into breaches of the RSTP prohibitions against third-party influence ("TPI") and third-party ownership ("TPO").

8. The Ban on Third Party Ownership – The Effect of Regulatory Change on an International Transfer

On 1st January 2015, after being approved first by the Players' Status Committee and then by the FIFA Council, article 18ter came into effect and prohibited at para. 1 of article 18ter "*No club or player shall enter into an agreement with a third party whereby a third party is being entitled to participate, either in full*

[9] FIFA, *Indonesian clubs sanctioned for publishing TMS data on social media,* [website], www.fifa.com/governance/news/y=2014/m=12/news=indonesian-clubs-sanctioned-for-publishing-tms-data-on-social-media-2489735.html, (accessed 18 July 2019).

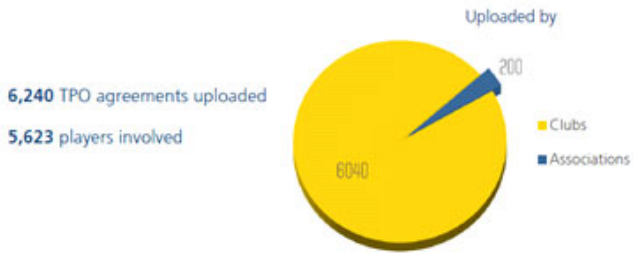
or in part, in compensation payable in relation to the future transfer of a player from one club to another, or is being assigned any rights in relation to a future transfer or transfer compensation".

This paragraph as well as the entire Annex III of the RSTP has remained unchanged under the FIFA RSTP 2019 edition.[10-11]

The ban was to come into force on 1 May 2015 and in the interim period – between 1 January 2015 and 29 April 2015, in accordance with article 18ter para. 4 clubs were permitted to signed third party ownership agreements but such agreements could not have a duration period of more than one year beyond their effective date. All agreements that had been signed prior to 1 January 2015 could continue until their natural expiration date.

In keeping with FIFA's commitment to transparency and accountability, article 18ter para. 5 prescribed that "*By the end of April 2015, all existing agreements covered by paragraph 1 need to be recorded within the Transfer Matching System (TMS). All clubs that have signed such agreements are required to upload them in their entirety, including possible annexes or amendments, in TMS, specifying the details third party concerned, the full name of the player as well as the duration of the agreement*".

Associations were notified of the new article 18ter by way of FIFA Circular letter number 1464 In ensuring compliance with the new article 18ter para 5 by the end of April 2015, over 6,000 TPO agreements were uploaded in ITMS.



Considerations of how FIFA would enforce the ban on TPO lead to corresponding system changes in ITMS and amendments to Annexe 3. In particular, article 4.3 of Annexe 3 required clubs to make a declaration as to the existence of both third party ownership and third party influence. Article 8.2 para 1 of Annexe 3 required the new club to upload in each transfer instruction "*proof signed by the player and his/her former club that there is no third-party ownership of the player's economic rights*".

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[10] Available at https://resources.fifa.com/image/upload/regulations-on-the-status-and-transfer-of-players-june-2019.pdf?cloudid=ao68trzk4bbaezlipx9u.

[11] FIFA. (2019). *Amendments to the Regulations on the Status and Transfer of Players* [Circular no. 1679]. Retrieved from https://resources.fifa.com/image/upload/1679-amendments-june-and-october-2019.pdf?cloudid=yhpcqh0syjuzaccv1yrz.

The former club is required to upload a copy of the agreement with the third party where the former club has declared that such an agreement exists.

The TMS HelpCentre provides clubs with a sample Proof of No TPO document that can be signed and used in each transfer.

On the investigatory (TMS Compliance) side, a landmark DisCo decision was issued in September 2015 when FC Seraing became the first club to be sanctioned under art. 18ter.[12] TMS Compliance conducted a full investigation into the Belgian club, gathered the necessary evidence and submitted a brief outlining the legal analysis of the alleged breach to the secretariat to the Disco. The DisCo found that FC Seraing had sold part of the economic rights of several players to a third party in breach of art. 18ter, as well as breaching art. 18bis by having entered into contracts that enabled the third party to have influence on the club's independence and policies in transfer-related matters. Although not public, as reported in the media, the club received a transfer ban of four consecutive registration periods, as well as a fine of CHF 150,000 for these breaches of the RSTP.

Numerous DisCo decisions have followed since, with sanctions imposed against Santos FC (BRA) and Sevilla FC (ESP) for breaches of art. 18bis, as well as fines of CHF 185,000 and CHF 60,000 against FC Twente (NED) and K St Truidense VV (BEL) respectively for breaches of art. 18bis and art. 18ter.[13]

9. How the System Assists with the Protection of Minors – Minors in ITMS

9.1 Minor applications

FIFA encourages the training and education of young players and works to protect their general well-being. FIFA also strives to prevent the exploitation of minor players and continues to be extremely concerned that more and more children are prematurely leaving their homes and families in order to seek engagements at football clubs in another country.

The situation of a child who plays for a club in a foreign country is different from the situation where the club is in the same country as the player's family and his/her well-known environment. When playing in a foreign country, children are more dependent on their clubs and are therefore in a more vulnerable position.

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[12] Tribunal Arbitral du Sport – Court of Artbitration for Sport. (2017). *The court of arbitration for sport (CAS) confirms the validity of the FIFA regulations on the prohibition of third-party ownership (TPO)* [Media release]. Retrieved from www.tas-cas.org/fileadmin/user_upload/Media_Release_4490.pdf.

[13] FIFA, *Several clubs sanctioned for breach of third-party influence, third-party ownership rules*, [website], www.fifa.com/governance/news/y=2016/m=3/news=several-clubs-sanctioned-for-breach-of-third-party-influence-third-par-2772984.html, (accessed 18 July 2019).

Art. 19.1 of the RSTP prohibits, as a general rule, the international transfer of players below the age of 18. However, in order to provide certain flexibility for both clubs and players, always bearing in mind the principal aim of protecting minor players from potential abuse and mistreatment, art. 19. 2 of the Regulations provides for three exceptions, which, in case the relevant conditions are fulfilled, allow the international transfer of a player (male or female, amateur or professional) before the age of 18:

a) The player's parents move to the country in which the new club is located for reasons not linked to football.
b) The transfer takes place within the territory of the European Union (EU) or European Economic Area (EEA) and the player is aged between 16 and 18. In this case, the new club must fulfil certain minimum obligations as to the academic and footballing education, accommodation and care provided to the player.[14]
c) The player lives no further than 50km from a national border and the club with which the player wishes to be registered in the neighbouring association is also within 50km of that border. The maximum distance between the player's domicile and the club's headquarters shall be 100km. In such cases, the player must continue to live at home.[15]

Art. 19.3 stipulates that the conditions of the article (in particular art. 19.1 and 19.2) shall also apply to any player who has never previously been registered for a club and is not a national of the country in which he (or she) wishes to be registered for the first time (and has not lived continuously for at least five years in said country immediately prior to the intended) ("first registration"). Obviously, this provision is also necessary to avoid circumventions of the general prohibition of international transfers of minor players.

Every international transfer of a minor, as well as every first registration, is subject to the prior approval of the FIFA Players' Status Sub-Committee (the "Sub-Committee"). The application for such approval must be submitted by the association that wishes to register the minor player for one of its affiliated clubs. The procedure for submitting this "minor application" is required to be done via ITMS (cf. art. 19.5 in conjunction with annexe 2 of the RSTP).

TMS, as identified in the RSTP, "*helps safeguard the protection of minors*". The application for approval by the association that wishes to register the minor for one of its affiliated clubs on the basis of article 19.2 and 19.3, RSTP and the subsequent decision-making workflow must be conducted through ITMS.

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[14] This provision was included so as not to contravene the principle of free movement of employees within the EU/EEA. Players from a country that has a bilateral agreement with the EU on the free movement of workers equivalent to the one contained in the EU treaty profit from the same conditions as EU players.

[15] This provision relates to the so-called cross-border-transfers. Due to the particular circumstances existing in certain areas, e.g. the club on the other side of the border is closer than the closest club in the player's own country, or in very populated areas close to a border, the border has a political but not a practical significance as the inhabitants of this area regularly use the infrastructure on both sides of the border.

Based on the jurisprudence of the Sub-Committee,[16] the reasons for submitting an application to the Sub-Committee in order to obtain approval for the international transfer or the first registration of a minor player have recently been extended in ITMS. In addition to the three exceptions mentioned in art. 19.2 and the "five-year rule" (art. 19.3 and 19.4, RSTP) associations are now able to submit a minor application in ITMS for one of the following additional reasons:

1) The minor player is an exchange student undertaking an academic programme abroad;
2) The minor player is moving for humanitarian reasons accompanied by his/her parents; and
3) The minor player is moving for humanitarian reasons without his/her parents.

If an association submits a minor application for the international transfer of a minor player moving for humanitarian reasons via ITMS, the former association will not have access to the information contained therein, it will not be invited to provide comments and it will not be notified of the Sub-Committee's decision. This aims to avoid any potential interference by the minor's former association in the ITMS proceedings, which could potentially jeopardise the minor player's and his/her family's safety in the event that the authorities of the player's country of origin would become aware of his/her whereabouts.

The TMS manager or TMS user, acting on behalf of the association seeking to register a foreign minor for a specific club, must enter an application in TMS along with specific documents relevant to the particular circumstances of the case. All applications for approval of the first registration or international transfer of a (foreign) minor player must clearly indicate in detail the specific circumstances concerning the situation of the respective minor player, and must also contain pertinent documentation that supports the request.

FIFA's publicly available "*Minor player application guide*"[17] outlines the pertinent documents to be included with the application depending on the various individual circumstances surrounding the international move of a minor player. If a document is not available in one of the four official languages of FIFA (English, Spanish, French and German), the association shall also submit either a translation of the document in one of the four official languages of FIFA, or an official confirmation of the association concerned that summarises the pertinent facts of each document in one of the four official languages of FIFA (cf. art. 7 of annexe 2 of the Regulations).

The majority of minor applications over the 8-year period since minor applications have been submitted in ITMS have been accepted by the SubCommittee of the PS department as shown in the visual below.

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[16] For a detailed analysis of the FIFA Sub-Committee's case law see. L. Ferrer, "*Understanding the FIFA rules on international transfer and first registrations of minors*", in this book.

[17] Available at http://resources.fifa.com/mm/document/affederation/footballgovernance/02/86/35/28/protectionofminors%E2%80%93%E2%80%9Cminorplayerapplicationguide%E2%80%9D_neutral.pdf.

Figure 5: Minor applications decided upon, by year of creation (men's football)[18]

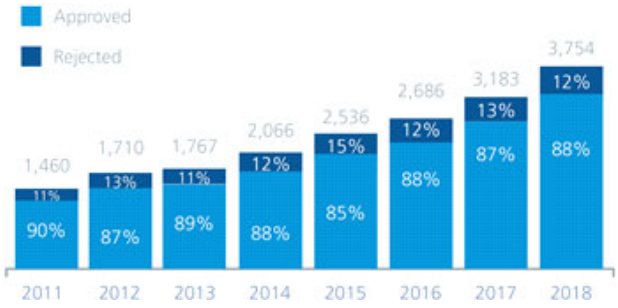


Figure 6: Minor applications decided upon, by year of creation (women's football)[19]

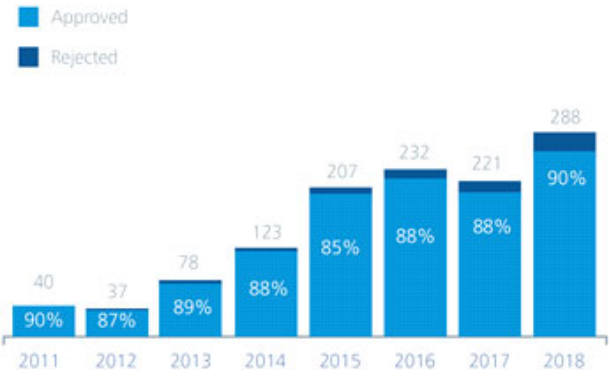
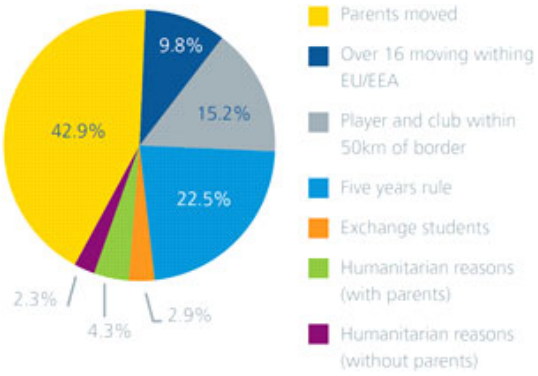
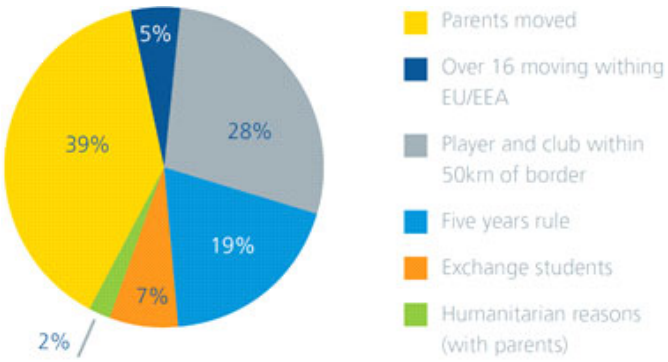


Figure 7: Minor applications submitted in 2018 and decided upon, by reason (men's football)[20]



[18] Cf. figure 37 in GTM 2018 Men.
[19] Cf. figure 19 in GTM 2018 Women.
[20] Cf. figure 38 in GTM 2018 Men.

Figure 8: Minor applications submitted in 2018 and decided upon, by reason (women's football)[21]



9.2 Monitoring and Compliance related to Minor Applications

Annexe 2 of the RSTP requires all member associations to check the "Minors" tab in TMS at regular intervals at least every three days and pay particular attention to any enquiries or requests for statements. All parties involved in the minor application proceeding must act in good faith and are obliged to tell the truth to the Sub-Committee. Sanctions may be imposed, by the FIFA Disciplinary Committee in accordance with the FIFA Disciplinary Code, on any association or club found to have provided untrue or false data to the Sub-Committee or for having misused the TMS application procedure for illegitimate purposes (cf. art. 2 and art. 4 of annexe 2 of the Regulations).

TMS Compliance is responsible for investigating allegations of international transfers and first registrations of minor players suspected to have taken place in breach of the RSTP. In accordance with art. 4.4 of annexe 2 of the RSTP, "*All parties are obliged to collaborate to establish the facts*". This 'collaboration' is wide-ranging and includes compliance, on reasonable notice, with "*requests for any documents, information or any other material of any nature held by the parties*" as well as any such material which is "n*ot held by the parties but which the parties are entitled to obtain*".

FIFA TMS Integrity and Compliance adheres to due process in all of its investigations into a potential breach of art. 19 and Annexe 2 of the Regulations, i.e. of any of the rules concerning the international movement of minor players. Where a suspected breach of the Regulations is discovered, the club and association(s) in question receive(s) an initial letter outlining the details of the alleged breach and requesting that the stakeholder provide its position, certain information and documentation by a specific date. Once all the relevant information has been collected, the matter will be transferred to the Secretariat of the FIFA

[21] Cf. figure 20 in GTM 2018 Women.

Disciplinary Committee with a detailed and comprehensive case report. The Secretariat of the FIFA Disciplinary Committee will then possibly open a disciplinary proceeding, providing a further opportunity for the stakeholder to respond. The case may then be presented (along with all the documentation and evidence gathered) to the FIFA Disciplinary Committee who is authorised to impose sanctions against the stakeholder in accordance with the FIFA Disciplinary Code, if a violation of the applicable provisions can indeed be proven.

Examples of the effective monitoring and investigative competencies of FIFA TMS as well as the collaboration with the Secretariat of the FIFA Disciplinary Committee are the above mentioned cases of FC Barcelona, Real Madrid, Atlético Madrid and the Real Federación Española de Fútbol. These clubs and association were all sanctioned by the FIFA Disciplinary Committee for substantial breaches of the FIFA Regulations relating to the protection of minors. In so doing, FIFA has acted and enforced the protection of minors in accordance with its Regulations.

Conclusion

The international transfer market is ever evolving and changing. FIFA, in its role as the global regulator of the international football transfer market, has the important task of engaging in an ongoing assessment of market to ensure that the FIFA Regulations on the Status and Transfer of Players are fit for purpose. FIFA's Transfer Matching System, as a technology solution, has the capacity to adapt to the evolution of the market and any regulatory changes that take effect. Ongoing support of the technology, by teaching, training and online support, is also key to ensure that all stakeholders and users of ITMS understand what is required when processing the international transfers of male and female players. The ultimate goal, is that all stakeholders, no matter how big or small, play by the same set of rules. This compliance and uniformity will, in turn, create a smoother, fairer and more transparent international transfer market.

While the international transfer market may continue to expand in both value and volume the overarching aim of ITMS is to facilitate the international movement of players in a secure and transparent manner.

THE TRANSFER MATCHING SYSTEM FROM A CLUB'S PERSPECTIVE

by *João Lobão*[*]

When created, the Transfer Matching System ("TMS") was "*designed to ensure that football authorities have more details available to them on international transfers. This will increase the transparency of individual transactions, which will in turn improve the credibility and standing of the entire transfer system*" – Art.1 para. 1 of Annexe 3 of the Regulations on the Status and Transfer of Players (hereinafter "FIFA Regulations" or "FIFA RSTP"). However, nowadays TMS is more than an international transfer system.

On FIFA's digital platform, National Associations, FIFA and Clubs can not only deal with transfers, but also intermediary registrations and complaints relating to solidarity contribution or training compensation. This broader range of utility of the platform since its creation can certainly be viewed as a success.

FIFA now recognizes TMS as an important tool in the relations between Clubs and Associations and has been working towards its improvement and the broadening of its range of use in order to not only better control the information within the football world, but also to simplify the exchange of such knowledge.

The FIFA Regulations now state that "a*ny professional player who is registered with club that is affiliated to one association may only be registered with a club affiliated to a different association after the Internacional Transfer Certificate (ITC) has been delivered by the former association and the new association has confirmed receipt of the ITC. The ITC procedure must be conducted exclusively via TMS (…) [a]ny form of ITC other than the one created by TMS shall be not recognized*" – Art. 8.2 Annexe 3 of the FIFA Regulations.

In order to perform the transfer of the ITC, the new Club needs to enter significant documents before confirming the instruction, namely, – but always depending on the transfer type – *i)* a copy of the contract between the new club and the professional player; *ii)* a copy of the transfer or loan agreement concluded can between the new club and the former club, if applicable; *iii)* proof of the

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Player's identity, nationality(ies) and birth date, such as passport or identity card; *iv)* proof of player's last contract end date and reason for termination; and *v)* proof signed by the player and his/her former club that there is no third-party ownership of the player's economic rights (Art. 8.2 para. 1 of the Annexe 3 of the FIFA Regulations.

When concluding an international transfer, both parties must enter the relevant instructions, which can in some cases turn out to be not as easy as one might think.

For instance, for a simple permanent or temporary transfer, the information to enter in the instructions is basically the same as the information provided in the agreement between the clubs. However, when dealing with a temporary transfer where an option to buy is included, doubts may occur if in the temporary transfer instruction the clubs do not clearly stipulate the terms of such option to buy the Player's rights on a permanent basis. In particular, the transfer fee, and the details of when and how the option may be exercised, must all be clearly provided.

We tend to assume that such information regarding the option to transfer the Player permanently shall be taken in consideration when entering the temporary transfer instructions on TMS and, therefore, the clubs shall introduce all relevant details even when the main objective of the transfer is a non-permanent.

On the edge of turning 10 (ten) years old, TMS has however been at the centre of some unpleasant outcomes in international transfers in cases where timelines are not met or when not all of the proper documentation is inserted in the system.

Adrien Perruchet Silva's move from Sporting Clube Portugal – Futebol, SAD to Leicester City is a good example of the outcome that we can expect when the deadlines are not met. The Player was involved in a last minute transfer between the Portuguese Club and the English Club, where the ITC was requested 14 (fourteen) seconds after the deadline. Both FIFA and CAS[1] rejected a "*validation exemption*" and the Player spent 6 (six) months without playing as a "professional player is not eligible to play in official matches for his/her new club until the new association has confirmed the receipt of the ITC and has entered and confirmed the player's registration date in TMS" (cfr. Annexe 3, Art. 5.2 para. 4).

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[1] CAS Press Release published on 17 November 2017 stated: "*The Court of Arbitration for Sport (CAS) has rejected an application for urgent provisional measures filed by the Portuguese footballer Adrien Silva. The Player had sought an order from CAS requiring FIFA to issue an International Transfer Certificate (ITC) which would allow the Football Association (the FA) to provisionally register him for its affiliated club Leicester City FC (Leicester) until CAS renders its final award in these proceedings. On 31 August 2017, the last day of the registration period for the 2017/2018 sporting season in England, Sporting Clube de Portugal (Sporting) concluded a transfer agreement with Leicester for the transfer of Adrien Silva to Leicester. However, the ITC request was blocked by the FIFA Transfer Matching System (FIFA TMS) as it was outside of the registration period and the FA was unable to register Adrien Silva's transfer to Leicester. The FA requested a "validation exception" from FIFA which was refused in a decision issued by the Single Judge of the FIFA Players' Status dated 27 September 2017*".

The same happened with Yannick Djalo's transfer to OGC Nice Côte D'Azur from Sporting Clube de Portugal – Futebol, SAD. The French Club only uploaded the mandatory documents to TMS after the deadline had elapsed. The Court Arbitration of Sport was called to resolve this case[2] and not only rejected the provisional measures that were requested by the Club, but also rejected all the arguments that the club presented.

However, FIFA had a different interpretation of the Regulations in a special case in Portugal. The English club Sunderland's signing of the goalkeeper Mika from Boavista – Futebol, SAD was first blocked by the TMS System but later confirmed by FIFA. In Mika's case, both clubs uploaded the necessary documentation and completed all the mandatory information, however the clubs – due to a TMS software problem – were not able to match each other's information, as both clubs were constantly asked to provide the counter instruction. The FA and the Portuguese FA did non intervene in this transfer as they were never requested to complete the transfer. FIFA later confirmed the transfer due to the fact that all the paperwork and information were completed before the closing of the window. FIFA held that in spite of the fact that the ITC had not been requested within the required timeframe, both clubs had complied with their duties before the deadline and therefore the transfer of the Player should be successfully completed.

As a general rule, transfers can only be successfully validated when the TMS procedure is completed within the deadline. However exemptions only occur in special circumstances. Let us imagine for example that a player from a Brazilian club is on loan to a Portuguese Club and during the loan period a further temporary transfer is agreed by the Brazilian Club to a Chinese Club.

Both the Portuguese and Brazilian Associations have their registration window closed, however, the Chinese Club has its registration window open. In this scenario, the Brazilian Club shall enter a return from loan instruction in order to allow the temporary transfer to the Chinese Club, however, as said, the registration window is closed in Brazil.

The ITC would have to return to Brazil, and then, immediately, be subject to a temporary transfer and registration with the Chinese FA. Bearing in mind that the registration window is closed in Brazil, a request would be made to FIFA to allow a special exemption for the return from loan of the ITC.

When dealing with this case, FIFA will ascertain i) why the transfer is being made outside the registration period, and ii) if there is concrete and irrefutable proof that the registration is being made with the sole purpose of allowing a subsequent transfer to the Chinese Club where the registration period is open.

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[2] CAS 2011/A/2578, *OGC Nice Côte d'Azur & Yannick Dos Santos Djalo v. FIFA*, Order on Provisional Measures of 11 October 2011, CAS 2014/A/3647 *Sporting Clube de Portugal SAD v. SASP OGC Nice Côte d'Azur* and CAS 2014/A/3648 *SASP OGC Nice Côte d'Azur v. Sporting Clube de Portugal SAD*.

In this case, the registration outside the registration period is needed, in order to successfully complete the transfer of the player. FIFA has been sensitive to this matter by allowing such cases to proceed.

In all the exemples presented above, the FIFA deciding body would be the Player Status Committee, while, the only one that has standing to sue and to pursue the ITC registration out of such period is the Association where the Player wishes to be registered. The Clubs and Players provide the information needed to complete the ITC release and registration (Art. 4 of the Annexe 3 of the Regulations) but it is the Association's that have the special role when verifying such information and requesting/releasing the ITC from/to the other Association.

FIFA's intervention only occurs when an ITC request is made by an Association, and not from the Club or the Player, even though ultimately they will be the parties who will be directly affected by FIFA's decision. Therefore the standing to appeal occurs when an ITC request is rejected, and lies with the new Association (Art. 5 namely para. 5 of Art. 5.2 of the Annexe 3 of the Regulations) where the player is to be registered.

The responsibility for asking, issuing or rejecting the ITC is solely in the Association's hands.[3] In Honorato da Silva's case, CAS established that "*The Club was in complete control of the ITC process. Although the QFA was – formally speaking – in charge of issuing the Player's ITC, in practice a national association only grants the ITC upon approval of the Player's former club. The Club, therefore was in control whether the Player's ITC would be issued timely enough for him to be registered with International by 3 October 2014"*. However, *"it was clear for the Panel (...) that the Club made the issuance of the Player's ITC conditional upon the execution of the Settlement, and, thus, conditional upon the Player's waiver of his entitlement to claim compensation*".[4]

The Panel considered that neither the Club nor the Association "*had any right over the Player and, therefore, were not entitled to decide whether to release the Player's ITC or not. In addition, the deadline referred to in the above provision [Art. 8 (2)(4)(b) Annexe 3 of the Regulations] is a maximum period, within which the national federation (and the respective former club) shall assess the contractual situation and take the decision either to grant or to reject the issuance of the ITC. However, in case the legal situation is clear before the expiry of said deadline – as is the case here given that the Employment Contract had been unilaterally terminated by the Club – the*

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[3] CAS 2016/A/4826 *Nilmar Honorato da Silva v. El Jaish FC & FIFA*, award of 23 August 2017. The mentioned case decides over a dispute concerning the compensation that should be awarded to a Player after the unlawful sport employment contract termination by the Club. Following the Association reluctance to release the ITC, the Player was forced to settle on a amicable termination with the Club that made him relinquish the compensation that he should be entitle.

[4] CAS 2016/A/4826 *Nilmar Honorato da Silva v. El Jaish FC & FIFA*, award of 23 August 2017, para. 80.

relevant club is under the obligation not to obstruct the player's search for a new employment. The deadline provided for in article 8 (2)(4)(b) Annexe 3 FIFA Regulations is evidently not intended to give the former club the opportunity to block at will the post contract free movement of a player. In the case at hand it was the Club that terminated the contract. Therefore, the Player was obviously entitled to the ITC. To arrive at this obvious conclusion was neither complicated nor time-consuming, but only fair. There remained, therefore, abundant time for the Club to properly process the ITC request forwarded to it by the QFA. Instead of enabling the Player to timely register with this new club, as was the Club's duty pursuant to the FIFA RSTP and its obligations post contract, the Club exploited the Player's straitened circumstances by conditioning the issuance of the ITC on the Player's waiver of his financial claims against the Club".[5]

Finally the Arbitrators concluded that "*(...) Article 3(1) of Annexe 3 of FIFA RSTP requires that all parties involved in the FIFA TMS act in good faith. Furthermore, article 9 (1) FIFA RST provides that "[t]he ITC shall be issued free of charge without any conditions or time limit" and that "[a]ny provision to the contrary shall be null and void*".[6]

The presented CAS Award shows the reasons why matters concerning ITCs fall within the Associations' competence. Furthermore, the regulations refer to certain circumstances under which an ITC shall not be issued by the Association. In particular, Art. 8(2)(7) Annex 3 FIFA RSTP states that "*The former association shall not deliver an ITC if a contractual dispute on grounds of circumstances stipulated in Annex 3, article 8.2 paragraph 4 b) has arisen between the former club and the professional player. In such case, upon request of the new association, FIFA may take profissional measures in exceptional circumstances. If the competent body authorizes the provisional registration (cf. article 23 paragraph 3), the new association shall complete the relevant player registration information in TMS (...) The delivery of the ITC shall be without prejudice to compensation for breach of contract*".

An Association shall analyse each case independently of the Parties and must have no position on the matter at stake. Its duty is only to check the terms and conditions of the transfer and ensure that it complies with National and FIFA Regulations.

An Association cannot block or delay the issue of the ITC for reasons relating to an obligation of the former club to pay taxes or amounts due in relation to the transfer agreement, as these are dealt with by National Laws and Regulations.

On the Club to Club relationship, TMS Global Transfers & Compliance (FIFA) have conducted several investigations with the clear objective to detect and fine clubs for the misuse of TMS as a negotiation tool. TMS Compliance

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[5] Idem, para. 82.

[6] Idem, para. 84.

states that there is a misuse of TMS whenever an international transfer contract contains a clause which requires the payment of a first installment before any action is taken in TMS with regard to the creation and issuance of the ITC. For TMS Compliance, such clauses contradict Art. 9 of the FIFA Regulations and are also in violation of A rt. 2.4 of Annexe 3 of the FIFA Regulations.

"Conditioning the issuance of the ITC is a serious breach of the Regulations, which jeopardizes the transparency of international transfers, stains the credibility of the entire transfer system and hinders the possibility of the football authorities to have a more effective monitoring of international transfers. Players' activities are hindered and prejudiced by such behavior.

[...] the use of TMS is obligatory. Its purpose is to ensure that football authorities have clear details of the international transfers of players available, and thus improve credibility and transparency of the system [...]. In this sense, all users must act in good faith, check TMS at regular intervals on a daily basis and be responsible for ensuring that they have all the necessary equipment to fulfill their obligations".[7]

Following an initial short investigation, if TMS Compliance finds that there has been misuse of TMS, they shall inform the FIFA Disciplinary Committee, who will begin the necessary proceedings upon which a more detailed investigation will be made.

It must be noted that in relation to this type of misuse of TMS, TMS Compliance and the FIFA Disciplinary Committee have investigated and sanctioned both the buying club and the selling club for including such conditions (both CA Independiente and Genoa CFC were sanctioned in the above-referenced case). It has to be noted though that when performing a transfer of a player, the clubs do not have the same bargaining power. Therefore, if a clause in a contract sets a certain obligation for the buying club, and if this obligation is not fulfilled the transfer does not happen, it is clear that the buying club is forced to accept such clause otherwise the transfer would not occur.

The FIFA Disciplinary Committee[8] has nevertheless concluded that when such clauses are used, both parties are in breach of the FIFA Regulations when they accept such terms.

However, if the transfer agreement is analyzed in accordance with the Swiss Code of Obligations "*a contract of purchase is a contract whereby the seller obligates himself to deliver to the buyer the object of the purchase and to transfer title hereto to the buyer, and the buyer obliges himself him to pay the purchase price to the seller", therefore "unless there exists an agreement or custom to the contrary, both seller and the buyer are obligated to perform simultaneously – performance for performance*". – Art. 184 SCO.

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[7] FIFA Media Release of 31 January 2013 concerning the transfer of the Player Julain Alberto Velazquez from CA Independiente to Genoa CFC.

[8] The decision awarded in the transfer of the Player Julain Alberto Velazquez from CA Independiente to Genoa CFC was not appealed to CAS/TAS.

Transfer agreements are nt contract with the new club and passing the necessary medical exams to the new club's satisfaction.

The terms of the transfer contract aim to set the timings and procedure for the *traditio* of the federative rights, therefore, if the selling club does not insist that any (or at least the first) payment has to be made before creating the release instruction on the TMS, it will be without any protection apart from claiming the due compensation by lodging a claim with the competent judicial bodies.

From the other perspective, the transfer only takes place when the selling club accepts the *i)* transfer fee and *ii)* payment terms; therefore, without an agreement on these two criteria, the transfer would not go through. The amount to be paid and terms of payment are conditions *sine qua non* to the release of the Player's rights and therefore they must come before the release of the Player as other conditions precedent to be taken into consideration.

As per Art. 9 Annexe 3 of the FIFA Regulations *"sanctions may be imposed on any association or club that violates any provisions of the present annex",* and the responsibility of the Clubs relates to any information or action entered using their TMS profile. The Disciplinary Committee may impose – separately or in combination – *i)* a reprimand or a warning; *ii)* a fine; *iii)* exclusion from a competition; *iv)* return of awards; on any Association that is found to be in violation of Annexe 3 of the FIFA Regulations. When dealing with clubs, the Disciplinary Committee may impose – separately or in combination – *i)* reprimand or a warning; *ii)* a fine; *iii)* annulment of the result of a match; *iv)* forfeit a match; *v)* exclusion from a competition; *vi)* a deduction of points; *vii)* a demotion to a lower division; *viii)* a transfer ban or ultimately; *ix)* a return of awards – Art. 9.3 and 9.4 of Annexe 3.

Conclusions

TMS brings to the football world integrity, transparency and cooperation between entities, which results in a more dynamic and clear process for international transfers. However, the system must always and continuously be subject to improvement. For example, the transfer process should be easier to complete and clubs should have the option to register the player immediately. A player's career could be put on hold due to the simple fact that ultimately the entering of information on the system took longer than expected, even when all the mandatory documents are signed and in place for registration.

INTERMEDIARIES

by *Andrea Bozza* and *Pierfilippo Capello*[*]

1. Intermediaries within the Football System

1.1 Introduction

The role of professional football players has completely changed in the last twenty years along with the developing trend of the football industry. The incredible growth of revenues and investments in football bears correlation with the amount of capital that clubs generally spend to ensure the performances of young and talented players.

In view of the amount of money involved and the complexity of many of the negotiations, players and/or clubs often hire a professional to represent them and close the deal in their best interest.

These professionals, who work in the football industry, are referred to as player's agents or intermediaries. For this reason, in this chapter, the use of the terms "agent" and "intermediary" shall be used interchangeably.

The purpose of this chapter is to illustrate the technical and practical aspects of the intermediary profession, especially within the context of a transfer.

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Firstly, the chapter will analyse the genesis of the regulations from the *Players' Agent Regulations* (PAR) to the current *FIFA Regulations on Working with the Intermediaries* (RWI).

Secondly, it will focus on how RWI has been implemented by national associations (NAs), together with the issues related to its implementation and application at national level.

Then, the chapter will analyse the representation agreements between intermediaries and clients in order to provide a meaningful understanding of how this type of agreement works in practice and the issues that arise from such agreements.

Finally, the Authors will analyse the main principles and guidelines FIFA is currently following in the context of the envisaged reform of the regulations concerning Intermediaries which should be enter into force in 2020.

1.2 Definition of intermediary in the RWI

In the business world, the definition of intermediary refers to companies or persons (e.g. brokers or consultants) who act as mediators between the parties to a transaction, investment decision or negotiation.

Intermediaries usually specialise in specific areas, act as an interface for market and other types of information, and are usually paid a percentage of the total value of the consideration/transaction.

In the football industry an intermediary is a person authorized by athletes or clubs to act on his or her behalf and in their best interest. That said, the definition of a sport's agent may vary from sport to sport and from association to association.

As regards football, FIFA in the RWI defines the intermediary as "*a natural or legal person who, for a fee or free of charge, represents players and/or clubs in negotiations with a view to concluding an employment contract, or represents clubs in negotiations with a view to concluding a transfer agreement*".[1]

As a result, footballers engage intermediaries to obtain the best employment contract, while clubs hire them to conclude a satisfactory transfer agreement or the renewal of an existing employment relationship. However, as noted in Paragraph 1.4 below, the work of intermediaries goes far beyond this narrow definition and touches upon many other legal and factual aspects.

In practice, in all sports, players' agents have a broader role than "intermediaries" within the meaning of FIFA's new regulations. Indeed, in addition to negotiating contracts, agents are meant to support and advise players, defending and managing their interests during their career or any part thereof.

An important part of an agent's job is to look for potential new clubs and introduce "their" players to some of them, and generally to be responsible for

[1] FIFA Regulations on Working with Intermediaries, Definitions.

managing the players' communication, negotiating sponsorship contracts, designing and implementing a strategy for marketing and image rights, and in some cases even advising on investments.

An intermediary can be used by clubs to identify players, or to find clubs for players they are looking to sell. Their network of connections is often a valuable tool for sport directors and managers, from the highest level down.

Their activity also ensures that players are able to focus on "football", thus being relieved of contract negotiations and other business discussions.

Therefore it is clear that, with the new regulations, FIFA sought to draw attention only to the conditions for concluding a transfer agreement and the associated activities, rather than the relevant aspects and formalities to be a players' agent.

1.3 The intermediary's role and activities: an empirical assessment

Intermediaries are active on the global transfer market either for international and domestic transfers or for the renewal of a player contract.

Their involvement in international transfers has increased significantly, as reported in the "*Intermediaries in International Transfers 2018 edition*",[2] a report published by the FIFA/TMS Data & Report department, which can be considered as a tool to gain an insight into the number of operations where intermediaries are involved.

As further explained in the relevant chapter of this book, the RSTP define the International Transfer Matching System (TMS) as a "*web-based data information system with the primary objective of simplifying the process of international player transfers as well as improving transparency and the flow of information*".

The aim of TMS is to simplify the process of international transfers by increasing transparency within the transfer market.

In this regard, the clubs must input into TMS all the relevant information on the transfers of a player, including the name of the intermediaries who served (whether they worked in the interest of the player, of the club or both), the nature of the services provided and the total amount of the relevant commissions.

Since 1 April 2015, when FIFA's RWI entered into force, each member association had to set up a registration system, recording and providing data for every single transaction where an intermediary is involved.

Currently, the FIFA/TMS Data & Report hold data from January 2013 to December 2018. In that period, 19.5% of the total international transfers (86,212) involved at least one intermediary and more than 2.14 billion US dollars have been paid in commissions to intermediaries. The report shows that out of the 7,457 clubs involved in international transfers (over a six-year period), 1,060 used an

[2] FIFA TMS, Intermediaries in International Transfers (2018), see www.fifatms.com.

intermediary; out of the 44,913 players involved in international transfers over the last five years, 9,652 were represented at least once by an agent.[3]

In international transfers (as per the Report data), intermediaries have been mostly working for players (in 12,604 transfers since 2013), followed by intermediaries representing an engaging club (6,066) and finally by those representing a selling club (1,489). In 2018, Italian clubs were the most involved in transfers with intermediaries (45.1% of the transfers), followed by the English clubs (38.6% of the transfers).

It is also very interesting to look at the steady growth of commissions paid by clubs to intermediaries, which reached a "*chiffre monstre*" of 548 million US dollars in 2018.

The clubs belonging to one of the UEFA member associations were responsible for 96% of the record spending in 2018, with most clubs (83.9%) coming from only six member associations (Germany, Portugal, Spain, England, Italy and France).

Two preliminary conclusions can be drawn from the analysis of the above data: first, engaging clubs tend to pay higher commissions than releasing clubs; second, the higher the transaction fees are, the lower the percentage of commissions paid for the services of intermediaries.

For example, for a US$ 1 million transfer fee, the average commission paid by clubs ranges between 28.2% and 16.1%, while for a US$ 1 million transfer fee, the average commission paid by clubs is around 7.3%, with the majority below 10%.

As is well known, although the charging of transfer fees for international transfers is rather customary in international football, there are still many free transfers (i.e. transfers where no fees are paid by the engaging club to the realising one, or transfers involving a free agent player). However, the interesting feature of free transfers is that intermediaries still receive a commission.

The report indeed demonstrates that there have been 3,256 free transfers involving intermediaries since 2013, with an amount of 375 million US dollars spent on commissions.

Many clubs are searching for cost-effectiveness in the market, and hiring a player out of contract could be a very profitable opportunity.

Therefore, in this kind of circumstances in which different clubs are willing to get a "free player", the activity of the intermediaries and their influence in the transaction is crucial since they have the "negotiation power" on their side.

For this reason, in these transfers, the activity of the intermediaries and their influence on the accomplishment of the transaction is crucial, and clubs tend to reward agents for having completed a transaction that would otherwise have been more expensive.

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[3] For further information and data, see www.fifatms.com/wp-content/uploads/dlm_uploads/2018/12/Intermediaries-2018.

Among the factors that may play a role in determining how often intermediaries are involved in transfers on behalf of players, players' age is one of the most significant ones.

The report shows that eighteen-year-old players used intermediaries in 18.3% of their international transfers, while eighteen to twenty-five-year-old players used intermediaries in 14.6% of their international transfers, and the percentage goes further down when players between twenty-six and thirty-two years of age are considered (13.4%).

This data displays that younger players, eager to enter the football system, are more inclined to rely on the service of intermediaries, which is certainly due to their expertise and connections, that can help them to be scouted and assessed by more clubs and in general improve their career path.

Another interesting finding from the report is the involvement of intermediaries depending on the type of transfer. In 2018, players' intermediaries provided their services three times more frequently for a permanent transfer (31.4%) than for a transfer of a player out of contract (10%).

Lastly, it is interesting to point out the significant increase in the number of players' agencies that are active in the football industry, also due to the new regulation which has formally opened the market to this type of structure in the interests of clubs and players.

In fact, as will be highlighted in paragraph 2.3.3 below, FIFA Regulations also provide for a "Declaration" for legal persons. For the first time, a regulation has officially created a provision for legal persons acting as a football agent, although many agencies had already appeared on the market.

From this empirical assessment, one can certainly infer that intermediaries play a very important role in the football industry.

On this basis, it will be interesting to carry out, as in paragraph 3 below, a comparative analysis on the different national rules, in particular those foreseen in Europe's most influential federations, i.e. the so called Big Five (The FA, FFF, DFB, RFEF and FIGC).[4]

Thus the importance of agents in football is linked to the economic growth of this sport. Taking into account the industrial dimension of the underlying business, the need for competence and qualification in the representation activity has increased significantly.

As a matter of fact, FIFA requires that a representation contract shall be concluded prior to the negotiation of an employment contract between a player and a club or a transfer agreement.

In particular, Article 5 of the RWI states that "*for the sake of clarity, clubs and players shall specify in the relevant representation contract the nature of the legal relationship they have with their intermediaries, for*

[4] The Football Association, Fèdèration Française de Football, Deutscher Fussball-Bund, Real Federación Española de Fútbol, Federazione Italiana Giuoco Calcio.

example, whether the intermediary's activities constitute a service, a consultancy within the scope of article 1 paragraph 1 of these regulations, a job placement or any other legal relationship".[5]

We can therefore assume that, in the eyes of FIFA, the activity of intermediaries is more than the negotiation of contracts; however, with the introduction of the RWI FIFA's intention has been to regulate just a single well-defined task, i.e. the conclusion of an employment or transfer agreement.

As mentioned above, despite the role in the negotiation of a contract with a professional club, an intermediary assisting a player has to deal with many other tasks, all of them having an impact on the career of players, such as injuries, poor relationships with their manager and/or teammates. Agents also play an important role in supporting the player in "off-the-field issues" and in their financial management. Many young players start their career with little or no financial experience, so it is important to have a consultant to help them manage their finances and prepare them for the post-career life.[6]

Therefore, the representation activity has evolved in the last few years in order to satisfy the needs of players and/or clubs, from legal assistance to financial advice.

In order to protect the interests of their clients, intermediaries should be aware of many laws or regulations that may affect their clients' interests, such as FIFA's regulations, contract law, labour law, antitrust law and the discipline of intellectual property rights.[7]

For this reason, many agents rely on the services of professionals and/or lawyers in order to advise clients on the relevant aspects of their careers.

Most of the services provided by many agents involve contract negotiation, career management (including wealth management), image and brand management, commercial and financial support, legal services and public relations.

Nowadays many agencies, especially in Europe, represent players and clubs, and the level of their revenue displays their importance within the football industry.

Another important aspect of the agents' activity concerns the assistance in endorsement related agreements (i.e. sponsorship agreements, testimonial agreements, brand-ambassador agreements etc.), often representing a significant source of income for the athletes.

Consequently, the agent is responsible for protecting the player's name and image from third party abuses.[8]

These rights are deemed as property rights (especially in the common law systems), since many football players, as well as athletes, are "celebrities" whose names and images have a strong commercial value.

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[5] FIFA Regulations on Working with Intermediaries (2015), Article 5, Representation contract.
[6] G. M. Wong, *Essentials of Sports Law*, Fourth Edition, 582-583.
[7] *Idem*, 574.
[8] *Idem*, 584.

Intermediaries should take care of their clients not only in their sport-related activities, but also in all aspects of their private lives, which are progressively becoming "public lives".

1.4 Transfer negotiation

Still, the most relevant part of the intermediary's activity is negotiating the transfer of a player.

In any transfer deal, there are often three key elements taking place at the same time: (i) the negotiation between the buying club and the selling club over the transfer fee, (ii) the negotiation between the buying club and the intermediary over the player's personal terms, and (iii) the negotiation between the buying club and the intermediary over commission fees.

In accordance with Article 18.3 of the FIFA Regulations on the Status and Transfer of Players, the selling club should first give permission to the interested buying club to speak to the player (or his agent) regarding the potential move.

However, in practice it is common that buying clubs, before any formal approach to a selling club is made, instruct trusted intermediaries to act on their behalf in exploring the availability of the player to be transferred and play for them, as well as in pre-negotiating the economic conditions (i.e. proposed new salary).

In this phase, the agent's activity relies on connections where the agent, through his network, can investigate and mediate in order to reach a satisfactory agreement for all the parties involved.

In principle, the selling club will only give permission to the buying club once the parameters of the transfer deal are agreed between clubs, thus this is the first key negotiation to take place.

In general, scouting of clubs is based on various parameters, objective parameters, mostly related to the player's performance, age and role, but also subjective parameters, related to the team's line-up, the guidelines proposed by the coach or to the budget that the club could afford.

Once the buying club decides to bid for the selected player, the negotiation's phase shall start.

The bulk of a deal is often set up before a fee has been agreed between the buying and selling clubs.

Negotiations' meetings are often brief, with the intermediary laying out the player's demands, and an official (usually the chief executive, the head of recruitment or the director of football) illustrating the club's detailed salary offer, according to the available budget.

The issues which typically arise in the course of negotiations are often related to fix salary, performance (individual and collective) bonuses and signing-on fees, as well as personal benefits and other personal

items.[9] Players often leave such negotiation to their agents, and are kept abreast of the situation from afar.

As we can see, the role of intermediaries is crucial in a transfer transaction and, as long as they act with diligence and professionalism, agents are very valuable for both players and clubs.

2. The International Legal Framework

2.1 Introduction to FIFA RWI: a devolution approach

The RWI are the regulations adopted by FIFA to govern the role of intermediaries within the football system.

The FIFA Executive Committee approved the regulations during its meeting on March 2014, which entered into force on 1 April 2015 and replaced the FIFA Player Agent Regulation (PAR).

The reform of the agents' legal regulations was the result of lengthy consultations and discussions between all the relevant stakeholders in the international football community, which began in 2009 at the 59th FIFA Congress in Nassau.

FIFA was well aware that a great number of agents had for years taken advantage of the weaknesses in the system and the lack of scrutiny. As a result, in 2015 the regulations applicable to agents were updated with the introduction of the new RWI. As clearly stated in the Preamble, the key objective of these new regulations is "*to protect players and clubs from being involved in unethical and/or illegal practices*".[10]

As explained below, intermediaries are currently not subject to FIFA jurisdiction, hence their activities will only be relevant provided they relate to a transfer contract or employment relationship.

The regulations do not regulate the access to the intermediary profession, contrary to what the previous regulations used to do. Rather, they focus primarily on the intermediary's activities in the context of a transfer market deal, and the obligations that players and clubs have to fulfil when "working with intermediaries".

The analysis of the FIFA RWI has to consider two essential aspects. On the one hand, the RWI set minimum requirements to be implemented by NAs in order to achieve greater transparency, control and oversight of transactions relating to the transfer of football players.

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[9] It has become quite common to include bonuses related to the achievement of sporting targets (such as first starts for their club etc.). Clubs tend to use this solution in order to move, within the balance sheets, part of the costs of the player from the "due payments" category to the "uncertain payments" one, in an attempt to keep their balance sheets under control.

[10] FIFA Regulation on Working with Intermediaries, Preamble.

On the other hand, FIFA has introduced a general provision in the RWI, which subjects the entire regulation "*to the mandatory laws and any other mandatory national legislative norms applicable to the association*".[11]

FIFA thus considered that it could no longer guarantee the quality of private contractual relationships between players and their agents and decided to abandon the idea of a strict regulatory framework, by entrusting NAs with the responsibility of regulating the intermediary profession, reserving for itself just the enunciation of the principles which all the national regulation shall keep referring to.

This has undoubtedly contributed to the emergence of different national rules in this field and ultimately to diversities which have created some sort of "forum shopping" and other issues within the football community. FIFA's approach to delegate this implementing power to NAs is controversial as intermediaries operate in a global market, manage international transfers and cooperate with different NAs.

In conclusion, agents and the regulation of the profession are in the hands of the FIFA's member associations, which are primarily responsible for regulating their activities in their respective countries.

On this basis, it would be more appropriate to define RWI as a devolution rather than deregulation exercise, since FIFA has given member associations the opportunity to set even stricter criteria for regulating the exercise of the activities of intermediaries.

2.2 PAR – Genesis

In order to have a complete overview of the current regulation, it is useful to understand how the previous system worked in practice, the most relevant provisions thereof and, finally, the reasons which led FIFA to reform the whole system.

FIFA's first approach to the activity of players' agents dates back to 1994 with the first PAR, which entered into force on 1 January 1996. The increasing impact of this business on the industry, especially in the post Bosman-age, prompted FIFA to propose that intermediaries be integrated into the football community.

This was the first official recognition of the existence of this professional role in the football system. The 1996 PAR were subject to numerous adaptations through several minor changes which, however, maintained the substance of the regulation.

The 2008 PAR entered into force on January 2008, and was the latest version in force before it was abrogated and replaced by RWI. These regulations defined a players' agent as "*a natural person who, for a fee, introduces players to club with a view to negotiating or renegotiating an employment contract*

[11] FIFA Regulation on Working with Intermediaries, Article 1(2).

or introduces two clubs to one another with a view to concluding a transfer agreement…".[12]

This definition suggests that only natural persons were allowed to provide intermediary services, like the negotiation or renegotiation of an employment contract for a player, or the negotiation between two clubs in order to complete a transfer agreement.

2.2.1 PAR – Access to the profession

In order to exercise the activities of a football agent, a licence was required. According to Article 6 PAR, in order to obtain such a licence, the candidate had to fulfil certain pre-conditions, i.e.: (i) to be a natural person, (ii) to have an impeccable reputation (which means having no criminal records for financial or violent crime) and, finally, (iii) not to hold a position as an official or employee of FIFA or within a confederation, association, league or club associated with these organisations and bodies.

Subject to the fulfilment of all the above pre-conditions, the candidate had to take a written examination held by the competent national association where he/she wished to operate.

Upon passing such examination, the candidate was granted a federal licence, enabling him/her to carry out the representation activity on a global scale as a FIFA-licensed agent. Article 6, paragraph III, provided that these pre-conditions had to be fulfilled "*at all times throughout the players' agent's entire career*",[13] meaning that they were considered effective not only for anyone who wanted to became a football agent, but also for all persons who were active as a licenced agent.

For the licence to be issued, agents had to sign the Code of Professional Conduct (included in Annexe 1 of the PAR), which obliged them to comply with all the international regulations and statutes.[14] In addition, agents were subject to the obligation to obtain professional liability insurance or a bank guarantee deposit of 100,000 Swiss Francs (CHF) to cover the risks associated with the activity.

The licence could be revoked at any time if the agent no longer fulfilled the conditions laid down in the Regulations.

As an exception, some categories were not obliged to undergo the above-mentioned examination. The first category of exempt individuals was "*the parents, siblings or spouse of the player"* who *"may represent him in the negotiation or renegotiation of an employment contract*";[15] qualified lawyers represented the second category; the latter category, and this is still the case

[12] FIFA Players Agent Regulations 2008, Definitions, point (1).
[13] FIFA Players' Agent Regulations, 2008, Article 6, Prerequisites for application, para. III.
[14] FIFA Players' Agent Regulations 2008, Article 11, Compliance with Code of Professional Conduct and football regulations.
[15] FIFA Players' Agents Regulations, 2008, Article 4, Exempt individuals, para. I.

today, had to comply with the rules governing the exercise of the profession in their country of residence. Thus these two categories did not fall within FIFA's competence.

2.2.2 Agent-disputes jurisdiction

Finally, it should be highlighted that the PAR provided for an arbitration clause under which the FIFA Players' Status Committee was recognised as the competent body in international disputes relating to agents' activities. For national disputes, each national association was responsible for providing an impartial and independent arbitration tribunal.

Any agent, player, club or association who had committed a breach of the relevant rules would have been subject to sanctions. Sanctions ranged from a warning to a fine or, for the most serious infringements, the withdrawal of the licence or the prohibition of any football-related activity.

In general, FIFA had set a specific arbitration framework for agents-related disputes in order to prevent their access to national civil courts, keep more control over agents' activities and confine them within the FIFA system.

As we will see in paragraph 2.6 below, with the entry into force of the new RWI in 2015 radically changing the entire agent dispute resolution system, FIFA no longer has competence to deal with any agent dispute at international level, and leaves each national association free to recognise and regulate different dispute resolution bodies.

The 2008 Regulations presented many weaknesses. As a matter of fact, many international transfers, for example, were concluded without the involvement of any licenced agent, inevitably leading to a lack of transparency and poor compliance with anti-bribery and anti-moneylaundering applicable rules.

Moreover, the old system created the perception that NAs did not properly enforce all the provisions of the Regulations, in particular, sanctions applicable to agents. For all these reasons, FIFA opted for a comprehensive reform of the system, focusing on two key points: protecting the integrity of football and increasing the transparency of the transfer market.

2.3 Regulations on working with intermediaries: general principles

In 2015, the licensing system of players' agents disappeared and was replaced by the notion of "intermediaries". As illustrated below, this broader definition of those carrying out the intermediary role covers many different legal aspects of the service provided.

In terms of content, Article 2 of the RWI establishes some general principles that players and clubs must observe when working with an intermediary.

Firstly, it clarifies that players and clubs are the only parties authorised by FIFA to engage an intermediary to conclude a player employment agreement

or a player transfer. Players and clubs may only appoint registered intermediaries, i.e. those individuals/companies that are listed in the registers of each national football association.

Secondly, the provision specifies that players and clubs "*must act with due diligence when selecting the intermediary*".[16] In this context, the word "due diligence" shall be interpreted as the application of "*reasonable endeavours to ensure that the intermediaries sign the relevant Intermediary Declaration and the representation contract between the parties*".[17] Players and clubs shall exercise due diligence when appointing an intermediary or may face sanctions depending on the seriousness of the infringement. As a practical remark, often the genuine purpose of this provision clashes with the minimal level of attention which pressing market dynamics impose on players and clubs.

An interesting aspect of the RWI is that only players and clubs who are willing to use the service of an intermediary must comply with the Regulations. This is clear evidence of FIFA's attitude vis-à-vis the intermediary's role: intermediaries are not considered to be part of the "institutional system", unless they are involved in a transaction related to a player transfer or an employment agreement. Similarly, with regard to the registration procedure provided for in Article 3 of RWI, the responsibility for registering the activity carried out by an intermediary lies solely with the players and clubs relying on his/her services.

Another important pillar of the new set of rules revolves around the role of NAs: indeed, FIFA grants NAs the authority to regulate the matter with regard to the "*minimum requirements*" that an agent must meet to work within any national association.

As a result, FIFA has *de facto* empowered each association to regulate autonomously the "passport" system of intermediaries in their own jurisdiction, leading to different rules and procedures (e.g. the maintenance of a licence system versus a simple registration model) with all the consequences that this entails, as will be analysed in the following sections.

Such delegation of the "passport" requirements to NAs has also led to different interpretations as to the applicability and enforceability of the FIFA rules.

As a consequence, working as a foreign intermediary in the territory of a given association with specific regulations for their nationals can become very complicated and somewhat confusing.

2.3.1 Intermediary declarations

The RWI provide for two intermediary declarations, one for natural persons, which is included in Annexe 1, the other for legal persons, which is included in Annexe 2.

In terms of content, these declarations are essentially the same and lay down important principles for the activities of intermediaries.

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[16] FIFA Circular no. 1417.

[17] FIFA Regulations on Working with Intermediaries, Article 2(2).

In addition to the intermediary's general information (first name, surname, date of birth and nationality/ties,) the Regulations require a proper declaration that the intermediary shall sign. In particular, by signing the declaration, the intermediary undertakes to "*respect and comply with any mandatory provisions of applicable national and international law*"[18] and "*to be bound by the statutes and regulations of associations and confederations, as well as by the Statutes and regulations of FIFA in the context of carrying out* [his/her] *activities as an intermediary*".[19] This is a sort of self-certification, aimed at increasing the burden of responsibility of the agent.

In line with the conditions laid down under the PAR system, one of the most important provisions mentioned in the declaration is the confirmation of the intermediary's impeccable reputation. The intermediary shall declare, under his/her responsibility, that he/she has never been convicted of any financial or violent crime.[20]

He/she shall also declare that he/she does not hold any position as an official, and that he/she will not participate (directly or indirectly) in gambling or betting related to football matches.

The last principle laid down in Article 2 of the RWI states that the recruitment of an official as an intermediary by players and clubs is prohibited. The definition of official is laid down in the FIFA Statutes 2018 under the point 13: "*any board member (including the members of the Council), committee member, referee and assistant referee, coach, trainer and any other person responsible for technical, medical and administrative matters in FIFA, a confederation, a member association, a league or a club as well as all other persons obliged to comply with the FIFA Statutes (except players and intermediaries)*".[21] The responsibility for the accuracy of this declaration lies, as already said, with the intermediary. NAs are required to verify the truthfulness of the intermediaries' declarations, as well as the absence of potential conflicts of interest.

2.3.2 Natural and legal persons

As mentioned above, the definition of intermediary, as first laid down in the RWI, has introduced the possibility for a legal person to also act on behalf of players or clubs; in all the previous regulations, only natural persons were allowed to operate as football intermediaries. This has undoubtedly contributed to the worldwide expansion of "football agencies", as business companies operating in the football market.

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[18] FIFA Regulations on Working with Intermediaries, Annexe 1, Intermediary Declaration for natural persons.

[19] *Ibid.*

[20] By signing the declaration, the intermediary gives also his/her consent to FIFA and the relevant association to disclose and publish any information concerning his/her activities, thus improving the transparency of the system.

[21] FIFA Statutes 2018, Definition point 13.

Annexe 2 of the RWI contains a standard declaration for legal persons, to be completed with the information and signatures of "*each individual acting on behalf of the company*".[22]

The representative of the company shall declare, *inter alia*, that he/she respects and is bound by the status and regulations of the relevant association, the corresponding confederation and FIFA, in the performance of the representation activities. Legal representatives shall also declare they do not hold an official position and have an impeccable reputation. All these declarations must be fulfilled at the time the representation agreement is signed.

Unlike some jurisdictions (e.g. Italy), the RWI remain silent as to the specific corporate structure (e.g. majority of shares or *de jure*/*de facto* control by natural person(s) registered as intermediaries in the same association where the company envisages to operate) that an intermediary company shall adopt in order to operate on the market.[23]

2.3.3 Conflicts of interest

In general, a conflict of interest can be defined as a situation arising where a person or organisation has multiple interests, of a financial or other nature, one of which possibly affecting their motivations or influencing their decisions.

Conflicts of interest exist not only when reasons based on specific circumstances suggest that a decision definitely was unduly influenced by a secondary interest, but even simply when there is a question that a decision might have been unduly influenced.

Clearly, it is very common – if not inherent to – for an intermediary to be in a situation of conflict of interest, particularly when the agent acts on behalf of both, the player and the club where he plays or wishes to play.

The intermediary's duty of diligence and loyalty towards the player should compel them not only to avoid, but also to refuse any arrangement which could give rise to the suggestion of a conflict of interest.

Indeed, the PAR prohibited any conflict of interest in the performance of the agent's activities, particularly as an agent could not represent more than one party in the same transaction.

The reason for this prohibition lied also in avoiding situations where an agent could be remunerated by multiple sides for the services rendered in the same transaction.

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[22] FIFA Regulations on Working with Intermediaries, Annexe 2, Intermediary declaration for legal persons.

[23] It is worth noting that – as firmly established in consistent case law – in the event of a dispute concerning a contractual relationship where the party concluding a representation agreement is a company, the right to sue shall be exercised by the company itself. In this regard, please see CAS 2017/A/5219, *Gaetano Marotta v. Al Ain FC*, CAS 2007/A/1274, *Vincenzo Morabito v. Ittihad Club*, CAS 2007/A/1260, *Patrizia Pighini v. Club Atlético de Madrid SAD* and, finally, CAS 2004/A/765, *Grzegor Bednarz v. Arsenal Kyiv FC*.

The so called "double representation" was, in principle, strictly forbidden and was used as a legal technicality by clubs and players to render representation agreements void and, as a consequence, not pay the relevant commission.

However, provided an agent fulfilled his/her duty of diligence and transparency and was not acting in bad faith, FIFA and CAS jurisprudence have allowed double representation and recognized agents' entitlement to an additional commission.[24]

With the entry into force of the RWI, FIFA has significantly changed its position: Article 8 now allows intermediaries to assist both a player and a club, or even two clubs, in the same deal.[25]

That said, the RWI lay down the obligations and precautions that clubs and players shall adopt before engaging an intermediary. In particular, before using the services of an intermediary, players and clubs shall make reasonable efforts to ensure that "*no conflicts of interests exists or are likely to exist either for the players and/or clubs or for intermediaries*".[26]

In this regard, Article 8(2) expressly provides that no conflict is deemed to exist if any actual or potential conflict is disclosed by the intermediary to the other parties and a written consent is obtained by all parties before the start of the relevant transaction.

Furthermore, according to Article 8(3), both the player and the club can appoint the same intermediary for the same transaction. In this case, specific conditions need to be met in order for the intermediary to legally provide his/her services.

First of all, the player and/or the club need to give their written consent before the commencement of any negotiation. Secondly, the parties shall always indicate in writing which party (player and/or club) is responsible for the commission payment. Therefore, as soon as the player and the club have agreed and signed a written consent, the intermediary can lawfully provide services to both parties.

This would no longer be considered a conflict of interest, and the intermediary can mediate and assist both the club and the player in concluding an employment contract between them. In such circumstances, the intermediary, the

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[24] CAS 2012/A/2988, *PFC CSKA Sofia v. Loic Bensaid Loïc Bensaïd*.
In particular: "*[…] an agency contract is not to be declared null and void because of an alleged violation by an agent of the ban of double representation provided by the FIFA PAR. Likewise, a club which was fully aware of the fact that an agent acted as "personal agent of a player" and which voluntarily entered into the obligations set out in an agency contract, which contract was signed on the same date and by the same executive president as the employment contract concluded between said club and the player represented by the agent, is bared from invoking the nullity of the agency contract. Moreover, there can be no fraud from the side of an agent who made it transparent to the club that he represented the player, therefore no wilful deception from the side of the agent rendering the agency contract invalid*".

[25] The English FA was the first national association, since the FA Agents Regulations of 2007, approving the double representation option, subject to the player's consent.

[26] FIFA Regulations on Working with Intermediaries, Article 8(1), Conflicts of interest.

club and the player would sign a specific contract called "Dual Representation Agreement".

2.3.4 Remuneration and duration

The intermediary remuneration is one of the most frequently discussed aspects of the RWI.

In this respect, FIFA decided to introduce a non-binding recommendation of 3% of the player's basic gross income for the entire duration of the relevant employment contract if the agent has been engaged to act on a player's behalf, or a lump sum agreed prior to the conclusion of the relevant transaction in case the clubs engaged the services of the agent. This recommended benchmark may or may not be used by any association in the implementation of the FIFA regulations.

Payment shall be made directly from the client to the intermediary upon conclusion of the relevant agreement, but it is possible for the player to agree in writing with the club to pay the intermediary on his/her behalf in accordance with Article 7(6).[27]

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[27] FIFA Regulations on Working with Intermediaries, Article 7: "*1. The amount of remuneration due to an intermediary who has been engaged to act on a player's behalf shall be calculated on the basis of the player's basic gross income for the entire duration of the contract. 2. Clubs that engage the services of an intermediary shall remunerate him by payment of a lump sum agreed prior to the conclusion of the relevant transaction. If agreed, such a payment may be made in instalments. 3. While taking into account the relevant national regulations and any mandatory provisions of national and international laws, and as a recommendation, players and clubs may adopt the following benchmarks: a) The total amount of remuneration per transaction due to intermediaries who have been engaged to act on a player's behalf should not exceed three per cent (3%) of the player's basic gross income for the entire duration of the relevant employment contract. b) The total amount of remuneration per transaction due to intermediaries who have been engaged to act on a club's behalf in order to conclude an employment contract with a player should not exceed three per cent (3%) of the player's eventual basic gross income for the entire duration of the relevant employment contract. c) The total amount of remuneration per transaction due to intermediaries who have been engaged to act on a club's behalf in order to conclude a transfer agreement should not exceed three per cent (3%) of the eventual transfer fee paid in connection with the relevant transfer of the player. 4. Clubs shall ensure that payments to be made by one club to another club in connection with a transfer, such as transfer compensation, training compensation or solidarity contributions, are not paid to intermediaries and that the payment is not made by intermediaries. This includes, but is not limited to, owning any interest in any transfer compensation or future transfer value of a player. The assignment of claims is also prohibited. 5. Subject to Article 7 paragraph 6 and Article 8 below, any payment for the services of an intermediary shall be made exclusively by the client of the intermediary to the intermediary. 6. After the conclusion of the relevant transaction and subject to the club's agreement, the player may give his written consent for the club to pay the intermediary on his behalf. The payment made on behalf of the player shall be in accordance with the terms of payment agreed between the player and the intermediary. 7. Officials, as defined in point 11 of the Definitions section of the FIFA Statutes, are prohibited from receiving any payment from an intermediary of all or part of the fees paid to that intermediary in a transaction. Any official who contravenes the above shall be subject to disciplinary sanctions. 8. Players and/or clubs that engage the services of an intermediary when negotiating an employment contract and/or a transfer agreement are prohibited from making any payments to such intermediary if the player concerned is a minor, as defined in point 11 of the Definitions section of the Regulations on the Status and Transfer of Players*".

Since FIFA's 3% represents a non-binding benchmark, it has not been used very often; rather it serves as a reference by sports courts and ordinary courts when one of the parties claims that the commission amount is unreasonable and disproportionate, and as such needs to be reduced to equity.

In terms of other items that may potentially be attached to agent commissions as "bonuses" to be awarded in order to remunerate some sort of "co-investment" on a specific player or deal, it is important to highlight that under no circumstances are intermediaries allowed to receive any percentage in relation to training compensation or solidarity mechanism.

Moreover, in this regard the intermediary's commission shall respect the TPO ban introduced by FIFA in 2015: in other words, an agent cannot be entitled to a participation and/or be assigned by a club or a player any rights in relation to a future transfer or transfer compensation.

However, in case the intermediary is intervening on behalf of the releasing club, the inclusion of a proportional lump sum related to the magnitude of transfer fees received by the realising club could be acceptable. Therefore, in this case it is essential (i) for the agent and the releasing club to conclude a specific mandate related to that transfer and (ii) that the commissions are not considered as a percentage participation.

However, there are still some lump sums which continue to be considered prohibited in light of Article 7(4) of the RWI.

As a matter of fact, the scenario whereby an intermediary would receive a lump sum participation from the engaging club including a future pre-arranged commission based on the fee of the future transfer of the player to a third club, will very likely be deemed as a TPO. This is because, in this case, an intermediary would own an interest in the transfer compensation or future transfer value of a player, as expressly prohibited by FIFA.

One of the last provisions concerns the duration of the representation agreement. In contrast to the previous regulations, RWI has not provided for a maximum time limit for the duration of the representation agreement, so that the parties would have the freedom to regulate this aspect of their contractual relationship arbitrarily.[28]

That said, in practice such provision needs to be coordinated with implementing rules at national level which, as detailed below, may well set a duration term for representation agreements.

2.3.5 Disclosure and publication

In order to ensure the transparency of the system, Article 6 of the RWI imposes a disclosure obligation on clubs and/or players relying on an intermediary. The RWI

[28] P. Lombardi, *The FIFA Regulation on Working with Intermediaries*, in *The FIFA regulation on working with intermediaries. Implementation at National level,* M. Colucci ed., 2017, Second edition, 29.

require players and/or clubs to inform the national association to which they belong of any details of the agreed remuneration or payments of any kind that they have made or are to be made to an intermediary.[29]

The representation contract needs to be attached to the player's contract and sent to the relevant association. If no intermediary is involved in the negotiation or transfer, this should be stated in the contract too.

The RWI also include the principle of publication by the relevant association of certain information regarding intermediaries; such principle was later confirmed by FIFA Circular no. 1519,[30] according to which each association, at the end of March of each calendar year, is required "*to make publicly available on an annual basis of the names of all intermediaries they have registered and the individual transactions in which they have been involve*d"[31] and to publish the "*consolidated total figure of remuneration paid to intermediaries by all players registered within a member association*".[32]

FIFA's diligence is justified by the intention to increase integrity and transparency within the whole system. As we know, one of the main reasons for which FIFA decided to reform the PAR was the impossibility of ensuring the accuracy of the information and data relating to players' transfers and commissions attached thereto.

However, as mentioned above, in most associations this data only reflects the total expenses of each club during the year, without mentioning the costs of each transfer. As a further tool to increase transparency about the activities of intermediaries in the transfer market today all international transfers are registered under the TMS (Transfer Matching System). As described in detail in this book, every club involved in an international transfer shall enter mandatory data and information about the transfer. This mandatory information shall also include the name of the club agent and the name of the player's agent, together with the amounts corresponding to commissions.[33]

2.4 Rules to protect minors

One of FIFA's main concerns has always been to protect minors against their exploitation for football purposes. The set of rules concerning intermediaries attempts to meet this goal.[34]

It is noteworthy that the RWI do not provide for a specific regulation to strengthen the protection of minors, but the standard declaration of the natural and

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[29] FIFA Regulations on Working with Intermediaries, Article 6(1), Disclosure and publication.
[30] See FIFA Circular n. 1519: https://resources.fifa.com/mm/document/affederation/administration/02/75/58/92/circularno.1519-delegationofmonitoringtofifatmsgmbh_neutral.pdf.
[31] FIFA Regulations on Working with Intermediaries, Article 6(3), Disclosure and publication.
[32] *Ibid.*
[33] FIFA Regulations on Status and Transfer of Players, Annexe 3, para. 4, Obligations of clubs.
[34] FIFA Regulations on the Status and Transfer of Players (2018), Definitions point (11).

legal person contained in Annex 1, in particular point 6 (for natural and legal persons), states: "*I shall not accept any payment from any party if the player concerned is a minor*". This declaration prevents the intermediary from accepting payments from a minor player.

FIFA's foremost provision for the protection of minors remains Article 19 of the RSTP, which states: "*international transfers of players are only permitted if the player is over the age of 18*".[35]

To reflect such rule of thumb, some national associations have also included a specific rule for the protection of minors in their own regulations. For instance, the FA regulation requests an additional extended certificate in the candidate's criminal record that shall be controlled by the relevant association in order for an intermediary to work with minors.

The DFB regulation has also adopted a regulation for minors, in which an intermediary working for a minor can only be paid if other conditions are met.[36]

There is a special provision in RFEF regulation that prevents intermediaries from receiving any payment from a minor. In this regard, it is interesting to note that the Spanish regulation decided to implement article 19 of the RSTP in its own legal framework also for prevention of other sanctions for the violation of this rule.[37]

A further measure for the protection of minors can be found in Article 7(8) of the RWI, whereby FIFA prohibits both clubs and players from paying an intermediary involved in the transfer of a minor.

However, it seems that an intermediary is permitted to conclude a free-of-charge representation agreement with a minor, which potentially leads to other consequences.

In particular, especially in countries where it is permitted to conclude a long-term representation agreement (i.e. more than two years) with a minor, intermediaries would financially invest in young players, as in a TPO scenario, in order to have a direct influence on the player and ultimately achieve a significant return on investment.[38]

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[35] FIFA Regulations on the Status and Transfer of the Players (2018), Article 19, Protection of minors.

[36] See section 3.4 below.

[37] In fact, on 25 October 2016, FIFA's Disciplinary Committee sanctioned the RFEF for breaching the regulation set in Article 19 of the RSTP for "*the regulations relating to the international transfer and registration of the players under the age of 18*". This was not the first time that the RFEF had been penalised by FIFA for breaches of this Article. Some years before this sanction, the Fùtbol Club Barcelona (FCB) had also been sanctioned by the FIFA Disciplinary Committee for infringement of Article 19, and the FIFA Appeals Committee later confirmed this sanction. The FCB decided to appeal to the CAS. By arbitration award of 24 April 2015, CAS dismissed the complaint lodged by FCB and upheld the decision of the FIFA Appeals Committee against FCB and the RFEF for infringement of Rules 19(1), 19(3), 19(4) and Article 9.1 of the RSTP. CAS confirmed the suspension of the club for two consecutive transfer market windows and reduced the fine imposed on the club from CHF 500,000 to CHF 280,000.

This type of influence is prohibited under current regulations and was forbidden even before the TPO ban of 2015, as FIFA has always striven to protect minors and their careers.

2.5 Sanctions

The RWI has considerably changed its penalty system for violations.

While the PAR offered a complete and exhaustive system of sanctions and established exclusive jurisdiction for disputes relating to representation agreements,[39] the RWI remain silent on the point.

According to Article 9 of the RWI, "*associations are responsible for the imposition of sanctions on any party under their jurisdiction that violates the provisions of these Regulations, their statutes or regulations"*.

Yet again, FIFA's devolution in relation to such relevant aspects of the intermediary's activities has led to a regulatory gap that needs to be filled by each member association.

This in turn raises different problems as to the consistency of regulations adopted by each association all over the world.

2.6 Jurisdiction over disputes concerning intermediaries

The RWI have also overturned the dispute resolution system designed under the previous set of rules, which prohibited the settlement of disputes before national courts, as the exclusive jurisdiction of the Player Status Committee (PSC) had to be observed.

FIFA is no longer competent in relation to international disputes involving intermediaries. It remains responsible for any issues that may arise in cases where the member associations have not complied with the rules laid down in the RWI.

As such, an important question revolves around the different types of dispute resolution systems which domestic regulations of each national association provide for.

The first, and probably most frequently used one, is the National and Independent Dispute Resolution Chamber, which is responsible for settling disputes between intermediaries, clubs and players. Whether there is a second instance

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[38] Nick De Marco, www.lawinsport.com/topics/Articles/item/the-new-fa-intermediaries-regulations-disputes-likely-to-arise.

[39] The PAR stated that "*sanctions may be imposed on the players' agent, player club or association that violates these Regulations*". The PAR set the competent body which has exclusive competence to decide on international matters: "*In the case of international disputes in connection with the activity of players' agents, a request for arbitration proceedings may be lodged with the FIFA Players' Status Committee*", and the sanctioning body responsible for imposing the sanctions, in fact, "*in international transactions, the FIFA Disciplinary Committee is responsible for imposing sanctions in accordance with the FIFA Disciplinary Code*".

appeal before the CAS depends mainly on the legal framework of the national association at hand.

In England, for example, the "rule K" binds intermediaries to submit their claims to the FA Tribunal; if there is a clause in a representation agreement to bring disputes to the CAS, that clause may be considered null and void.[40]

An appeal can be brought directly to the CAS. If NAs do not identify a specific national appeal body, CAS' competence can be considered as a common means of settling the disputes.

The existence of a general arbitration clause in the representation agreement authorises the parties to devolve their disputes to the CAS. In general, disputes classified as "ordinary arbitration proceedings" are submitted to the CAS, as the court itself has established in its case law when dealing with the recognition of the arbitration clause in a representation agreement.[41]

A model ensuring a two-level review, involving a dispute resolution chamber and a possible appeal before the CAS, presents several advantages, and can be strongly supported for several reasons. First, because it preserves consistency, since all cases involving intermediaries are decided by applying the same law (in particular with reference to *Lex Sportiva*), thus creating strong precedents that can be referred to in similar cases.

Second, it ensures impartiality and expertise in the field of sport matters.

Finally, it guarantees a speedy, economic and confidential resolution of the disputes.

In the absence of (i) a dispute resolution system provided for in the local rules of each association, and (ii) an arbitration clause laid down in the relevant representation agreement, the parties shall bring their action before national courts. This exposes disputes to a range of different principles and procedural rules provided by national legal systems. For example, a club or a player dealing with a foreign intermediary who does not reside (i.e. is not domiciled) in the country in which he/she is registered as intermediary, might – in case of a dispute – have to bring an action against the intermediary in his/her country.

In addition, disputes before national courts are generally more time-consuming than sport arbitration proceedings, let alone the presumable lack of specific competence and expertise of national judges in the sport field.

Such decentralisation of the disputes resolution system has led to divergent and confusing case law and, above all, to a lack of uniformity in judgements on similar cases.[42] For all these reasons, this book advocates the inclusion of an arbitration clause in representation agreements so as to involve competent sports courts in all possible disputes.

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[40] Rules of the Football Association, rule K(1)(e).

[41] CAS 2008/A/1726 *Pinhas Zahavi & Gol International v. Club Besiktas AS & FIFA*.

[42] J.D.D. Crespo – P. Torchetti, *Changes to the Dispute Resolution System* in Football Legal/FIFA's RWI Comprehensive analysis, 44.

3. The implementation of RWI in the "Big Five"

3.1 Introduction

As mentioned above, in the RWI FIFA sets minimum standard/requirements, which each national association needs to implement in national regulations. Nevertheless, the RWI expressly recognize the "*right of the associations to go beyond these minimum standards/requirements*",[43] thus NAs retain the right to establish further (and possibly stricter) conditions for regulating the activity of an intermediary.

Each association has implemented the RWI with different requirements in relation to a range of important aspects such as (a) access to profession, (b) payment of a registration fee, and (c) commission caps.

In order to get an overview of the functioning of the implemented rules at a domestic level, it is worth analysing the measures adopted in the regulations of some of the most important associations in Europe.

In particular, the book will focus on the key points of the regulations adopted in England, France, Germany, Italy and Spain (also known as the "Big Five"), which represent the bulk of the football transfer market to date.

3.2 England

The "FA Regulations on Working with Intermediaries" (FAR) is one of the most complete and structured legal frameworks regarding the intermediaries' activity. The FA decided to include the intermediaries' subject in the FA Rules,[44] thereby avoiding possible problems related to the competence regarding intermediary issues, which are solved by the FA Regulatory Commission.

In order to conclude a representation contract for a player and/or a club, the FAR require the previous registration of the involved intermediaries. Natural and legal persons can register at the FA via an online system and sign the required declaration, which is more accurate than the FIFA template. Intermediaries registering at the FA "*are required to declare they comply with the criteria of the Test of Good Character for Intermediaries upon registration, and Intermediaries must confirm they continue to meet those criteria every time they carry out Intermediary activity in relation to a Transaction*".[45] The registration is valid for one year and intermediaries are entitled to use the designation "FA Registered Intermediary" upon registration.[46]

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[43] FIFA Regulations on Working with Intermediaries (2015), Article 1, Scope.
[44] *Ibid.*
[45] www.thefa.com/football-rules-governance/policies/intermediaries/intermediaries-registration .
[46] D. Lowen, *The implementation of the FIFA regulations in England*, in *The FIFA regulation on working with intermediaries. Implementation at National level*, M. Colucci ed., 2017, Second edition, 221.

The FAR allow "multiple representation", i.e. an intermediary can act on behalf of different parties in one and the same transaction, but shall first obtain prior written consent from all the involved parties.

The representation contract[47] needs to be submitted to the FA within ten days of its signature and shall contain all the minimum information referred to in Article 5 of RWI.[48]

The FAR provide for a maximum term of two years for the representation contract and a recommended cap of 3% of the player's basic gross income for the entire duration of the relevant employment contract.

Another important (and peculiar) provision concerns the protection of minors: Appendix II paragraph 3[49] expressly provides that an intermediary wishing to work on a deal involving a minor shall obtain a specific, additional authorization directly from the FA. The applicant shall present an additional "enhanced certificate" on his/her criminal records, which the FA will assess before releasing the specific authorisation for working with minors. In addition, the intermediary receiving the FA's authorisation can not contact a minor before the 1st of January of the year of the player's 16th birthday.[50] The FAR also require the signature of the minor's parents or legal guardian in the case of intermediaries concluding a representation contract with a minor.

As regards foreign intermediaries who are not resident in England, they can be registered as "FA Intermediaries" under the same conditions as national citizens, which represents a clear element of attractiveness.

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[47] FA Regulations on Working with Intermediaries, letter B point (1).

[48] "*1. For the sake of clarity, clubs and players shall specify in the relevant representation contract the nature of the legal relationship they have with their intermediaries, for example, whether the intermediary's activities constitute a service, a consultancy within the scope of Article 1 paragraph 1 of these regulations, a job placement or any other legal relationship.*

2. The main points of the legal relationship entered into between a player and/or club and an intermediary shall be recorded in writing prior to the intermediary commencing his activities. The representation contract must contain the following minimum details: the names of the parties, the scope of services, the duration of the legal relationship, the remuneration due to the intermediary, the general terms of payment, the date of conclusion, the termination provisions and the signatures of the parties. If the player is a minor, the player's legal guardian(s) shall also sign the representation contract in compliance with the national law of the country in which the player is domiciled".

[49] The FA Working with Intermediaries regulations Appendix II par.3. Requirements relating to minors, 3.1 "*Prior to entering into a Representation Contract with a Minor or with a Club in respect of a Page 12 of 13 Minor, an Intermediary must obtain from The Association additional authorisation to deal with Minors. This authorisation can be applied for by an Intermediary when registering with The Association in accordance with Appendix II or at any point after his Registration. This authorisation shall be valid for 3 years, subject to the Intermediary remaining registered in accordance with paragraph 1.1*".

[50] D. Lowen, *The implementation of the FIFA regulations in England*, in *The FIFA regulation on working with intermediaries*. *Implementation at National level*, M. Colucci ed., 2017, Second edition, 223.

However, in light of the recent progress of *Brexit*, it should be noted that, in this respect, the rules concerning foreign intermediaries operating in the United Kingdom may well be affected by the impact that this massive political change will have on most foreign employees. This means that this provision could be reformed in the coming months.

3.3 France

France has its own and very strict regulations (i.e. a French law) governing the intermediary's profession, which covers not only football but also any other professional sport.

In particular, the essential provisions on sport agents are laid down in the *Code du Sport* (CS). The role of the agent is defined in Article 222-7 of the CS, which states that "*the profession that consists in bringing together, for payment of a remuneration, the parties interested in signing a contract under which a person will be paid to practice a (professional) sport or training activity; or concerning the signature of an employment contract for a paid sport or training activity can only be exercised by an individual holding a sports agent's license*".[51]

The definition of sports agent differs in many respects from the definition provided in the FIFA RWI. Firstly, the performance of a free-of-charge activity is not taken into account.

Secondly, the CS requires the possession of a licence only if the agent brings together two contracting parties in connection with a professional employment agreement for athletes (hence this definition does not apply to the activity related to the signing of endorsement agreements or other image right contracts, so these activities are not subject to the CS).

As an additional specificity, French law allows coaches and technical staff to hire an intermediary.

In order to act as a registered intermediary, the candidate shall obtain a licence from the French Football Federation (FFF) (the licence is issued by the FFF Sports Agents Commission). Before releasing the licence, FFF requires the candidate to pass a written test.

Once in possession of the licence, the intermediary enters his/her name on the FFF list of intermediaries, which is published every year and communicated to the Ministry of Sport.

The licenced agent may work in France and the licence is not subject to any time limit.

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[51] Code du Sport, Article L. 222-7 in J-M. Marmayou, *The implementation of the FIFA Regulations in France*, in *The FIFA Regulation on Working with Intermediaries. Implementation at National level,* M. Colucci ed., 2017, Second edition, 288.

One of the other differences with the FIFA RWI concerns the cap on fees, which is subject to an internal set of rules. In France, there is a fixed remuneration cap of 10% of the total contract value. Therefore, if the activity succeeds in securing the conclusion of an employment contract, an intermediary may receive up to 10% of the gross basic salary of the athlete or manager.

If the activity consists of negotiating a salary increase, the amount of the fee will be calculated on the basis of the salary difference whereas in case the agent concludes a transfer contract, the commission will be calculated as a percentage of the pre-tax amount of the transfer contract.[52]

Where more than one intermediary is involved at the time the contract is concluded, the 10% shall be considered as the total amount and distributed among all intermediaries.[53]

Commission payments are only due after the representation agreement has been notified to the FFF, as long as proof of the service rendered is provided; not surprisingly the burden of the proof lies with the intermediary.

Within one month of the signature of the representation contract, the agent shall provide all relevant information concerning the contract and, on an annual basis, all relevant information relating to his/her business in order for the FFF to verify his/her professional activity, especially in case of intermediaries acting through companies.

Following the CS provisions, the FFF created a disciplinary procedure to protect the interests of athletes in respect of all contracts, employment contracts and transfer agreements concluded with the assistance of an intermediary.[54]

The FFF set up a federal commission having jurisdiction on sports agents, composed of experts and representatives of the most important stakeholders of the FFF.[55] Such commission has the duty to ensure that all the activities involving intermediaries are consistent with the CS. In the event of infringement, the commission may impose sanctions, ranging from a mere warning (for a minor violation) to the withdrawal of the licence for the most serious infringements.[56]

Another interesting aspect of the FFF Regulation is that foreigners are subject to different conditions. EU nationals[57] shall have sufficient knowledge of the French language to be able to work as intermediaries; they must also send a declaration to the competent national association and obtain a special permit, on top of the other conditions to be met.

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[52] J-M. Marmayou, *The implementation of the FIFA Regulations in France*, in *The FIFA Regulation on Working with Intermediaries Implementation at National level*, M. Colucci ed., 2017, Second edition, 299.

[53] Article L. 222-17, C. sport.

[54] Article 7 of the FFF "*Règlement des Agents Sportifs*".

[55] Article 1 of the FFF "*Règlement des Agents Sportifs*".

[56] Article 7.2 of the FFF "*Règlement des Agents Sportifs*".

[57] Article 4 of the FFF "*Règlement des Agents Sportifs*".

For non-EU nationals, they may not act as intermediaries on an occasional or permanent basis without a French licence, unless by stipulating a contract with a licenced intermediary authorized to work in the French territory.[58]

3.4 Germany

The German Football Association (DFB) decided on the very same day FIFA issued the RWI (on the 1 April of 2015) to implement the DFB Regulations for Players Intermediation (DFBR).

The DFBR apply to all players, clubs and intermediaries registered with the DFB.

Interestingly, the DFBR refer to the German Civil Code, in particular to the rules governing the activity of "brokers".[59] There are two different registration procedures for the DFBR: the first one, pursuant to Section 3, provides that a club or a player shall register an intermediary when they engage one for a specific transaction. Thus the obligation to register the agent lies with the party requesting the services.

The party must ensure that the intermediary has signed the relevant declaration and submits the relevant documents to the DFB for the registration upon conclusion of the transaction.

Registration is therefore only required once the transaction between the intermediary and the other party(ies) has been completed. As such it is worth noting that the DFB places an emphasis on the conclusion of the employment agreement rather than on the formalities of the intermediary services.

In the event of non-compliance with the DFBR, the validity of the transfer agreement or of the employment agreement signed by the parties remains unaffected.

The documents required for the registration are: (i) the signed declaration of the intermediary, (ii) the representation contract signed by both parties, (iii) a proof of good conduct, and (iv) the proof of the payment of the registration fee.[60]

The second form of registration is defined in Section 4, which allows the intermediary to register in advance in a list of intermediaries administered by the DBF, prior to the conclusion of a possible deal. The pre-registration is valid for one season and is released upon submission of (i) a signed declaration, (ii) proof of good conduct, and (iii) a registration fee of 500 euros.

However, the above pre-registration system does not eliminate the registration process under Section 3: any pre-registered intermediary is required to register again for the transaction he/she has worked on. The pre-registration

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[58] Article 5 of the FFF "*Règlement des Agents Sportifs*".

[59] Section 652.1 of the German Civil Law Code (Bürgerliches Gesetzbuch, BGB).

[60] A. Soldner, *The implementation of the FIFA Regulations in Germany*, in *The FIFA Regulation on Working with Intermediaries. Implementation at National level,* M. Colucci ed., 2017, Second edition, 309.

system only provides for a faster registration process as the documents submitted for the pre-registration remain valid and do not need to be resubmitted for the registration of future transactions.[61]

The remuneration for the activities of intermediaries is regulated in Section 7 of the DFBR.

The DBF has decided not to follow the 3% recommendation.

In this respect, German intermediaries are free to agree on a percentage, or lump amount.[62] The payment shall be based on invoices including details of the fees paid, the services rendered and a reference to the related representation agreement. The DBFR prohibit any cash payment in order to ensure transparency.

In terms of jurisdiction, the intermediary's declaration states that the intermediary accepts the jurisdiction of FIFA, UEFA and the DBF in the event of any breach of the regulations. This clause was considered unlawful by the Frankfurt Regional Court, in that the DFB cannot oblige intermediaries to comply with this provision. Following a preliminary injunction from the Frankfurt Court, the DBF has hence decided that this clause should not be regarded as binding in nature, but only as a recommendation.

Another important and debated rule of the DFBR is the prohibition of third party ownership arrangements (TPO), which mirrors the FIFA approach.[63] The prohibition has given rise to many discussions in Germany, as this type of practice is common and legal in domestic commercial transactions. That said, the Frankfurt Court of Appeal upheld[64] the decision of the Landgericht Frankfurt am Main (LG) on the legitimacy of the TPO prohibition in the DFBR.[65]

In line with most jurisdictions, the DFBR also contain a general provision preventing intermediaries from receiving any remuneration for a service provided to a minor or for any deal involving a minor.[66]

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[61] Section 4.4 of the DFBR.

[62] "*Examples of the current practice in Germany show that clubs and intermediaries also agree on payments based on the player's (basic) gross salary payable per season the player is under contract and registered with the relevant club. This current practice could raise the question whether such payment terms can still be regarded as a "lump sum" as set out under Section 7.2 of the DFB Regulations and whether there factually exists any differentiation between the determination of payment under Section 7.1 and 7.2 of the DFB Regulations under consideration that the limit of 14% of a yearly gross salary of the player (as set out under Section 2.1 of the statutory order on intermediary fees) should also apply to the relationship described under Section 7.1*", in A. Soldner, *The implementation of the FIFA Regulations in Germany*, in *The FIFA Regulation on Working with Intermediaries. Implementation at National level,* M. Colucci ed., 2017, Second edition, 314.

[63] Section 7.3 of the DFBR.

[64] OLG Frankfurt am Main, Urt. v. 02.02.2016, Az.: 11 U 70/15 (Kart), II.3.c; Article 7.3 DFBR.

[65] In the decision, the Court of Appel found that the possibility of receiving remuneration from the sale of a player could be considered as an incentive for the intermediary to actively promote the early termination of the player contract. The German Court's ruling was intended to prevent an intermediary seeking a financial advantage from inducing the player to move to another club, leading to a breach of contract.

[66] Section 7.7 of the DFBR.

However, there is an exception to this rule, and intermediaries can be paid commissions, when three conditions are met: first, that the player is not younger than 17; second, that he is about to sign his first professional contract and that the contract shall enter into force when he turns 18; and third, that the player is represented by his parents or other legal representative.

3.5 Italy

The Italian Football Federation (FIGC), following the introduction of the FIFA RWI, adopted the regulations on the intermediation service on 26 March 2015.

However, with the introduction of the 2018 Italian "Budget Law"[67] (BL) – i.e. a state law – the regime for intermediaries has radically changed.

This new legal framework established (i) a first level, general regulation[68] for the activity of sport intermediaries managed by the Italian Olympic Committee (CONI), which has tightened up the access to the profession, and (ii) a second level regulation for each specific sport; as a result, the FIGC regulations have also been amended accordingly, to be compatible with such two-layer system.

For the above reason, on 17 April 2019 the FIGC adopted a new federal regulation,[69] which follows the principles established in the general regulation adopted by the Italian government and managed by CONI.[70]

In terms of pre-requirements, any candidate shall have an impeccable reputation (no criminal record for violent or economic crime and no inappropriate sanctions on the sports side), and possess at least a Bachelor of second Education degree or equivalent education. Provided a candidate meets these requirements, he/she can undergo the official examination.

The access to the profession is subject to a "double-step" examination, which only Italian or European citizens are entitled to undertake. Such examination is divided into two parts: a general part held before CONI, and a specific part held before the relevant sport association in which the agent wishes to operate.

The general one consists of a written multiple-choice examination on the principles of sports law, civil law and administrative law. Only if the candidate passes the written part, he/she can go ahead with the oral one.

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[67] Law 27 December 2017 n. 205 on "*State budget for the financial year 2018 and multiannual budget for the three-year period 2018-2020*2".

[68] "Regolamento CONI" 2019 Ed.: www.scuoladellosport.coni.it/images/sds/Regolamento_Agenti_sportivi_2019.pdf.

[69] "*Regolamento Agenti sportivi*" adopted by the FIGC *Consiglio Federale* via official statement No. 102/A.

[70] M. Lai, *Il Regolamento FIGC (2019) sugli Agenti Sportivi nel calcio professionistico*, in *Riv. Dir. Ec. Sport*, Vol. XV, 1, 2019.

As soon as the candidate successfully completes the general CONI exam, he/she can be enlisted in the CONI General Register of Sports Agents and undergo an examination related to the specific sport association.[71]

In particular, FIGC has set up a specific written examination based on the knowledge of federal rules, general rules of procedure of sport arbitration, and FIFA rules.

Once the candidate has passed both examinations, he/she shall pay a registration fee of 500 Euro, and then apply for registration in the FIGC "*Registro Federale degli Agenti Sportivi*" (FIGC Register).[72] The subscription to the FIGC Register binds the agent to comply with FIGC, FIFA and UEFA regulations and is valid for one year, with the option to renew it within 30 days of the end of each sporting season.

The FIGC regulations establish, as FIFA does, the registration of each and every agreement concluded with a player and/or a club before the "*Commissione Federale degli Agenti Sportivi*" (CFAS),[73] which requires the payment of a 250 Euro administrative fee. Agents shall submit the relevant agreement to the CFAS no later than 20 days after signing.[74]

As regards the agents' commissions, the new FIGC regulations simply recommend a 3% benchmark, thus allowing the parties to set a different percentage or a lump sum calculated on the players' gross salary income or on the transaction value.[75]

As mentioned above, only Italian/European citizens can undergo the "double-step" examination; however, the FIGC regulation expressly provides some rules for the intermediaries already registered in other associations. In particular, it provides for every European agent, already registered in an EU Association, the option to request the CFAS to be enlisted in a special section of the FIGC register. The CFAS, within 30 days, shall decide if the candidate is suitable for working as agent in the Italian territory without having to undergo the examination. Three years after being registered in the special section of the FIGC register and having carried out his/her activity in Italy, the agent may request the registration in the standard register without the need for any examination. Such entitlement is subject to the fulfilment of all the obligations laid down in both the CONI and FIGC regulations.[76]

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[71] This examination is a multiple-choice test and evaluates the candidate's competence with regard to the rules of the chosen association and sport, as well as knowledge of national, international laws and regulations.

[72] Article 2 of the "*Regolamento Agenti sportivi*".

[73] Article 5.7 of the "*Regolamento Agenti sportivi*".

[74] *Ibid.*

[75] Article 5.8 of the "*Regolamento Agenti sportivi*".

[76] Article 4.2 of the "*Regolamento Agenti sportivi*".

In relation to non-European intermediaries, the FIGC regulations expressly provide that the foreign intermediary wishing to work in Italy shall first elect domicile with a FIGC licensed intermediary or other subject authorized by FIGC to operate as football agent; failure to comply with this provision is sanctioned with the invalidity of the relevant contracts concluded in breach of the federal regulations.[77]

As a further remark, it is interesting to mention the rule introduced by the new federal regulations concerning dual representation agreements. Article 5.4 of the "General Provision" allows, as FIFA provides in the RWI, agents to carry out their activities for both club and players in one and the same transfer; however, unlike the previous set of rules, it requires the agent concerned to conclude different agreements depending on the number of parties represented (player, engaging club and/or releasing club), each of these agreements containing a specific declaration/disclosure of potential conflicts, together with the written consent of all parties involved.

Finally, in line with the other "big four", the Italian rules also contain a general provision preventing intermediaries from receiving any remuneration for a service provided to a minor or for any deal involving a minor. [78]

3.6 Spain

The Spanish Regulations on intermediaries were approved by the Delegate Committee of the Spanish Football Federation (RFEF) at the General Assembly on 25 March 2015, and published on 31 March 2015.

The RFEF Regulations (RFEFR) reiterate most of the principles laid down in the RWI, however Article 4 of the RFEFR, which governs the registration process, present a few peculiarities.

In Spain a candidate needs to undergo a personal interview with the federation deciding whether he/she has the necessary qualifications and knowledge of the football industry.[79]

Another prerequisite for registration is the candidate's impeccable reputation. This requirement is laid down in Article 4.3 (d) of the RFEFR and is deemed to be fulfilled upon signature of the Ethic Code and the Intermediary Declaration included in the Annex 1 or 2 of the RFEFR (depending on whether the candidate is a natural or legal person).

If the candidate has a successful interview and meets the requirement of impeccable reputation, he/she can be included in the list of RFEF intermediaries by paying an annual fee of 861 euros. All these requirements must be met before the representation agreement is concluded.

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[77] Article 9 of the "*Regolamento Agenti sportivi*".
[78] Article 5.5 of the "*Regolamento Agenti sportivi*".
[79] Reglamento de Intermediarios de la RFEF, Article 4.

The RFEFR, unlike other associations, create no obstacles for the registration of intermediaries already registered for other associations.

When engaging an intermediary, the club or player shall act with due diligence to control any conflict of interest that may arise during the negotiations. If the parties accept an existing (or potential) conflict in writing, the intermediary may continue to provide his/her services.

The RFEF decided to standardise the representation contract in order to comply with the RWI guidelines. The contract shall contain the signature of the parties, the details of the service provided and all the relevant information of the parties (name, surname, the amount to be paid to the intermediary etc.).

The duration of the agreement shall not exceed two years. The representation agreement with all this information, duly signed by the parties, needs to be submitted to the RFEF within ten days of signature.[80]

The RFEFR have not followed RWI's 3% cap recommendation; the remuneration shall be calculated on the basis of the gross amount of the employment contract of the player or it could be a fixed lump sum determined with a club before the conclusion of an agreement.

The disciplinary procedure under Article 14 and 15 of the RFEFR delegates to the RFEF Jurisdictional Committee the responsibility for economic disputes arising from the activities of intermediaries. The problem with this system is that it only covers the economic aspects.

All disputes concerning the activities of intermediaries, which are of a non-economic nature, fall within the jurisdiction of the ordinary civil courts.

The RFEFR allow the registration of an intermediary from another association. A foreign intermediary needs to go through the same process as the national citizens, including the personal interview (in Spanish).

The Spanish association, like most associations, has included a provision for the protection of minors in its regulations. Article 10 of the RFEFR states that if the player is a minor, both players and clubs, who have engaged an intermediary, are not allowed to pay any amount for the service received.[81]

4. Representation Agreements in Practice

4.1 Essential elements

As a general remark, it is clear that the intermediaries' duties vis-à-vis their clients, be these players and/or clubs, primarily depend on the nature of the contracts entered into.

Whilst the nature of intermediary contracts may vary among countries on the basis of the relevant legal system, there exist universal principles governing the contractual relationship between football agents and their clients.

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[80] Reglamento de Intermediarios de la RFEF, Article 7(4).

[81] Reglamento de Intermediarios de la RFEF, Article 10(7), Pagos a Intermediarios.

As stated above, in the RWI, FIFA requires that the representation agreement shall be concluded before the intermediary participates in the relevant transaction, and the agreement shall specify the legal relationship between the parties containing the following essential (and basic) elements: "*the names of the parties, the scope of services, the duration of the legal relationship, the remuneration due to the intermediary, the general terms of payment, the date of conclusion, the termination provisions and the signatures of the parties. If the player is a minor, the player's legal guardian(s) shall also sign the representation contract in compliance with the national law of the country in which the player is domiciled*".[82]

Concluding a written representation agreement prior to the relevant transaction is of crucial importance in terms of legal certainty.

In general, an agent involved in a deal should always bear in mind that an issue of burden of proof (i.e. concerning the commission at stake) could arise at any time in a possible dispute against a Club and/or a player: a written representation agreement would be the only instrument to prove entitlement to a commission payment and/or involvement in a given transaction.

In this regard, it is very interesting to examine the FIFA case *Christian Casini vs. Vestel Manisaspor*, where, even though the club had executed a partial commission's payment to the agent (in doing this the club had clearly acknowledged its debt), the agent's claim was still rejected by FIFA since no written contract was signed by the parties which could demonstrate the agent's activity.[83]

4.2 Scope of the services

It is always advisable to include the scope of the services as a detailed description of the activities and services that an intermediary undertakes to provide for the client. In drafting this clause, the wording should be as precise and complete as possible in order to leave no room for ambiguity.

As a general rule, an intermediary will typically provide a player with services of (i) representation and assistance in employment' negotiations and signing of employment agreements with professional football clubs; (ii) registration of the player with the relevant football association; and (iii) any potential renewal and/or termination of the employment agreement; the assistance during a transfer transaction, in all its phases, will instead be the relevant scope of work when the intermediary is appointed by a club.

In case of a dual representation agreement, the intermediary can legitimately operate in the interest of both player and club.

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[82] FIFA Regulations on Working with Intermediaries, Article 5(2), Representation contract.

[83] FIFA Players' Status Committee in *Christian Casini vs. Vestel Manisaspor*, decision issued on 26 October 2007; see also FIFA Players' Status Committee in *Vincenzo Morabito vs. Ittihad Club*, decision issued on 4 December 2006.

4.3 Duration

In the PAR, the duration of a representation agreement could span a maximum of two years starting from the date of signature. Such provision reflected the intention of FIFA to protect the players' interests in order to avoid long-term binding contracts with an agent, which in turn resulted in frequent breaches and violations leading to undesirable disputes.

Thus FIFA's approach was to leave the parties free to renegotiate and renew the representation terms, only in writing, on a two-year basis.

With the RWI, FIFA has not established a mandatory maximum duration of representation agreements, entitling NAs to regulate this aspect.

As described above, some associations have decided to set a maximum duration in their regulations (e.g. two years in Italy and England), while other jurisdictions have merely followed the applicable law of the country (e.g. France), or allowed the parties to freely set the length of their contractual relationship.

4.4 Exclusivity clause

An exclusivity clause frequently appears in mandates and representation contracts between intermediaries, clubs and players. This clause generally prohibits a player or a club from benefitting from the services of, or being represented by, any other intermediary or third agencies, in the negotiation and conclusion of an employment contract or in a transfer agreement.

In other words, an exclusive representation contract gives the right to an intermediary to carry out his/her activity on an exclusive basis, usually within specific territories or at a worldwide level.

Exclusivity clauses constitute a means for a higher degree of contract compliance,[84] and result in greater motivation for the intermediary to provide a premium service for clients, in that they reduce the uncertainty of the relationship and reward the investment for client acquisition.[85]

Before FIFA published the RWI, the PAR provided that licenced intermediaries had "*the right to contact every player who is not, or is no longer, under an exclusive representation contract with another players' agent*".[86]

Accordingly, any agent seeking a new client would have been in breach of the regulations, and therefore could face sanctions, if the player or the club had already signed an exclusive representation agreement with a third agent.

With the introduction of the RWI, exclusivity is no longer mentioned and regulated by FIFA, leaving such legal aspect to the implementing rules of each country or to the intention of the parties.

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[84] N. de Marco QC, *Football and the Law,* 220-221.

[85] M. Valeting Lenz, *Contractual Stability and Transfer System from an Economic Point of View*, in *Contractual Stability in Football*, M. Colucci ed. SLPC, 2011, 313.

[86] FIFA Players' Agents Regulations (2008), Article 22(1).

It should be highlighted that in some countries such clauses are illegal, thus void and not enforceable, especially when they are prohibited by domestic law of higher hierarchy (e.g. Germany).[87]

CAS jurisprudence has set some limitations as to exclusivity clauses.[88] In particular, exclusivity clauses shall be well defined in terms of application; they should define what exactly the agent can do and in which countries or specific clubs the agent can operate under the exclusivity umbrella.

In addition, CAS has established that intermediaries could be appointed on an exclusive basis, however this shall not prohibit the player from concluding their own deal, even though they signed a representation contract with an agent.[89]

Nevertheless the intermediary may still receive a commission from the transaction, provided this is agreed in the relevant contract (which is strongly advisable, where permitted).

Indeed, according to well-established jurisprudence of FIFA and CAS, agents can still claim commission even if they have not been actively involved in a transfer, as long as a clause to this effect is explicitly and unequivocally stipulated in the relevant contract.[90]

Therefore, well worded and carefully drafted exclusivity clauses can substantially complement a representation agreement, by increasing contractual stability, legal certainty, and reducing potential breaches and/or economic losses.

4.5 Remuneration

Remuneration clauses can be considered the essence of any representation agreement, since they determine the commission in favour of the intermediary for the provision of services in a given transfer deal or employment agreement.

The RWI lay down specific requirements for the determination of the fees for intermediary services. Indeed, the intermediary's remuneration shall be calculated on the basis of the basic gross income of the players for the entire

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[87] Para. 297 - Sozialgesetzbuch (SGB) Drittes Buch (III) - Arbeitsförderung - (SGB III).

[88] CAS 2006/A/1019 *G. v. O.*, available at: www.theplayersagent.com/uploads/knowledgecenter/article/22/ attachments/52e7a2e26b418.pdf

[89] In this regard, see CAS 2013/A/3104, *Vladimir Stojkovic v. Anthony McGill*, para. 63: "*Although the Bureau of the Players' Status Committee had held in August 1998 that the Players' Agent's activities must be causal to the conclusion of employment contract and that, as a general rule (emphasis added), if an employment contract was signed without the involvement of a particular player's agent, the player concerned did not owe any commission to the agent, this rule is not without exception. Thus, it is clearly recognized that an agent is entitled to claim a commission, even when he has not been actively involved in a transfer, if a clause to this effect is explicitly and unequivocally stipulated in the Representation Agreement*".
See also CAS 2017/A/5374 *Jaroslaw Kolakowski v. Daniel Quintana Sosa*. A different decision was rendered in CAS 2007/A/1371 *Jose Urquijo Garcia v. Liedson da Silva Muñiz,* award appealed before the Swiss Federal Tribunal in 4A_400/2008, judgment of 9 February 2009.

[90] In this regard, please see CAS 2011/A/2660, *d'Ippolito v. FC Danubio* and CAS 2013/A/3251, *Genoa Cricket and Football Club S.p.A v. Gary Porter*.

duration of their contract, if the agent acts on behalf of the player,[91] and on the basis of a lump sum agreed prior to the conclusion of the transaction concerned, if the intermediary acts on behalf of the club.[92]

As a general rule, the represented player has to pay the intermediary, although, in practice, it is often the club to execute the payment in favour of the intermediary on the player's behalf, upon the player's prior written consent. Such payments should be carried out only in accordance with the general terms of payment agreed between the player and the agent, and – from a club's perspective – remain always subject to the scrutiny of national tax authorities in relation to possible fringe benefits.

As mentioned above, the introduction of RWI has, for the first time, brought a recommended cap of 3% of the player's gross income over the term of the employment contract as a whole.

This recommendation apparently is not widely followed in the current transfer market.[93] In reality, the remuneration earned by agents is rather variable and can easily reach a percentage between 5% and 10% of the player's gross income.

All discussions concerning a cap on remuneration raise the question of what an appropriate commission would be for the services rendered by an intermediary.

In this respect, according to the CAS jurisprudence, the agent's commission must be reasonable, fair and proportionate compared to the total services rendered.[94]

If the agency fees are considered disproportionate, a competent court would always be entitled to reduce it.

For instance in case CAS 2016/A/4517,[95] the Panel reduced the amount of compensation due to an agent by applying Article 417 of the Swiss Code of Obligations (SCO)[96] in order to restore the balance between the conflicting interests of the parties. In particular, the Panel discussed the tension between "*pacta sunt servanda*" on one hand and Article 417 SCO on the other.

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[91] FIFA Regulations on Working with Intermediaries, Article 7(1), Payment to intermediaries.

[92] *Idem*, Article 7(2).

[93] In some countries the federal regulations provide for a recommended cap of 3% of the player's annual gross income (i.e. in Brazil, Colombia, Japan, England, Mexico, Qatar, Uruguay), whereas in others there is a variable mandatory cap that can range from a percentage of 3% (i.e. in Cyprus, Russia Paraguay, Saudi Arabia) to 10 % (i.e. in France) up to 14% (i.e. in Germany).
For further details see: M. Colucci, *FIFA Regulations on Working with Intermediaries a comparative analysis*, in *The FIFA regulation on working with intermediaries. Implementation at National level*, M. Colucci ed., 2017, Second edition, 515.

[94] CAS 2016/A/4485, *Al Ittihad FC v. Daniel Gonzales Landler*.

[95] CAS 2016/A/4517, *Bologna FC 1909 S.p.A. v. Gonzalo Luis Madrid Pineiro*, available at: https://jurisprudence.tas-cas.org/Shared%20Documents/4517.pdf.

[96] Swiss Code of Obligation Article 417, "*Where an excessive fee has been agreed for identifying an opportunity to enter into or facilitating the conclusion of an individual employment contract or a purchase of land or buildings, on application by the debtor the court may reduce the fee to an appropriate amount*".

Para. 65 et seq. of the award state that "*[...] in exceptional cases, by application of Article 417 SCO, freedom of contract may be limited, with the aim to restore balance between the competing interests of the parties, or with the aim to remedy an undesirable, unreasonable or immoral effect of a contractual agreement on the basis of the principle of proportionality*".

Apparently, although CAS is seldom involved in disputes concerning intermediaries, there will always be the possibility that CAS could apply Article 417 SCO in order to reduce it and restore the balance between the parties, even when such commission was expressly agreed in the representation agreement.[97] This could also apply, *mutatis mutandis*, to proceedings before national courts on the basis of national rules.

4.6 Termination clause

In general, a representation agreement will terminate automatically upon the lapse of its term.

However, every representation contract should include a termination clause that (i) defines the circumstances under which either party may end the relationship and, depending on who initiates the action, (ii) specifies the rights that each party enjoys when termination occurs.

Indeed, a contract that does not adequately address the subjects of termination is an invitation to future and undesirable disputes.

Reasons of termination may include: the non-compliance with an essential obligation, such as, for a player, the failure to abide by the exclusivity of the representation agreement or the non-payment of the commission due to the agent; for an intermediary, the breach of the obligations to provide services with diligence and professionalism or a clear conflict of interest acting in bad faith.

As a deterrent to early termination without just cause, the intermediary can also include indemnity and penalty clauses in the agreement. Receiving compensation for a contract's breach can sometimes be a difficult process that requires a very long and expensive legal battle. Therefore, in order to minimize the hassle and legal costs, most of the representation agreements contain a penalty clause in favour of the intermediary in order to be compensated with a mutual predetermined amount in case the client terminates the representation agreement without just cause, or breaches essential obligations (such as breaching the exclusivity) arising from the contract.[98]

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[97] Please note that in some cases CAS confirmed the agent's commission, holding that the agent's activity was essential in reaching an agreement between club and player. For instance, in the award CAS 2015/A/4326, *Al-Ittihad FC v. Ghassan Waked*, the commission corresponding to 10% of the value of the transfer and the employment contract was not considered to be unreasonable or contrary to Swiss law. See also CAS 2012/A/2988, *PFC CSKA Sofia v. Loïc Bensaïd* and CAS 2015/A/4112, *Al-Ittihad v. Eduardo Uram.*

[98] In this regard, see CAS 2017/A/5374, *Jaroslaw Kolakowski v. Daniel Quintana Sosa*. In the award, the Panel confirmed that it is common practice to use an exclusivity clause in representation

The amount set in the penalty clause should be a genuine and realistic pre-estimation of the likely loss suffered by the agent in losing the representation of a player, otherwise it is very likely that the competent court will strongly reduce the amount or even consider the relevant clause as null and void.

4.7 Jurisdiction and applicable law

As stated above, it is clear from the RWI, FIFA no longer wishes to retain jurisdiction over claims in relation to intermediaries.[99]

That said, it is always advisable to include an arbitration clause in the representation contract in order to settle any disputes before a competent sports panel, especially when the association in question does not provide a competent internal judicial body.

The most common arbitration clauses refer disputes to national arbitration chambers or to the CAS (in international transfers).

CAS arbitration proceedings require a valid agreement between the parties as a source of the arbitrators' power to adjudicate on a disputed matter: consent shall exist with regard to a matter resolvable by way of arbitration, and shall be expressed in a valid form.[100]

If CAS has jurisdiction over an intermediary's dispute, it will be decided pursuant to the ordinary procedural rules provided by the CAS Code. It should be highlighted that awards rendered in CAS ordinary procedures can no longer be enforced directly by FIFA through the disciplinary internal process provided by Article 64 of the FIFA Disciplinary Code, since this provision deals only with awards rendered by CAS under the appeal procedure.[101]

As this reform affected agents, it prompted strong reactions. Currently FIFA, when requested to enforce a CAS ordinary award, has taken the position that federations, according to the FIFA Statutes, are obliged to ensure that their registered members (such as clubs and players) comply with awards rendered by the CAS, failing which the federation itself may face disciplinary sanctions.[102]

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agreements, although it was unusual to see a clause on remuneration of the intermediary which shall be due regardless of the participation of the intermediary in the conclusion of the contract. Since the player had agreed on the terms of the representation agreement (including in relation to the clause at stake), the intermediary was deemed to be entitled to the penalty commission of 15% of the player's employment contract according to the *pacta sunt servanda* principle.

[99] CAS 2016/A/4477, *João António Soares de Freitas v. Al Shabab FC*.

[100] See Article 178 PILA (Swiss Private International Law) regarding the conditions as to form, and the law applicable to the substantive elements, for the validity of an arbitration agreement.

[101] In this regard see CAS 2012/A/2817, *Fenerbahçe Spor Kulübü v. Fédération Internationale de Football Association (FIFA) & Roberto Carlos Da Silva Rocha*. It was back in 2011, when FIFA amended Article 64 of the Disciplinary Code: the FIFA Disciplinary Committee, as of August 2011, would solely enforce awards relating to cases that have previously been dealt with by a body or committee of FIFA.

[102] For further details see A. Amoros Martinez and S. Santorcuato Caffa, Associates at Ruiz-Huerta & Crespo, in *Enforcement of CAS awards: a general review of the available options*

That said, CAS awards may be enforced in countries that are parties to the New York Convention on the recognition and enforcement of foreign arbitral awards, but the entire process can be complex and costly.

Intermediaries usually try to avoid bringing an action before national courts because this kind of procedure is time-consuming, and can last up to two or more years depending on the procedural rules of each country.

Furthermore, since a representation agreement is a private contract between parties, the latter can decide which law applies to the agreement.

As a general rule, the representation agreement is governed by the law of the country in which the contract is signed and registered under the rules set by the relevant national football association.

5. Criticisms and prospective reforms

Despite the relevant changes adopted by FIFA in the RWI, the legal system is not exempt from many perplexities and criticisms, some of which are manifestly and openly expressed by several football stakeholders around the world.

A first ground of criticism concerns regulatory disparity: while the RWI set minimum guidelines, each national association has issued its own regulations, often adding supplementary or complementary requirements, which in turn ultimately lead to heterogeneity, excessive burdens in terms of bureaucratic formalities, inconsistencies among regulations and, in some cases, formal obstacles to the registration system.

One of the most frequently cited "attacks" the de-professionalization of the representation activity. While in some countries the accreditation of certain knowledge remains a necessary requirement in order to be admitted as intermediary (e.g. China, Italy, Czech Republic, Denmark and France still provide an examination), in others it is only necessary to prove an impeccable reputation or similar self-certification documents (e.g. Argentina, Slovakia and Spain provide for a simple interview) which does not prove the possession by the intermediary of the knowledge necessary to exercise this profession.

Another consideration has historically touched upon the need for a unique dispute resolution system, taking into account, in particular, the strong international cross-border and cross-jurisdiction nature of the underlying activity.

Since 2015, when FIFA waived its jurisdiction over agent issues, intermediaries have been forced to submit their claims to civil jurisdictions, which, in most cases, neither had the required expertise and specialisation on those matters, nor a consolidated level of case law (as the FIFA Players' Status Committee used to have).

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and its particularities. Despite such current practice by FIFA, the football stakeholders are advocating for a new amendment of article 64 of the FDC, providing a direct enforcement also of these "ordinary CAS awards".

As already mentioned above, for international transfers intermediaries can avoid lengthy civil proceedings only by including a CAS arbitration clause in the relevant representation agreement or by way of a subsequent arbitration agreement.[103]

As a consequence of the 2015 FIFA's decision, many agents bypassed national registration procedures, by relying on private law contracts and national laws to bring legal actions before ordinary courts or to CAS (ordinary procedure) in order to settle their disputes. This situation has contributed to a considerable lack of transparency and control both by NAs and FIFA itself.[104]

For all these very reasons, the FIFA Stakeholders Committee "*has identified the topic of the intermediaries as a priority in the current review of the transfer system*".[105] In other words, it would not be inappropriate to conclude that the new architecture introduced by the RWI has not achieved its objectives as a consequence of a number of shortcomings.

FIFA has announced a series of principles in order to reform the transfer system, from which a comprehensive reform of the intermediary regulations would stem.

The Stakeholders Committee is already working on this reform, with the support of a "Task Force", which is a group composed of major football stakeholders. In this context, it would be interesting to shed some light on the main guidelines and measures, although not final yet, which have been discussed in recent meetings.

In particular, the FIFA Task Force, backed by high-end officials at FIFA, strongly hints at the possibility of setting up a "clearing house" or "compensation chamber". The "clearing house" will be set up "*to process transfers with the aim of protecting the integrity of football and avoiding fraudulent conduct. This will ensure the good functioning of the system by centralising and simplifying the payments associated with transfers such as solidarity, training compensation, agents 'commissions and, potentially, transfer fees"* (emphasis added).[106] The idea is to use an existing independent entity (e.g. a bank) or to set up an external financial services company under the control of FIFA to process and distribute all the relevant payments due on the basis of the information contained

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[103] CAS Code, Article R27.

[104] I. Trigguero, *Novedades relativas a los representantes de jugadores en el ámbito internacional*, available at: www.sennferrero.com/es/opinion/520-novedades-relativas-a-los-representantes-de-jugadores-en-el-ambito-internacional.

[105] FIFA media release, "FIFA holds talks with agents on possible revision of football intermediaries system", www.fifa.com/about-fifa/news/y=2018/m=4/news=fifa-holds-talks-with-agents-on-possible-revision-of-football-intermediaries-sys.html, 20 April 2018.

[106] FIFA media release, "Football stakeholders endorse landmark reforms of the transfer system", www.fifa.com/governance/news/y=2018/m=9/news=football-stakeholders-endorse-landmark-reforms-of-the-transfer-system.html, 25 September 2018.

in the TMS. The "clearing house" will process all the relevant information and will be able to supervise clubs, intermediaries and players.[107]

In order to be registered and licenced through the FIFA system, intermediaries will be required to pass an examination and attend regular professional development courses (CPD).

In the Task Force's view, the reintroduction of the licensing system should restore a higher level of expertise with the possibility of validating the licences of those agents who had already passed the examination before the 2015 reform. The reintroduction of such system would also require relatives and spouses of the players, traditionally defined as 'exempt subjects' on the basis of their relationship with the player, to pass the official examination without exception. It is also likely that all these people will have to hold professional liability insurance, as is already the case for other professional categories.

Furthermore, the Committee is willing to publish all contracts and clauses in order to increase the transparency of the system. This is because the overarching idea is that FIFA intends to ensure the functioning of the system by centralising and publishing the payments involved in transfers, including the representation agreements between intermediaries, player and clubs.

One of the most controversial topics of the reform is the reference to the introduction of compensation restrictions (i.e. a proper cap on commissions). As a starting point, the recommended 3% benchmark provided in the RWI is already considered too low by intermediary associations and lobbying bodies, thus it is unlikely to be undercut. In addition, some analysts and commentators have already expressed doubts as to the compatibility of this possible provision with European and international competition law.[108]

Notwithstanding the general atmosphere of criticism and scepticism surrounding capped commissions, it seems that FIFA will insist on establishing a cap of 3% (apparently of the player's salary) for agents representing a player and intermediaries providing their services to engaging clubs. On the other hand, in a transaction where an agent represents the releasing club, the commission will be capped at 10% of the transfer fee to be paid to the releasing club.

Another main issue that will be subject to the future reform, and a matter quite related to the cap limitation, is the clear goal to confine conflicts of interest. FIFA will likely prohibit dual or multiple representations, thus an agent will not be able to represent, in a single deal, more than one party. In particular, an agent will no longer be able to act in the interest of the player and the releasing club or to represent the engaging club and the releasing club in one and the same transaction;

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[107] A similar system is already in force in England, where all the relevant transactions related to a transfer, including intermediaries' commission, must be processed through a clearing house set up by the FA. available at: www.sennferrero.com/es/opinion/520-novedades-relativas-a-los-representantes-e-jugadores-en-el-ambito-internacional.

[108] The European Commission could regard the compensation restrictions as an infringement of Article 101 of the Treaty on the Functioning of the European Union (TFEU) or an as an abuse of a dominant position under Article 102 TFEU.

however, as a result of lengthy discussions during the preparatory works, it is also like very likely that there will be an exception to this rule, which is the agent being allowed to represent both the player and the engaging club, in which case the relevant commission could be capped at 6% of the player's annual salary.

Although the FIFA Task Force has consulted many agents around the world to receive their feedback on the key measures that will be introduced with the new reform, it should be noted that football agents have no representation – an illogic distortion of the system, in the authors' view – in the FIFA Stakeholder Committee. That said, the importance of the agents' contribution to the institutional debate surrounding this reform is demonstrated by extensive correspondence between EFAA and FIFA.

In particular, the EFAA has proposed to create a "quality standard" system recognised by all associations worldwide: agents officially registered in one association would automatically be recognised in another one, without further registration or bureaucratic requirements. In the case of an international transfer, the licensed agents can freely operate between more than one association without being bound by any restrictions, as the possession of this quality standard could guarantee that a given agent has already been scrutinised and officially approved by the competent association. Therefore, the importance of reintroducing a licensing system is that it would primarily ensure the recognition of the right/passport to act as a football agent worldwide.

The reform which is under way will undoubtedly be essential to increase transparency whilst providing (i) legal certainty for intermediaries through a set of detailed rules, as well as (ii) an international framework to ensure adequate legal protection and the deserved recognition of these professionals as part of the football community.

Absent surprises, FIFA is expected to approve these measures by the end of 2019 in order for them to enter into force later in 2020 or, more likely, in time for the transfer market sessions of 2021.

6. Conclusion

The development of the intermediary's profession has always been closely linked to the rules relating to the transfer market, proof that this profession has evolved together with the growing needs of players and clubs.

It is particularly interesting to observe that only in 2019 the global spend on intermediary commissions has arisen to new record high USD 653 Million.[109]

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[109] Please see FIFA's Intermediaries in International Transfers 2019 report available on www.fifatms.com/wp-content/uploads/dlm_uploads/2019/12/TMS-Intermediaries-2019.pdf. As per FIFA's press release on 4 December 2019 (please see www.fifa.com/about-fifa/who-we-are/news/global-spend-on-intermediary-commissions-rises-to-new-record-high-of-usd-653-mil) the report offers a summary of the involvement of intermediaries in international transfers completed in FIFA's International Transfer Matching System (ITMS) during 2019.

With the introduction of the FIFA RWI, the concept of representation has opened up to new professional roles and duties, with the possibility of working for both clubs and players, thereby giving intermediaries an undeniable role in the transfer of players and consequently in the whole football industry.

In the last few years, FIFA has recognised that nowadays intermediaries not only represent players but also offer more services to clubs and leagues in terms of transfer market issues and business opportunities around the world.

However, the globalised nature of the intermediary profession contradicts the rules introduced by the RWI in 2015.

As already mentioned in this chapter, this new legal framework has regulated the profession at international level, but at the same time has delegated to the single member associations the regulation of the main provisions, thus leading to a high degree of fragmentation and diversification within the rules laid down in the different countries. This heterogeneity of rules has been severely criticised and means that, in the authors' opinion, FIFA regulations on intermediaries are far from being complete.

It is undeniable that the aim of the current regulatory system is to increase the level of transparency within the football industry and to create a thorough monitoring over transactions.

However, it has also treated the regulation of the activities of intermediaries and (more in general) the position of intermediaries within the football constellation as a hybrid matter.

In addition to the deregulation of the agent profession, FIFA has also gradually abolished its licensing system: this is the result of a deep change in the approach, from a strict focus on the agent profession in itself, to the present one, which instead provides for direct obligations and duties addressed to players and clubs who choose to be represented by an intermediary.

Such standpoint means that the lack of formal and official recognition of agents within the football system persists; in other words, intermediaries acquire legal and professional relevance only when they establish a connection with clubs or players.

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The key highlights can be summarised as follows:

- out of more than 17,000 transfers completed so far in 2019, 3,557 involved at least one intermediary;
- spending on commissions paid to intermediaries has increased to USD 653.9 million to date in 2019, which is already 19.3% more than during the whole of 2018;
- over 80% of all intermediary commissions worldwide was paid by clubs from Italy, England, Germany, Portugal, Spain and France combined,
- in 2019, Portuguese clubs have so far spent almost half as much on intermediary commissions as on transfer fees; and
- a total of 242 international transfers of female professional players completed since 1 January have involved at least one intermediary. Compared to 2018, involvement of club intermediaries has more than doubled and spending on intermediary commissions more than tripled.

In the authors' view, their role should be regarded as a crucial one, not only because of their importance in the transfer of players, but also because of their significant influence on the education of footballers and the development of their careers.

The protection of players, which has always been portrayed as one of FIFA's greatest goals and missions, especially when minors come into play, should also be achieved by way of properly regulating the profession of intermediaries.

The upcoming reforms by FIFA will demonstrate the extent to which the new rules will provide a meaningful professional framework for intermediaries, to the ultimate benefit of the football community.

INTERNATIONAL TAX ISSUES RELATED TO TRANSFERS OF FOOTBALL PLAYERS

by *Mario Tenore*[*]

1. Outline of the Chapter

This chapter focuses on international tax issues arising from transfers of football players between different national federations. The purpose of the chapter is to provide sports lawyers and non-tax lawyers with a general overview regarding the main international tax issues arising in transfers of players between different jurisdictions.

The chapter includes five sections. In section 2 the Author deals with issues related to the tax residence of football players and provides a brief overview of selected European domestic tax laws as well as of the international tax rules which apply if a football player is regarded as tax resident in two different jurisdictions with regard to the same tax period (i.e. so called "dual residence conflicts"). In addition to some European jurisdictions, the analysis includes China which is currently trying to challenge Europe's hegemony by, *inter alia*, bringing in several footballers that have forged their career in the "Old Continent".

In section 3 the Author focuses on international tax issues related to certain special categories of income, namely image rights payments, termination payments, buy-out payments and sign-on fees or bonuses.

Furthermore, the Author discusses in section 4 the taxation of fringe benefits related to the payments of agents' fees, focusing the analysis on the tax treatment of such fees from the perspective of some selected jurisdictions. In addition, in section 5 the Author addresses a number of special tax regimes currently

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The author wishes to thank Panagiotis Roumeliotis for his invaluable help in the drafting of this chapter and for co-authoring the sections related to Chinese taxation and sec. 3.3 ("Sign-on fees"). Panagiotis is senior tax advisor at KPMG Luxembourg. He is, concurrently, pursuing a Master in International Sports Law.

The Chapter is updated to 1st October 2019.

in force in some jurisdictions, which may provide for tax benefits to football players and, therefore, foster their transfer on an international level.

Finally, the last section includes an analysis of the most relevant contractual issues arising in the framework of gross-up agreements, which are often stipulated in connection with international transfers of players and are aimed at ensuring that football players receive an agreed "net amount" of income which is not affected by the tax burden applicable in the State of destination.

2. Tax residence of football players

2.1 Residence tax issues to be considered in relation to international transfers of players

During their professional career, football players may move among different clubs in various jurisdictions. They are mobile taxpayers for whom the identification of the state of residence for tax purposes (where most likely the player shall be due to report his / her worldwide income) can turn into a rather complex exercise.[1]

In most jurisdictions, the concept of tax residence relies on factual elements, which may take into account the personal and business ties of the player with a given jurisdiction. There may be situations (not so infrequent) in which, for example, the player lives in a jurisdiction (because he plays for a local team), whereas his family continues to live in a different jurisdiction.

Each tax jurisdiction has its own rules governing the residence of individuals. In the aforementioned scenario, the football player may be considered tax resident in two different jurisdictions, provided that one State (in which he performs his activity as a football player) regards the economic interest of the person as relevant for establishing his tax residence, whereas the other State (in which the family lives) takes into account the existence of personal ties with the territory for the purpose of establishing tax residence of individuals. In the international tax language, such situation is referred to as "dual residence conflict"; the main consequence of the conflict is double taxation, which materialises insofar as the same income is taxed in two different jurisdictions. As indicated below, double taxation is avoided or mitigated through the application of international tax treaties (if applicable).

That said, generally speaking, for an international (permanent or temporary) transfer, the tax rules of two different States must be taken into account, namely those of the State of origin and those of the State of destination. In particular, it should be considered:

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[1] It has been noticed that football players are less mobile than other categories of sportsmen, see S. Rychen, "*Football Players – Employees rather than Sportspersons: An exception to Article 17 OECD Model*", in Taxation of Entertainers and Sportspersons Performing Abroad, (ed. Guglielmo Maisto), EC and International Tax Law Series, Vol. 2013, IBFD, 2015, 213.

– what are the residence criteria in force in both the States involved;
– which is the relevant fiscal year (e.g. the calendar year or a different period) for individuals in both the States involved;[2] and
– if either State applies the so-called split-year rule, under which individuals can be considered tax residents therein only for a portion of the relevant tax period.

2.2 Brief overview of domestic tax laws

The present section contains an overview of the tax residence criteria applicable in some selected jurisdictions hosting the major football leagues on a global scale. The analysis is certainly not exhaustive but is meant to make the reader aware of the fact that the criteria for tax residence may be substantially different depending on the jurisdiction under consideration. The overview demonstrates that the tax residence is a factual concept. Depending on the jurisdiction, regard should be made, for example, to the business ties or the personal ties of the person (such as the place where the family lives or other personal acts).

Italy

Under Italian legislation (art. 2 of Presidential Decree n. 917 of 22 December 1986), an individual is deemed to be resident in Italy for individual income tax purposes (IRPEF) if either of the criteria illustrated below is satisfied for more than 183 days in the calendar year: a) the individual is registered in the official register of the Italian resident population; b) the individual has a domicile in Italy according to art. 43(1) of the Civil Code, which is identified as the place in which a person has the centre of his personal and economic interest; and c) the individual has his residence in Italy for civil law purposes, namely the place in which the person has his habitual abode according to art. 43(2) of the Civil Code.[3]

The tax period coincides with the calendar year. Italian domestic law does not envisage the "split-year" period rule. Therefore, in case either of the conditions outlined above under a) to c) is fulfilled in the calendar year (for more than 183 days), the individual shall be considered tax resident in Italy for the full tax period.[4] In addition to IRPEF, for which the marginal tax rate is 43% for

[2] In general terms, a "tax period" or "tax year" is an annual accounting period for keeping records and reporting income and expenses and can be either the calendar year (i.e., 12 consecutive months beginning 1 January and ending 31 December) or a fiscal year (i.e., 12 consecutive months ending on the last day of any month save December).

[3] For a broad analysis, see S. Dorigo – P. Mastellone, "*Italy: Tax residence of professional football players*", in Global Sport Law and Taxation Reports, September 2017, Nolot, 30 and ff.

[4] Special rules apply in the case of transfer of residence to jurisdictions that are listed in the Ministerial Decree of 4 May 1999 (so-called "blacklist"). These rules provide for the shifting of the burden of proof on the Italian individual, who has removed himself from the Civil Register of the Resident Population upon transfer of his residence to a blacklisted jurisdiction. The individual is deemed resident of Italy unless proof to the contrary, i.e. the rules introduce a rebuttable

income exceeding EUR 75.000,00, the individual is also subject to local (regional and municipal) surcharges.[5]

In light of the above, in the event a football player transfers his domicile to Italy in August, he shall take up Italian tax resident as from the subsequent year. Conversely, if, following the conclusion of a transfer agreement, the football player moves out of Italy, for example, at the end of August, he will be regarded as Italian tax resident for the year in which the transfer takes place.

France

Under French legislation (article 4A in conjunction with article 4B of the Code Général des Impôts) an individual (whether a French national or not) is treated as a French tax resident if he fulfils alternatively one of the following conditions:

i. the individual has a home located in France or has his main place of abode in France;
ii. the individual maintains on the French territory his professional activity, salaried or not, unless he can prove that it is a secondary activity;
iii. the individual has his centre of economic interest on the French territory.[6]

The tax period for individual income tax purposes is the calendar year. The marginal tax rate is 45% for income exceeding EUR 156.244,00. French domestic law does envisage the "split-year" period rule.

That being said, any football player transferring his domicile to France shall, therefore, be taxed on the income generated therein as from the date of the transfer therein. Conversely, if, following the conclusion of a transfer agreement, the football player moves out of France, for example, at the end of August, he will be liable for tax only until the end of August (article 166 in conjunction with article 167 of the Code Général des Impôts).

Germany

Under German legislation, an individual is considered resident in Germany if his domicile is located on the German territory.

In particular, an individual's domicile is the place where he occupies a home/dwelling in circumstances which indicate that he will retain and use it (section 8 of the AbgabenOrdnung, the German General Tax Code, hereinafter "AO", adopted with the Adoptiongesetz of 02 July 1976, and published on the same date with the Federal Law Gazette n. 1749-I). German tax rules rely on the facts and disregard the intention of the taxpayer. Moreover, the stay should not be just temporary.

A habitual place of abode is deemed to exist in Germany if an individual has been continuously present there for a period longer than 6 months (section 9

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presumption as they allow the taxpayer to demonstrate the actual transfer abroad and that he does not meet any of the criteria highlighted above.

[5] Surcharges may apply in the range of 3% to 4%.

[6] See S. Ivana Zivnovic, "*France*", in Taxation of Entertainers and Sportspersons Performing Abroad, (ed. Guglielmo Maisto), EC and International Tax Law Series, Vol. 2013, IBFD, 2015, 394.

of the AO). Short interruptions during the stay are not taken into account for the calculation of the 6-month period. A presence of less than 6 months may also create a habitual place of abode if the presence is not temporary.

Special rules applies (section 2 of the Aussensteuergesetz, hereinafter "AStG", the German Foreign Tax Law, entered into force on 13 September 1972) for German nationals who move to a foreign country. Under such rules, the German national remains subject to an "extended tax liability as a non-resident" for 10 years from his departure under certain conditions (such as if he has been subject to unlimited German taxation for at least 5 of the 10 years preceding his departure).

The tax period for individual income tax purposes is the calendar year. The marginal tax rate is 45% for taxable income above EUR 265.327,00. In addition, the individual is subject to solidarity tax, which is capped at 5.5% of the income tax and, under certain circumstances, to church tax ranging from 8% to 9% of the tax depending on the federal state.

German domestic law does envisage the "split-year" period rule. Accordingly, if a football player moves to Germany, he shall be subject to unlimited income tax liability from the moment of the transfer until the end of the calendar year. In the opposite scenario, if a football player moves abroad he shall be taxed on a worldwide basis until the moment of the transfer, while for the rest of the calendar year he shall be subject to limited tax liability.

Spain

Spanish legislation contemplates two alternative criteria to determine the tax residence of an individual in Spain, namely (i) the individual is present on the Spanish territory for more than 183 days in one calendar year or (ii) the individual has the centre of economic interests on the Spanish territory (i.e. the main economic or professional activities). Moreover, by way of a rebuttable presumption, an individual is deemed tax resident in Spain if the spouse and/or his/her underage children are usually resident in Spain. If that is the case, the taxpayer would be considered as resident for tax purposes in Spain even if he spends less than 183 days on the Spanish territory, unless he may rebut the presumption by proving his habitual abode in another country for 183 days or more in that given calendar year (article 9 of the Ley n. 35 of 28 November 2006).[7]

The tax period for individual income tax purposes is the calendar year. Spanish domestic law does not envisage the "split-year" period rule. The marginal tax rate is 45% for income exceeding EUR 60.000,00.

Interestingly, a Spanish author[8] has mentioned an unwritten administrative practice under which players that move to Spain are, by way of a rebuttable presumption, considered Spanish tax residents as from the year of the transfer

[7] See E. Montejo Rodrigo, "*Image rights: tax situation in Spain*", in Global Sport Law and Taxation Report, Nolot, June 2017, 12.

[8] A. Juarez, "*Spain*", in Taxation of Entertainers and Sportspersons Performing Abroad, (ed. Guglielmo Maisto), EC and International Tax Law Series, Vol. 2013, IBFD, 2015, 613.

into Spain when the remuneration received by them in the second half of the year (after the transfer to Spain) is higher than that received in the first part of the year. In a specular manner, players who move to a foreign club are considered Spanish tax residents, under the centre of economic interest test, if their remuneration in the first half of the year exceeds that of the second part of the year.

United Kingdom

The UK residence status of an individual is determined by the Statutory Residence Test ("SRT"). It was introduced by Schedule 45 of the Finance Act 2013, enacted with Royal Assent on 17 July 2013, applicable as from the fiscal year beginning on 6 April 2013. HMRC provided detailed guidance on its interpretation of the concept of residence. The SRT provides for four automatic UK residence tests, which are alternative. The most relevant for football players is the presence in the United Kingdom for 183 days or more in a tax year or working sufficient hours in the United Kingdom over a period of 365 days (without a significant break from work) when all or part of the 365 days fall within the tax year. In particular the "UK work days" (i.e. days on which at least 3 hours are spent working in the United Kingdom) must account for at least 75% of the individual's working days in the 365-day working period.

In addition to the automatic residence tests, UK legislation contemplates five automatic overseas tests, under which an individual will be treated as not UK resident.[9] In case neither the automatic UK residence tests nor the five automatic overseas tests apply, the so called "sufficient ties" tests should apply in order to determine the tax residence of the individual.

With regard to the latter, the relevant ties depend on whether or not the individual was UK resident for one or more of the 3 years preceding the relevant tax year. The ties to be considered are family ties, accommodation ties, work ties, 90-day tie (broadly, presence in the United Kingdom for at least 90 days), and country tie (i.e. if the individual was present in United Kingdom at midnight for the greatest number of days in that year. This method will be also applied when more than one country considers that the individual spent the greatest part of a tax year on its own territory).

The income tax year runs from 6 April to 5 April. UK legislation contemplates the "split-year" period rule, i.e. in case of departure of the individual, the tax period is split into a portion of UK residence, up until the date of departure, and a portion of non-residence from the date of departure, when he is deemed to be ceasing UK tax residence, to the end of the tax year.[10] The marginal tax rate is 45% for income exceeding £150.000,00.

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[9] For example, where the individual spent fewer than 16 days in the United Kingdom, did not die during that tax year, and was UK resident for one of the preceding 3 tax years or where the individual spends fewer than 46 days in the United Kingdom, and was not resident in any of the preceding 3 tax years.

[10] See K. Offer, "*United Kingdom: International transfers of professional football players*", in Global Sport Law and Taxation Reports, March 2018, 9.1, 23.

China

In 2019, China reshaped its tax system following the amendment of the Individual Income Tax Law ("IITL) on December 27, 2018. The amendments entered into force on January 1, 2019.

An individual is deemed to be tax resident in China, predominantly, on the basis of his domicile or physical presence therein. Notably, in order to acquire Chinese tax residence the individual shall fulfill alternatively one of the following conditions:[11]

– the individual's domicile is located on the Chinese territory;[12] or if not
– the individual has resided in China for an aggregate of 183 days or more[13] in a single calendar year. This criterion refers to *non-dom* individuals (expatriates) who under the 183-day threshold are regarded as tax resident in China due to the fact that they have substantial "physical presence" on the Chinese territory. It should be noted that absences of temporary nature (i.e., less than 30 days at one time) will not be deducted from the computation of the 183-day threshold.

In China, the tax period coincides with the calendar year. Chinese tax residents are subject to tax in China on their worldwide income. Individual income tax is applied on a progressive basis.[14] The marginal tax rate is 45% for monthly income exceeding Chinese Yuan Renminbi ("CNY") 80,000.00, corresponding approximately to EUR 10,500 (of course depending on the applicable conversion rate).[15] Progressive taxation only applies to so-called 'comprehensive income' that includes, amongst others, wages and salaries.[16]

2.3 Dual residence conflicts and their resolutions

As indicated above, dual residence conflicts may arise insofar as a football player is considered to be tax resident in two (or more) jurisdictions with respect to the

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[11] As per Article 1 China IITL.

[12] Domicile in China is assessed on the basis of "habitual" residence in China due to household registration and personal and/or economic ties (e.g. family, financial interests).

[13] According to the 2019 Circular No. 34 jointly issued by the Ministry of Finance and the State Administration of Taxation '*only the days in which the individual has stayed in China for 24 hours are considered in the calculation; those days in which the individuals stayed less than 24 hours are not counted*' (extracted from: www.rsa-tax.com/single-post/2019/03/19/China-SAT-clarifies-how-to-calculate-the-length-of-residence-of-individuals). For the determination of tax residence, only the full day spent in China is counted. For example, if the person arrives in China at 0:01 am, the day of arrival does not count.

[14] Article 3 (1) China IITL.

[15] In particular, the monthly salary that exceeds CNY 85,000 is taxed at 45%. However, CNY 5000 is the tax-free amount. So effectively the remaining CNY 80,000 is subject to individual income tax.

[16] Taxable income derived from employment shall be calculated, declared and taxed on a monthly basis, under the "pay-as-you-go" system. The relevant tax is withheld by the employer (in the case of football, the football club) and levied by the local tax bureau within the first 15 days following the month of withholding. In contrast, other types of income are consolidated and are subject to tax with the filing of the individual annual tax return.

same tax period (or for a part of it). Such conflicts may arise, for example, insofar as the player is considered to be tax resident in one jurisdiction because his personal ties may be located therein, while he is also regarded as tax resident in a different jurisdiction, e.g. because he takes up an employment with a local club and is present in the latter jurisdiction for more than 183 days. Residence constitutes the main tax-connecting criterion manifesting the *nexus* of the taxpayer with the respective jurisdiction.

Most double tax conventions contain the so-called tie-breaker rules, which are aimed at providing a solution in the event of dual residence conflicts. The analysis shall focus on the OECD Model Tax Convention (hereinafter "OECD MTC") and the related Commentary (hereinafter "OECD Commentary").[17] This is due to the fact that OECD member countries have largely conformed to the OECD MTC when concluding or revising bilateral tax conventions. The worldwide recognition of the OECD MTC has made the related OECD Commentary an authoritative source of interpretation for the provisions, which are included in the bilateral tax conventions.

Art. 4(2) let. a) of the OECD MTC addresses the issue of dual residence conflicts for individuals. The provision gives preference to the State in which the individual has a permanent home available to him on a permanent basis (as opposed to an arrangement indicating short-term occupation).[18] A home/dwelling made available for short-term use (e.g. while on business or educational travel, or while on holiday) is not regarded as permanent. The criterion is also not satisfied if the home is rented out despite the fact that the individual retains the legal ownership of the property.

If the individual has a permanent home in both Contracting States, under Art. 4(2) a) of the OECD MTC, preference is given to the State in which the personal and economic relations of the individual are closer, this criterion being understood as the centre of vital interests. Thus, regard will be had to his/her family and social relations, his/her occupations, his/her political, cultural or other activities, his/her place of business, the place from which he/she administers his/her property, etc.[19] The circumstances must be examined as a whole, but the personal ties to a State must receive special attention. In several cases, economic relations are considered less relevant than personal relations.[20] The OECD Commentary provides an example of an individual who, while having a permanent home in one State, establishes a second in another State. The individual could be considered to retain his centre of vital interest in the first State if, together with other factors, and notwithstanding his second permanent home, he has always lived and worked in such State, his family still resides there and his possessions

[17] The tie-breaker rules may apply to a portion of the entire taxable period (e.g. in the above example, double taxation arose for the period July-December).
[18] See para. 11 of the Commentary to Article 4 of the OECD Model Tax Convention.
[19] See para. 15 of the Commentary to Article 4 of the OECD Model Tax Convention.
[20] See for example, German Supreme Court, 20 February 2008, Case 2005/15/0135.

are also kept therein. However, in some cases economic ties have been considered more relevant than personal relations.[21]

In cases where the residence cannot be determined by reference to this rule, Art. 4(2) b) of the OECD MTC provides as subsidiary criterion respectively, that of habitual abode,[22] which applies if

a) a dual resident individual has a permanent home in the contracting States, but it is not possible to determine in which State his "centre of vital interests" is located;
b) a dual resident individual does not have a permanent home in either of the contracting States.

Regarding scenario a), the OECD Commentary suggests to identify the State of residence as the State where the individual stays more frequently. For this purpose, account should be taken of all stays within each State, whether or not at the permanent home. To determine the individual's habitual abode under scenario b), account should also be taken of all his stays in each contracting state. The reasons for those stays are immaterial. As to the length of time over which the comparison should be made, the OECD Commentary merely affirms that it must "cover a sufficient length of time", and that regard should be had to the intervals between the stays.

Nationality of the individual applies as a subsidiary criterion if it is not possible to determine the individual's habitual abode. If none of these criteria is applicable, the question shall be solved by the competent national authorities on an administrative level, in the framework of a mutual agreement procedure established in Article 25 of the OECD MTC.

2.4 Practical cases and solutions

The current section intends to provide an illustration of some practical cases regarding the transfer of football players on an international level, bearing in mind that such cases are merely illustrative because the assessment of the tax residence requires a careful examination of the facts and circumstances.

Case no. 1: Player is transferred from an Italian club to a Spanish club in January 2020. Player moves to Spain while his family continues to live in Italy.

Both Italy and Spain would regard the player as tax resident. Under Italian law the player would be deemed tax resident because his personal ties (domicile) are located on the Italian territory for more than 183 days (see above). Spain shall also regard the player as tax resident therein as from 2020 because the player is there for more than 183 days. In the event of a conflict regarding the residence of

[21] See for example, Spanish Supreme Court, 3400/2001.

[22] The concept of abode refers to the frequency, duration and regularity of stays that are part of a settled routine of an individual's life and are, therefore, more than transient.

the player, the tax residence shall be determined by applying art. 4(2) of the double tax convention concluded between Italy and Spain on 8 September 1977 (hereafter "Italy-Spain DTC"). Italy-Spain DTC is patterned on the OECD Model Tax Convention. Accordingly, assuming that the player has a permanent home available to him on a permanent basis both in Italy (where his family lives) and in Spain, the tax residence shall be determined having reference to the State with which the personal and economic relations of the player are closer (i.e. centre of vital interests). As mentioned above, whether personal relations prevail over the economic relations depends on the specific jurisdiction. From an Italian perspective, the personal relations should prevail, whereas Spain maintains the opposite view.[23] Accordingly, the centre of vital interests criterion would not be effective for the solution of the dual residence conflict. Therefore, such conflict should be resolved under the habitual abode criterion, set forth in Art. 4 (2) let. b) of the Italy-Spain DTC. Under such criterion the player should be considered tax resident of Spain, being the place where the individual stays more frequently.

Case no. 2: Player is transferred in August from a UK Club to an Italian club in August 2020. The player moves to Italy together with his family.
From a UK perspective, the player would cease to be considered tax resident therein upon the transfer. Italy would not consider the player as tax resident therein since none of the criteria relevant to determine the tax residence (see above) would be met for more than 183 days in the tax period 2020. There is therefore a period (i.e. from the date of transfer until the end of 2020) for which the player would not be considered tax resident in Italy or in UK.[24] As a consequence thereof, the player shall be subject to tax in Italy exclusively with regard to income sourced in this jurisdiction.

In the opposite scenario, in which a player is transferred from an Italian club to a UK club in August 2020, the outcome would be different. Italy would continue to regard the player as Italian tax resident since it is likely that, at the time of the transfer, the player would have met either of the residence conditions for more than 183 days in 2020. The UK, under the split-year rule, would also consider the player as tax resident as from the moment of the transfer (1st August – 31st December).

Accordingly, double taxation would arise for the period August-December 2020 due to a dual residence conflict that should be resolved by applying the tie-breaker provision envisaged in art. 4(2) of the double tax convention concluded

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[23] See 3400/2001 (Spain).

[24] See with specific reference to the Convention N. Saccardo, "*Considerazioni in materia di perdita e acquisto della residenza in corso d'anno*", Riv. Dir. Trib., 4/2000, 73. See also, in the same sense, with reference to a similar rule provided by the convention between France and Sweden and with reference to Switzerland and the Netherlands, R. Betten, "*Income Tax Aspects of Emigration and Immigration of Individuals"*, IBFD, 1998, 148-149, while, with reference to the convention between Italy and Germany see M. Boidi, C. Gerla, M. Piazza, "*Il trasferimento della residenza all'estero. Coordinamento fra normativa interna e trattati contro le doppie imposizioni*", Fisco, 2000, 2757.

between Italy and UK on 21 October 1988 (hereafter "Italy-UK DTC"). In the event that Italy were to be the "winning" jurisdiction, the income of the player paid by the UK club would be taxed in Italy but the player could claim a foreign tax credit with regard to taxes paid in UK that could be offset against Italian taxes (under certain conditions).

3. Taxation of specific remunerations:[25] *image rights income, termination payments, buy-out payments and sign-on fees*

3.1 Image rights payments

It is frequent for sportspersons, such as football players, to derive directly or indirectly (e.g. through a payment made to a star-company) a substantial part of their income in the form of payments for the commercial use of, or the right to use, their "image rights", e.g. the use of their name, signature or personal image, invariably in the context of sponsoring, advertising and endorsement activities.

However, before proceeding to the main part of this analysis, a distinction should be drawn, on the one hand, as to whether the image rights have been assigned to the club/employer, or licensed to a commercial company (e.g. NIKE, Adidas etc.), and, on the other hand, as to whether the player exploits his/her image, or uses an interposed image rights company, or, commonly known as a "rent-a-star-company".

In many jurisdictions, insofar as an employee (e.g. a football player) assigns its image rights to the employer (a football club), income derived in connection with the exploitation of the image rights is regarded as employment income. This is the case in Italy where employment income is subject to WHT if the Italian payer qualifies as a "withholding agent" according to article 23 of Decree 600/1973, e.g. it is an Italian resident or an Italian PE of a non-resident person. The WHT applies according to the applicable progressive rates (e.g. 43% if the income exceeds EUR 75,000).[26] The same applies in other jurisdictions, as well.

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[25] For the tax aspects raised in the case of solidarity payments see P. C. Roumeliotis, "*Solidarity payments in football. A general overview and their qualification in the international tax field*", in Global Sport Law and Taxation Report, June 2017, 22 according to whom "In a nutshell, the conclusion that must be reached is that both training compensation and solidarity contribution must be considered as a business profit of the club derived from the investment it made in the past and, for this reason, taxed in the former club's State of incorporation/residence. It is transparent that they cannot be assigned to performances of the player and for this reason the superseding role of art. 17 in relation to art. 7 does not apply".

[26] This is also the case in the UK, See K. Offer, "*UK developments in the taxation of imager rights*", in Global Sport Law and Taxation Report, December 2017, Nolot, 14; the author recalls the recent decision given by the UK Supreme Court on 5 July 2017 in the Rangers case www.supremecourt.uk/cases/docs/uksc-2016-0073-judgment.pdf . According to the author, "within paragraph 39 of the decision, the court set out the principle that employment income paid from an employer to a third party is still taxable as employment income. HMRC's view is that this principle applies to a wide range of "disguised remuneration tax avoidance schemes no matter what type of third party is used". HMRC guidance, published on 29 September 2017, stated that HMRC intended to use the

The player can also assign the right to economically use his/her image rights to an entity other than a club. Such entity receives payments for the use of, or right to use, the player's image rights. National tax authorities have challenged such arrangements on the grounds that the assignment of the image rights to a foreign entity was a sham transaction. In particular, such arrangements have been challenged, for example, on the ground that their purpose is to avoid source taxation on the income which is paid by the club to the foreign entity. The argument is that had such income been paid to the player directly, it would have been subject to tax as employment income.

Italian tax authorities re-characterised, for example, the royalties paid by an Italian football club to a Liechtenstein entity as salary paid to the player, based on a number of factual circumstances. In particular:

– the amount paid for the purchase of the image rights was not proportionate *vis-à-vis* the salary that the Italian team paid to the player;
– the stipulation of the agreement between the club and the Liechtenstein entity was close in time to that stipulated by the club with the player; and
– the royalties paid by the club was contingent on the sporting results achieved by the club.

Italian tax authorities argued that the Liechtenstein entity was an interposed person and assessed the club in its capacity as a withholding agent. The taxpayer (i.e. the football club, in its capacity as a withholding agent) appealed in court. The Provincial Tax Court (First Instance Court) upheld the position of the Italian tax authorities,[27] but the decision was reformed by the Regional Tax Court (Second Instance Court), which decided in favour of the club, arguing that the Italian tax authorities had not sufficiently proven the existence of an interposition.[28]

A similar case was addressed in a decision of the Italian Supreme Court (no. 4737 of 26 February 2010), which upheld the interposition of a foreign vehicle (tax-resident in Ireland) that was set up for the purpose of acquiring and managing the image rights of various sportsmen resident in Italy for tax purposes. In this case the Supreme Court decided in favour of the Italian tax authorities.

Similar issues have arisen also in other jurisdictions.[29]

In UK, for example, if a sportsperson or entertainer generates income from the exploitation of his image, the main question to be determined for domestic UK tax law purposes is whether income arising from the exploitation of image is trading income, employment income or some other form of income.[30]

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decision to take action against a number of schemes. Whilst that guidance does not refer to image rights structures it could be argued that payments made to an image rights company negotiated as part of the salary of a player could be challenged on those grounds.

[27] Provincial Tax Court of Naples (I° chamber), 20 Dec. 1993, Decision no. 3230.

[28] Regional Tax Court of Naples (I° chamber), 6 Sept. 1994, Decision. no. 126.

[29] W. Hoke, "*Soccer Star Messi Faces Trial on Spanish Tax Evasion Charges*", Worldwide Tax Daily, 12 June 2015.

[30] See E. Lawson, "*United Kingdom*", in Taxation of Entertainers and Sportspersons Performing Abroad, (ed. Guglielmo Maisto), EC and International Tax Law Series, Vol. 2013, IBFD, 2015, 713.

A recent UK decision involves the club Hull City and the player Geovanni, whereby a payment was made for use of image rights to an IRC. According to the UK tax authorities ("Her Majesty's Revenue and Customs Department" – HMRC) the payments were a "sham"; should be considered part of the remuneration of the employment; and taxed as employment income. On 16 August 2017 the UK tax authorities also released their guidance on image rights payments and confirmed the existence of other ongoing investigations on possible avoidance schemes based on which professional soccer players transferred their image rights to offshore entities to avoid UK tax and social security contribution.

But the list of cases also includes other footballers, such as Bergkamp and Platt,[31] where the court had to decide whether image rights exploited through personal services companies should have been treated as part of the players' employment income generated through their employment by Arsenal Football Club. The case was decided in favor of the players who were successful in arguing that income arising from the exploitation of their image rights was not part of their UK employment income.

The situation is similar in France where the French Courts ruled that "since the image and the fame of a professional sportsperson cannot be distinguished from their sports-related activities", the amount of the annual royalties paid by a French football club to a UK company (holding the rights to use the name and image of the professional player employed by the French club) was regarded as remuneration for the assignment of those rights and, in principle, taxable in France in the player's name (pursuant to article 155(A) of the FTC) in the industrial and commercial profits category:[32]

The above shows that tax structures regarding the use of image rights raise legal uncertainty. It is crucial that the arrangements reflect market conditions, that is, the price that would have been agreed by independent parties or entities under conditions of free competition, and that such arrangements are justified by an underlying commercial rationale and genuine business reasons, other than the mere attainment of tax advantages and the circumvention of tax laws. More specifically, and as regards the rent-a-star-companies, as the football player would, most probably, be a shareholder or a director, this would most likely lead to a qualification as 'related party' by virtue of the transfer pricing tax rules put in place in some tax jurisdictions. Hence, special consideration should be granted to the transfer value of said rights as it should be performed on an arm's length basis, while being commensurate to the player's actual marketability. Last, but not least, the 'interposed' entities should couple their business rationale with significant substance.

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[31] *Sports Club and others v. Insp. of Taxes*, SpC 253, concerning the footballers David Platt and Dennis Bergkamp.

[32] CAA, Lyon, 3 Mar. 2009, 06-5699, Edmilson Gomes de Moares.

Some authors have noted that Spanish tax authorities are inquiring into the market price agreed between the player and the assignee of his image rights.[33] The assessment of the fair market nature of the price is done by the Spanish tax authorities having reference to the market price agreed by independent parties (i.e., sponsors, boots brands, sports clubs, etc.).[34]

According to Angel Juarez, Spanish Tax Authorities have used the *ex post* financial results as a benchmark to determine whether the transfer price at which the original license to the image right company was granted was compliant with the arm's length standard. If that transfer price failed to comply with the arm's length standard, then the ex post results have been used by the Spanish Tax Authorities to determine the appropriate arm's length price and the subsequent transfer pricing adjustment. This has been the common practice where the image rights companies were resident in Spain for tax purposes. Conversely, where the image rights companies were resident outside Spain, the approach of the Spanish Tax Authorities seems to have been different, in the sense that the deficiency notices have not been issued on the basis of transfer pricing adjustments, but on the basis of considering that the original license was a sham transaction, thus giving rise to potential criminal liability.

In addition, Spanish Tax Authorities have challenged that the transfer of the right to economically use image rights: i) is aimed at avoiding the application of personal income tax ii) is also abusive because the acquiring companies have very little substance and do not carry out any economic activity.

3.2 Termination payments and buy-out payments

Termination payments, i.e. compensation following the termination of a contract between a club and the player, can raise complex tax issues from an international perspective. As a matter of principle, subject to the domestic tax laws of the respective jurisdictions, such stream of income/payment made by the club to the player shall be qualified as remuneration deriving from the employment contract. However, this should be assessed on an *ad-hoc* basis.

For illustration purposes, we can assume hereafter that a player resident for tax purposes in Italy is transferred to a foreign club in another State (hereinafter the "foreign State").

Italy would tax the termination payment as employment income derived from activities performed on the Italian territory prior to the transfer abroad. This

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[33] E. Montejo Rodrigo, "*Image, rights: tax situation in Spain*", in *Global Sport Law and Taxation Reports*, June 2017, 13.

[34] See Spain, in *Taxation of Entertainers and Sportspersons Performing Abroad*, (ed. Guglielmo Maisto), EC and International Tax Law Series, Vol. 2013, IBFD, 2015, 618. "According to Spanish media, such tax audits have affected, *inter alia*, football players such as Iker Casillas, Sergio Ramos and Xabi Alonso, of Real Madrid CF, and Lionel Messi, Xavier Mascherano, Xavi Hernández and Gerard Piqué, of FC Barcelona".

conclusion holds true whenever the transfer occurs, i.e. at the beginning of the year (in January when the player is no longer considered Italian tax resident) or in the course of the year (i.e. in August, in which case the player is still regarded as Italian tax resident for the entire year in which the transfer takes place).

Buy-out clauses may be included in a sport contract for two reasons: they deter the player from activating it, as the sum is usually higher than the player's fair transfer market value, and they dissuade competitors from acquiring the players' sport performance.[35]

Upon the exercise of the buy-out clause the club is entitled to receive a sum which can be paid either by the player directly or, more frequently, by the club which is intending to acquire his performances (Club of destination).

As indicated in the literature, in most jurisdictions the payment by the Club of destination upon the exercise of the buy-out clause, is regarded as the payment on the player's behalf of a personal expense (otherwise owed by the player to the club). It is therefore regarded as a "benefit in kind" taxable in the hands of the player as employment income.[36]

In Spain, such clauses are prevalent and of mandatory nature and are embedded and construed in accordance with Art. 16 of the Real Decreto n. 1006 of 26 June 1985, which requires compensation to be paid in the event that a player (having the corresponding statutory right) unilaterally terminates the contract.[37] More concretely, according to Art. 13 of the aforementioned Real Decreto n. 1006, the player is statutorily entitled to terminate the employment relationship on his own will and, pursuant to Art. 16, the amount of the abovementioned compensation is defined in two ways: (i) in advance, during the conclusion of the employment contract, or (ii) in absence of a predetermined sum, it will be assessed and determined by the labor court.

Art. 16 of the Real Decreto n. 1006 explicitly determines that amounts paid in the exercise of a buy-out clause are a benefit in kind received in the hands of the player as an employee. In such a case, the personal income tax rate of 48% applies. Some authors[38] have highlighted though the existence of a tax ruling issued by Spanish tax authorities under which the payment of a buy-out clause is regarded

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[35] See P.C. Roumeliotis, "*Professional football players' contracts: Buy-out clauses and their international tax implications*", in Global Sport Law and Taxation Report, September 2018, 35 according to whom "The objective of such clauses is twofold. On the one hand it deters the player from activating it, as the sum is usually higher than the player's fair transfer market value. On the other hand, it dissuades competitors from thinking of poaching the player as, apart from a handful of top-flight European clubs, it is difficult for the majority of clubs to have the resources for the recruitment of just one player".

[36] P.C. Roumeliotis, "*Professional football players' contracts: Buy-out clauses and their international tax implications*", in Global Sport Law and Taxation Report, September 2018, 36.

[37] Their legality is strengthened by Art. 1,152 of the Spanish Civil Code that render such clauses *prima facie* permissible.

[38] J. D. D. Crespo Pérez - P. Torchetti, Legal, *Practical and taxation issues of buy-out clauses in professional football contracts*, in Global Sport Law and Taxation Report, December 2018, 24.

as a capital benefit for the player[39] and concluded that the payment is not subject to personal income tax in the hands of the player.[40]

In international transfers, buy-out payments and termination payments raise similar tax issues. For illustration purposes, we can assume hereafter that a player resident for tax purposes in Italy is transferred to a foreign club in another State (hereinafter the "foreign State").

Italy would tax the termination payment as employment income derived from activities performed on the Italian territory prior to the transfer abroad. This conclusion holds true whenever the transfer occurs, i.e. at the beginning of the year (in January when the player is no longer considered Italian tax resident) or in the course of the year (i.e. in August, in which case the player is still regarded as Italian tax resident for the entire year in which the transfer takes place).

With regard to the foreign State, the following scenarios could materialise:

– scenario a) the transfer occurs in August and the player would not be considered tax resident in the foreign State. In this case the latter jurisdiction would not tax the termination payment (which would be regarded as income of a non-resident taxpayer, related to a past employment activity exercised outside its territory). The payment would be considered as an element of employment income and, thus, directly linked to the former employment relationship and presumably be taxed in Italy, assuming that the player is resident for tax purposes in Italy by virtue of the application of the worldwide income principle. It is not important that the payment is made after the termination of the employment contract, as the player would be deemed to be resident for tax purposes in Italy in the whole calendar year;
– scenario b) the transfer occurs in August and the player is considered tax resident in the foreign State as from the moment of the transfer (assuming that domestic legislation envisages a split-year rule). In such a scenario a distinction has to be drawn with regard to the timing of the payment, namely:
  – if the payment is made before the football player leaves Italy, the player would remain unlimitedly liable to tax in Italy, and Italy would have the right to tax on the grounds of its domestic tax law and applicable international tax rules (such as double tax treaties, if any);

[39] The advance ruling applied general taxation principles and reasoned that the payment of a buy-out clause was, in effect, a capital payment, because of the enduring nature of the benefit, namely, the release of the obligation on the player to perform services in the future.

[40] The advance ruling specifically stated that: "The payment to the player of an amount equivalent to the amount of the buy-out clause does not correspond for the purposes of remuneration that could make us understand that we are facing a consideration that derives directly or indirectly from a current or future employment relationship". For greater specificity, the advance ruling applied art. 33.1 of Spain's Personal Income Tax Law, which determines that "variations in the value of the taxpayer's assets by any changes in their composition, will be considered capital gains or losses, unless they are classified as income by this law". As such payments are not income on a current basis but a capital benefit with the consequence that the player is not subject to personal income tax with respect to the exercise of a buy-out clause.

- if the payment is made after the player has left Italy and has established himself in the foreign State, it is arguable whether the termination payment would be taxed in the foreign State by the application of the unlimited tax liability resulting from the acquisition of the tax residence status therein. On the one hand, it could be argued that such a State should not tax the income as it relates to past employment activity which was terminated prior to the acquisition of the tax residence in the foreign State. On the other hand, the foreign State could exercise its unlimited taxing right to tax the termination payment which is materially received after the acquisition of the tax residence in the foreign State. In the latter case, the double taxation conflict could be resolved through the tie-breaker rule provided in the treaty between Italy and that foreign State. If the foreign State would be considered as the Residence State, Italy would still preserve its taxing rights as the State of source of the income/the relevant activity. Potential double taxation would be alleviated / eliminated in the foreign State, being the residence state, through the application of the relief methodologies (exemption / exemption with progression /credit methods). On the other hand, should the foreign State be the losing jurisdiction under the application of the tie-breaker rule, the latter State should be prevented from levying a tax on the termination payment, which shall be taxable exclusively in Italy;
- scenario c) the transfer occurs in January and the player is considered tax resident in the foreign State at the time of the payment of the termination fee. In such case it is also arguable whether the termination payment would be taxable in the foreign State for the same reasons indicated with regard to the abovementioned scenario.[41]

3.3 Sign-on fees

Upon a potential transfer, parties may negotiate 'bonuses' that are regarded as part of the contractual arrangements of the employment contract. The FIFA Dispute Resolution Chamber ("DRC") has acknowledged the use of such bonuses and in a number of cases has deduced that the underlying clauses invariably refer to the number of official matches that a player would be or is fielded for the club with which he is registered.[42]

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[41] The aforementioned conclusion is confirmed by a decision of the Dutch Supreme Court (Hoge Raad der Nederlanden) according to which a payment that results from termination of an employment contract is classified as income from employment. The fact that the employment is terminated does not preclude an allocation of the taxing right to the State where the employment was exercised pursuant to the exception ("unless") clause in Art. 15(1) of the treaty (and Art. 15(1) OECD MTC) because the condition "employment is exercised" is meant to include situations where the employment is terminated.

[42] F. De Weger, "*The Jurisprudence of the FIFA Dispute Resolution Chamber*", Asser International Sports Law Series (2016), 2nd Edition Springer, 161.

Among such bonuses, sign-on fees, being a sum of money paid to the player in the form of an incentive to join the club, are quite common in football negotiations. According to fundamental jurisprudence of the Court of Arbitration for Sport ("CAS"), "*The signing fee is a contractual obligation and is not performance-related (unlike premiums or bonuses which necessarily are dependent on a player's performance)*".[43] It may take the form of a one-off payment upon the signature of the contract, or, upon mutual agreement, be paid *via* instalments over the length of the contract.

In light of the above, it shall be considered that when dealing with international transfers, the tax issues are very similar to those already highlighted with regard to termination payments and buy-out clauses (see above).

3.4 Practical cases and solutions

The tax considerations may be better understood through a practical example. We can assume that player A is currently playing for Club B, or club of origin (in State B1). In January 2019, Club B concluded a definitive transfer agreement with Club C, or destination club (in State C1) pursuant to which, the effective date of the player's transfer to the latter is due to take place in July 2019. Once the transfer was agreed upon and the parties came to terms on the basic remuneration, in the context of additional payments, Club C granted a sign-on bonus to Player A (already in January 2019 regardless of the fact that Player A is still competing with Club B). It is envisaged that Player A would remain in State B1 as from January 2019 until the end of the season, whilst he would definitively relinquish State B1 to move to State C1 only in July 2019.

We shall address hereafter three fundamental questions to come to the conclusion as to which State should tax the sign-on fee.

a. Will Player A cease to be tax resident of State B1 upon the transfer to State C1 for the fiscal year in which the transfer occurs? Will Player A acquire the tax residence of State C1 in the same fiscal year in which the transfer occurs?

As a preliminary remark, let us assume that both States' tax periods coincide with the calendar year (i.e., 1 January 2019 – 31 December 2019). Tax residence is a factual notion that needs to be analysed in light of all the relevant criteria set forth in both States' domestic laws and also in the tie-breaker rule of their tax treaty (if any). Against this backdrop, two possible variants shall be observed:

– No "split year" period rule envisaged in either State.[44]

Eventually, Player A would be unlimitedly liable to tax, being bound to report his worldwide income for the whole calendar year, in whichever State that is found to be the winner of the dual residence conflict under the applicable tax treaty.

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[43] Arbitration CAS 2010/A/2049 *Al Nasr Sports Club v. F.M.*, award of 12 August 2010 [15].

[44] Points b) and c) below are based on this scenario.

– "Split year" period rule envisaged in both States.

In the event that both States envisage the "split year" rule, Player A would become tax resident for a part of the calendar year (subject to fulfilling the prescribed requirements in the tax residence criteria). That being said, in the event that the effective move of Player A occurs, for example, on 10 July 2019, Player A would be deemed to be tax resident in State B1 between 1 January and 10 July, whilst he would be deemed to take up tax residency in C1 as from 11 July until 31 December (i.e., being the moment that he *de facto* takes up his employment on a regular basis therein). In simple words, this variant would lead to a compartmentalisation/ split of the calendar year into two parts. As a result, he would be taxed on a worldwide basis in State B1 for the period of 1 January until 10 July and in State C1 for the period between 11 July until the end of the calendar year. In turn, for the latter period, Player A would be deemed as non-tax resident in State B1 and, as such, liable to tax only on his State B1-sourced income (if any).

b. What is the treatment of the sign-on fee for income tax purposes in State B1?

If player A is ultimately considered fiscal resident of State B1 at the time of the payment of the sign-on fee, the said remuneration should be subject to tax therein only. Notwithstanding, considering that the fee derives from State C1, we shall fall back on the relevant tax treaty to assess whether State C1, being the State of source, is entitled to tax such income, by application of the pertinent allocation provisions.

It is crystal clear that the signing-on bonus is grounded on, and *prima facie* linked to the underlying contract, which would be enacted in the foreseeable future. The timing of the payment is irrelevant.[45] The fact that such payment is materially made for employment services to be rendered in the future, by no means should affect its qualification as income from employment whatsoever.[46] Principally, the predominant reason of the payment of the fee is to incentivise the player to sign and, as a corollary, acquire his future services. Hence State C1, would presumably be entitled to fully tax the fee. Potential double taxation would be alleviated / eliminated in State B1 through the application of the relief methodologies (i.e., exemption / exemption with progression / credit methods).

c. What is the treatment of the sign-on fee for income tax purposes in State C1?

Should State B1 be the losing jurisdiction under the application of the tie-breaker rule, this insinuates that the latter State should not levy a tax on the sign-on fee, which shall be taxable exclusively in State C1 (translated into a purely domestic

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[45] OECD, 2014, *Commentary on Art. 15, §2.2*.

[46] "Art. 15", in K. Vogel, "*Double Taxation Conventions*", Vienna: Wolters Kluwer Law & Business (4th ed.), 2015, Vol. 2, [40]. CAS in *Al Nasr Sports Club v. F.M.*, underlined that signing-on fees are an intrinsic contractual obligation and is not performance related (see above). Hence it is agreed upon by the parties and paid to allure the player to enter into the employment relationship. Furthermore, the fact that the timing of the payment is irrelevant is well engraved in the OECD Commentary.

situation). Player A, would instead remain liable to tax in State B1, as non-resident, solely on the State B1-sourced income that he may have derived during the fiscal year.

4. Taxation of fringe benefits

In various jurisdictions, national tax authorities have challenged payments made by the clubs to agents.[47] In particular, such payments were considered taxable income in the hands of the player himself, i.e. a "fringe benefit". Such taxation takes place on the assumption that the club paid the agent and relieved the player from the cost of the intermediary services.

National tax authorities challenged the existence of a fringe benefit even in cases where the player did not require the club to pay the intermediary on his behalf. Insofar as national tax authorities deem that the payment made by the clubs constitutes a fringe benefit for the player, the following tax consequences could potentially materialise:

– for the player, an increase of the taxable income;
– for the club, the non-deductibility of the commission fees from the corporate taxable income, and the non-deductibility of VAT.[48]

The international regulatory framework is contained in the FIFA Regulations on working with intermediaries, issued on April 1st, 2015, which are aimed at improving transparency regarding remuneration and involvement of intermediaries. As solemnly illustrated in the Preamble, their purported aim is to bolster high ethical standards for the relations between clubs, players and third parties, as well as enable proper control and transparency as regards player transfers.

For the purpose of our analysis, it must be pointed out that Art. 7(6) of the FIFA Regulations stipulates that "*After the conclusion of the relevant transaction and subject to the club's agreement, the player may give his written consent for the club to pay the intermediary on his behalf. The payment made on behalf of the player shall be in accordance with the terms of payment agreed between the player and the intermediary*". FIFA is currently reforming the intermediary system and the outcome of such reform should be delivered in the upcoming months.[49]

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[47] For an extensive analysis on the tax treatment of players' intermediaries from international context see M. Tenore, "*FIFA Regulations from the taxation 'Corner'*" in The FIFA Regulations on working with Intermediaries – Implementation At National Level, (2nd ed. Michele Colucci) International Sports Law and Policy Bulletin 1/2016, Issue I-2016, SLPC, 2016, 113; and P.C. Roumeliotis, "*Solidarity payments in football. A general overview and their qualification in the international tax field*", in Global Sport Law and Taxation Report, June 2017, 45.

[48] In Italy the club is also liable for the payment of withholding taxes not levied on the income in kind and for the related penalties which range from 110% to 200% of the withholding taxes.

[49] The General Council of the European Football Agents Association (EFAA), Mr. Roberto Branco Martins, advocated that under the upcoming FIFA Regulations on agents "clubs should be allowed

This stated, the approach of tax authorities may change depending on the jurisdiction concerned.

– *Italy*

In Italy there is no special tax regime regarding the fees paid to intermediaries. Despite the absence of tax rules on this specific point, tax authorities assume the existence of taxable fringe benefits for the players by proving that the intermediary – despite being remunerated by the Club and not by the player – has nonetheless acted exclusively or partially in the interest of the player, in the course of the negotiation with the club. In tax audits, Italian tax authorities have argued that fees paid to agents/intermediaries for services rendered by the latter to the club, constituted in fact a taxable benefit for the player himself. To support their position, Italian tax authorities have claimed in a number of cases that, despite being formally appointed by the club, the agent/intermediary acted *de facto* as the player's agent during the transfer negotiation. In these cases, the player was considered the ultimate beneficiary of the agents/intermediaries' services, and since the related fee was borne by the club, the full amount (or part of it) of the agents/intermediaries' fees has been requalified as a fringe benefit, i.e. a taxable income of the player.

Several court's decisions did however reject the abovementioned position of the Italian tax authorities, particularly where evidence showed that the player had appointed his own agent and had borne himself the related fee for the agent's services.[50]

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to pay on behalf of their players in consideration of relevant national tax regulations".(extracted from: www.lboro.ac.uk/media-centre/press-releases/2019/august/the-future-of-football-agents/ - Accessed on August 2, 2019).

[50] In the past (i.e. prior to 1 January 2016) the tax regime of the fringe benefit was dealt with in article 51(4-bis) of the Italian Tax Code (ITC). Such provision introduced a special fringe benefit for professional sportspersons (with effect as from 1 January 2013), which was in fact meant to apply mainly to professional soccer players. According to this provision, the sportsperson was subject to tax upon a portion of the intermediary's fee which is paid by the club that acquires the sporting performances of the athlete. The deemed income in kind was computed in the amount of 15% of the intermediary's fee. The sportsperson was however entitled to deduct from such amount the fees paid to his own agent (if any). The underlying rationale of the provision considered that the sportsperson has taken advantage of the services provided by the intermediary appointed by the club. With regard to the existence of the benefit in kind, article 51(4-bis) (now abrogated) was grounded upon a non-rebuttable presumption, i.e. the sportsperson was unable to give contrary proof that he did not receive any benefit from the activity of the intermediary (which was rendered therefore to the exclusive benefit of the club). Article 51 (4-bis) of the ITC applied to the extent the intermediary was involved in the negotiation of the sport performance. This was the case, for example, if the intermediary's scope of activities dealt with the resolution or the extension/renewal of the existing contract between the sportsperson and the club. On the contrary, the provision did not apply if the activity of the agent regarded other matters, such as the exploitation of image rights. Where the sportsperson had appointed his own intermediary it was questionable whether in fact he could have derived any benefit from the activity rendered in the course of the negotiation by an agent who had been appointed by the club. Article 51(4-bis) of the ITC did not allow any contrary proof by the sportsperson (that no benefit was derived from the service rendered by the

– *Germany*

In Germany there is no special tax regime regarding the fees paid to intermediaries. As noticed by a German author,[51] over the past years German tax authorities have maintained quite an aggressive approach *vis-à-vis* German clubs. In particular, German tax authorities have focused on VAT issues and have denied the deductibility of the input VAT applied on payments made by the clubs to player agents. On 28 October 2013, the Federal Tax Court issued a landmark judgment,[52] which however deals with a year in which the latest FIFA regulations were not yet in force and therefore dual representation was not permitted. The case was also peculiar for two reasons: (i) there was no contract between the club and the intermediary and (ii) the agent had a contract with the player before the negotiations with the club took place. In such contract the parties agreed a certain commission fee but also convened that it would have been paid by the club (i.e. the existing club in case of renewal or the new club in case of player transfer).

The existence of the latter contract lead the Federal Tax Court to conclude that the player had an obligation to pay to the agent a fee for the services received. Therefore, the Federal Tax Court upheld that the agent had not performed in fact its activity for the benefit of the club. Relying on the old FIFA regulations for players' agents (which did not permit dual representation), the Federal Tax Court concluded the lack of written agreements between the agent and the club was merely a consequence of the fact that the agent could not enter into such agreements because of the ban for dual representation applicable at that time. In light of the above, the Court upheld that the agent acted in the benefit of the player and therefore denied input VAT deduction for the club, treating the commission fee as a cost not related to the club's activity.

The same author has also pointed out the existence of a ruling issued by the Regional tax court of Düsseldorf[53] which, in a case similar to that addressed by the Federal Tax Court, divided the entire commission fee paid by the club, attributing half of the amount to the club for the services received and the remaining half of the amount to the player. As a consequence, the club was partly denied the deductibility of half of the input VAT.

The author has noticed that, under the applicable FIFA regulations, current clubs' practice is to conclude written agreements with agents in which the scope of the agent's services is defined. This should reduce the risk of a tax claim provided

agent appointed by the club). This preclusion raised doubts as to whether the provision violates the ability to pay principle set out in article 53 of the Italian Constitution.

[51] See C. Schlotter, P. Driffing, "*Tax treatment of intermediary fees – Germany*", in the EPFL Legal Newsletter (#3 - January 2018). The authors also quotes: *Diffring*, Mehrwertsteuerrecht (MwStR) 2015, 790, "Vorsteuerabzug aus Rechnungen von Spielervermittlern"; *Feldgen, Martens, Schiffers*, Vorsteuerabzug aus Spielervermittlerrechnungen im Profifußball – Update -, Betriebsberater (BB), 2015, 1028 (in German).

[52] Federal Tax Court of August 28, 2013 – XI R 4/11, Federal Tax Gazette Part II 2014, 282.

[53] Federal Tax Court of August 28, 2013 – XI R 4/11, Federal Tax Gazette Part II 2014, 282.

that the agent does not perform services for the benefit of the player and the club does not pay the agent on behalf of the player.

– *France*

In France, under certain conditions, players may deduct the commission fees paid to their agents for income tax purposes. Such expenses are deductible, if they are not considered excessive.[54] As noted by a French author,[55] as FIFA regulations do recommend that the remuneration paid to intermediaries shall not exceed 3% of players' remuneration, French tax authorities could deny the deduction of commission fees for payments in excess of the threshold, which might be considered excessive compared to the market practice.

As from 2011,[56] French tax authorities have re-characterised the commission fees paid by clubs in favour of agents and have regarded such fees as a taxable benefit in kind of the player,[57] also subject to social security contributions.[58] The re-characterisation of commission fees was pursued in cases where the French tax authorities disregarded the contract between the club and agent and considered that the agent acted for the benefit of the player.

– *Spain*

In Spain, fees paid by clubs to agents or intermediaries for services rendered in connection with the negotiation of the employment contract of a football player are reclassified as a benefit in kind paid by the club to that football player.[59] The challenges raised by the Spanish Tax Authorities (hereafter "STA") rely on a substance over form approach and are based on the analysis of certain factual issues such as the past relationship between the player and the intermediary, and that of the club and the intermediary. The direct consequence of the challenges raised by the STA is that the player will have to recognise the benefit in kind for the purposes of personal income tax ("PIT"). Moreover the fees paid to intermediaries are not deductible for the purpose of the player's PIT. Hence, the player would suffer taxation at marginal rates (up to 52%) on the gross amount of the benefit in kind, which will comprise of the intermediary fee, the VAT charge and, potentially, the gross-up of PIT prepayments.

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[54] French Tax Code, art. 81.

[55] See C. Moreau, C. Hannetel, "*Tax treatment of intermediary fees – France*", in the EPFL Legal Newsletter (#3 - January 2017).

[56] Article 103 of the Law 2010-1657, 29th December 2010 eliminated art. L. 222-17 of the French Sport Code that prohibited the re-characterisation of the fee paid to the agent.

[57] French Tax Code, art. 82.

[58] Social Security Code, art. L 136-1.

[59] The issue has been thoroughly analysed by A. Juarez, "*Tax treatment of fees paid to intermediaries in the light of the new FIFA Regulations, Spain*", in the EPFL Legal Newsletter (#3 - January 2017).

– *United Kingdom*
Under the UK system, if the intermediary is acting for the player, the player must make the payment directly, unless he requested in writing to the club to pay the agent on his behalf. If there is no such request, the club may pay the intermediary on his behalf, deducting the payment from net salary (that is remuneration less all taxes, social security or other deductions) or discharging the player's obligation as a taxable benefit. If the intermediary is acting for the club then the club will be able to deduct the fee charged by the intermediary when determining the taxable profits.

5. Special regimes providing for tax benefits

Various States provide for special tax regimes which are applicable to football players, although they are not aimed at exclusively applying to them. These regimes constitute contrivances to a potential transfer as players could be endowed with a beneficial right for themselves and their entourage.[60]

– *Italy*
Very recently, Italy introduced attractive tax measures aimed at fostering professional sports. In particular, Law Decree No. 30 of 30 April 2019 (the "Decree"), converted by Law 28 June 2019, n. 58, has amended the already existing rules for inbound workers, introducing an ad hoc regime for professional sportspersons transferring their tax residence to Italy as from 2020 onwards.[61]

Under such regime, incoming sportspersons benefit from a 50% exemption for the purposes of personal income tax (and local surcharges). The tax benefit has a minimum duration of five tax periods (the year of transfer of tax residence and the subsequent four years) and, subject to certain conditions, could be extended up to a maximum of ten tax periods.

The new regime is particularly attractive to football players who may benefit from the tax exemption with regard to the Club remuneration (which is qualified as employment income), including payments received for the use of the image rights of the player.

In order to claim the benefits of the regime, the following three cumulative conditions must be satisfied:

i. the player must take up Italian tax residence as from the fiscal year ("FY") 2020. This condition should be satisfied by players transferred to Italian clubs

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[60] See P.C. Roumeliotis, "*Special Tax Regimes: The European Perspective and their impact on Association Football*", in the European Leagues Legal Newsletter (#1 - January 2019). According to Panagiotis "In light of the foregoing, and on a *prima facie* basis, it seems that the consequences yielded are positive for the game, considering the benefits ensued in the sphere of the players, the clubs and the leagues".

[61] M. Tenore, "*The New Impatriate Regime: Does Italy boost international transfers of football players?*", in *Global Sport Law and Taxation Reports*, June 2019, Nolot, 12 and ff.

in August 2019 who shall become Italian tax resident in the fiscal year 2020 (subject to a careful review of the personal facts and circumstances). Accordingly, income paid in the FY 2020 shall benefit from the tax reduction, whereas income paid in the FY 2019 shall be subject to ordinary income tax;

ii. the player must not qualify as Italian tax resident in the previous two FYs prior to that of acquisition of the Italian tax residence. For players transferred to Italian clubs in August 2019, who qualify as Italian tax resident as from the FY 2020, the condition at stake must be satisfied for the FYs 2018 and 2019. In case the player returns to Italy, the condition would be satisfied if the latter left Italy in August 2017 (summer transfer window) or in January 2018 (winter transfer window), as in both cases the 183-day threshold would not be met for the FY 2018. In all these cases, however, the residence status must be tested against a careful review of the personal facts and circumstances;

iii. the player must remain Italian tax resident for at least two FYs. Such requirement would be met to the extent that the player remains in Italy until the end of the sport season 2020/2021. Indeed, if the player leaves Italy in August 2021, he would still qualify as Italian tax resident in the FY 2021 as the 183-day threshold would not be met (again the conclusion must be tested against a careful review of the personal facts and circumstances).

The player could request to the Club the direct application of the tax exemption; in such case, the Club would apply the withholding taxes on half of the income paid to the player. Prior termination of the regime, e.g. because the player leaves Italy after one year, triggers the claw-back of the personal income tax as well as the application of administrative penalties which, depending on the case, could apply to the Club (in its capacity as withholding agent) or to the player if he declared a lower taxable income.

It is expected that the regime shall foster in the upcoming years the transfer to Italy of international football stars and other famous sportspersons.

Italy also has another special tax regime that has drawn the attention of the media for being an attractive tax regime fostering the Italian football sector's competitiveness on the European stage. This regime is known as the flat tax regime as it envisages the payment of a flat tax equal to 100,000 euro per year (in lieu of the levy of income tax according to general rules) which is subject to the condition that the income is derived from activities carried out outside the Italian territory. It should be highlighted that in variance with the UK scheme (please refer below), said regime does not provide for any remittance concept (i.e. foreign-sourced income can be transferred to an Italian bank account tax-free). What is more, the fact that foreign-sourced income may not be taxed abroad should not prejudice the application of the flat tax (in contrast to the Portuguese regime – see below).

Due to this condition, the regime does not apply to the club's remuneration, (regardless of whether it refers to the performance or the licensing of the player's image rights). Such remuneration constitutes Italian income (from employment) and is not eligible for the application of the substitute tax (which covers only

foreign-source income). It is arguable whether the regime could cover the club's remuneration in case it is directly connected to a specific performance outside the Italian territory (e.g. a bonus paid for the victory of the Champions League final match played abroad). As for sponsorship income, a distinction must be made between sponsorship income related to performance (e.g. income received from a sportswear company upon the obligation to wear branded football boots) and other income from activities carried out outside the football field, including endorsement income or income paid for the right to use the player' image (e.g. income paid by a watch manufacturer for the use of the player's image during an advertising campaign).

Generally speaking, income from sponsoring activities is sourced where the relevant activity is performed (the "place of activity criterion"). If the activity is performed outside Italy, the income derived therefrom is deemed to be foreign-source income and is therefore eligible for the special tax regime. Under the place of activity criterion, sponsorship income shall not qualify for the application of the special tax regime insofar as it is related to an Italian performance.

The application of the regime in case of income derived by the player in connection with the right to use the image outside the football field is uncertain ("off-field income"). It should be noted that in the latter case, the application of the place of activity criterion is not as straightforward as in the case of the income associated to the performance. In other words, it is not crystal clear the extent to which a fee paid by a foreign sponsor would qualify as foreign-source income. To date, Italian tax authorities have not yet provided official guidance regarding off-field income. To mitigate this uncertainty, the taxpayer could submit to the Italian tax authorities an advanced tax ruling to obtain a preemptive confirmation about the qualification of the aforementioned income (in whole or in part) as foreign-source income.

– *Spain*

As indicated above, the main condition triggering Spanish tax residence is the "183-day" rule in the calendar year. Players that do not meet the threshold are treated as a non-resident, with certain caveats. Insofar as a player joins a Spanish club during the summer transfer window (e.g. in August), he should not be treated as a Spanish resident for the year in which the transfer occurs. Therefore, the income paid for the first months in Spain might be taxable at the flat 24% rate applicable to non-residents.

Moreover, if the player only spends one season with the club, therefore leaving Spain before the end of June (without spending 183 days in Spain), he will not be considered Spanish tax resident in the second year and thus will also be taxed at 24%. In fact, a player that has stayed in Spain for the period August-June will not acquire Spanish tax residence and shall therefore take the benefit of a lower taxation.

Despite its narrow scope of application – which include only players who play for a Spanish club for a single season – the tax treatment is beneficial

since the player's remuneration is subject to the flat 24% rate applicable to non-resident taxpayers rather than the progressive income tax rates (the marginal tax rate is 45%).

It is finally worth mentioning that the "special expatriate regime", commonly known as "Beckham's Law" (created through the issuance of the Law 62/2003 and subject to several modifications) is no longer applicable as from 1 January 2015.[62] Under this regime, football players were taxed as non-resident and only on Spanish-source income, so that their wages were taxed at a flat rate of 24% instead of being subject to progressive rates – reaching up to 50% at the time. This regime was applicable for up to six years and the only condition was that the beneficiary had not been a Spanish resident in the previous ten tax periods.

– *United Kingdom*

Foreign players moving to the UK very often elect to be taxed as resident but non-domiciled taxpayers. They are deemed *non-dom* as long as they do not intend to reside permanently in the UK and their residency therein lasts no more than 15 years. Under the regime, *non-dom* taxpayers are upon election taxed exclusively on their UK sourced-income and gains, whereas non-UK sourced income and gains is not subject to UK personal income tax, under the condition that it is retained offshore, unless the related funds are "remitted" (i.e. brought in) to the UK. That said, such income wouldn't trigger taxation on an accrued basis. Such benefit is provided for the first 15 years of tax residency in the UK as long as no acquisition of UK domicile occurs in the meantime.

Under the resident *non-dom* regime, football players may avoid paying UK personal income tax with regard to income from activities carried out outside the UK borders (e.g. income related to appearances with the national team abroad or payments from endorsement companies for activities carried out purely outside the UK) to the extent that income is kept offshore and not remitted into the UK.[63]

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[62] In general terms, the purpose of this special attraction regime was to increase the amount of qualified foreign workers to Spain and its duration will be for up to six calendar years.

[63] See K. Offer, "*UK developments in the taxation of imager rights*", in Global Sport Law and Taxation Report, December 2017, Nolot, 14, according to whom "*Image rights companies are particularly attractive to overseas players who can pay funds outside the UK after ceasing to play in the UK and avoid further taxes altogether. Foreign players with an international earning potential may be able to set up a company outside the UK and take advantage of the UK's non-domicile regime. This can allow payments for image rights and so on that arise outside the UK to be paid to an offshore company without incurring any UK tax charge. It is not uncommon, therefore, to see endorsement contracts to cover exploitation of a player's image in certain areas of the world with the UK specifically excluded. Such companies may be set up in tax havens, although the need for access to tax treaties and the reluctance of some sponsors to be associated with a company in a tax haven make this less likely. It is, however, still possible to have the best of both worlds by using structures, such as the one it is suggested was set up for Jose Mourinho, which can allow a small amount of income to be taxed in Ireland at a rate of 12.5% with the balance flowing through to a company in a tax haven such as the British Virgin Islands*".

Moreover, if a player moves to the UK during the year, foreign income earned in the period prior to his arrival (their non-resident period) should be treated as clean capital and not subject to UK personal income tax accordingly.

For a *non-dom* player with a non-resident image right company, payments made to the latter company should not trigger UK tax liability to the extent it is related to endorsement activities carried out outside the UK territory and the related funds are not remitted to the UK. However, a number of uncertainties surround the regime and, as highlighted by a UK author, it is recommendable that the player seeks confirmation from the UK tax authorities regarding the application of the regime in the specific case.[64] This is, for instance, necessary in the event that a *non-dom* player has a non-resident image rights company, and the club pays the said company for the use of the player's image. The waters are quite blurry and the question that may be raised in this respect is the following; would UK tax liability be avoided if the funds were imputed for non-UK activities and remained offshore?

– *France*

The Impatriate Tax Regime notably applies to international footballers that become tax residents in France[65] because of a transfer concluded from a foreign club. The obtainable benefits have a duration of 5 years for players having settled in France before July 6, 2016, while as from that date, incoming foreign players would be granted, instead, an 8-year grace period.[66]

Notably, foreign assets are exempt from net wealth tax ("NWT")[67] for a five-year period while foreign passive income enjoys a 50% exemption from personal income tax. Moreover, the deemed 30% impatriation premium granted to the footballer for expenses incurred upon settlement in France enjoys full tax exemption subject to the "Comparable Salary Test"[68] and a portion of the salary allocated to performance(s) taking place abroad is exempt, as well. Nevertheless, it should be highlighted that the total exemption granted cannot exceed 50% of the gross salary received.

– *Portugal*

At the outset, it should be pointed out that there is no specific regime applicable to athletes in Portugal. Notwithstanding, footballers can acquire the "Non-Habitual Resident Status" and benefit from a favorable tax treatment for the first ten years

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[64] P. Hackleton, "*The current legal status of image rights companies in football*". Available at: www.lawinsport.com/topics/articles/item/the-current-legal-status-of-image-rights-companies-in-football (Accessed on November 11, 2018).

[65] They should not have been French fiscal residents for the past 5 calendar years before the conclusion of the transfer.

[66] Article 155B French Tax Code.

[67] Article 885A French Tax Code.

[68] The remaining taxable base should not be lower than that of a French player of equivalent ability and position who does not avail of the impatriate tax regime.

of residence.[69] In spite of the fact that their activity does not fall within the scope of "high added value activities",[70] in the sphere of which, any income derived is subject to tax at a rate of 20%,[71] the regime is still quite attractive for footballers.

More concretely, it confers on them the entitlement to have foreign income (i.e. investment income, capital gains) exempt from tax in Portugal provided that it is taxed at source (by virtue of the applicable DTT or the OECD Model Tax Convention in the absence of a DTT in force) and does not derive from a so-called "tax heaven". That said, the foreign income element remains tax exempt to the extent it is not derived in a black-listed jurisdiction.

– *China*

China *non-dom* tax residents who have resided in China for, at least, 183 days or more in a calendar year but less than 6 *consecutive* full[72] years[73] are absolved of their liability to pay tax on income derived from a foreign entity (foreign-paid) in the context of the performance of duties taking place outside China (foreign-sourced) that required the individual's *temporary* presence (i.e., less than 30 days).[74] Accordingly, even if China is entitled to tax on a worldwide basis, for this portion of foreign income, its tax liability is limited. Caution should be exercised on the fact that such income should by no means be borne economically by a Chinese entity/individual. Nevertheless, China will gain its entitlement to tax the worldwide income if the taxpayer resides there for more than 6 consecutive years without being absent for more that 30 days in any of these years.

In the case of footballers, such exemption could regard image rights/ endorsement income from relevant activities conducted abroad. The threshold of

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[69] Under the condition, that they have not been tax residents in Portugal for any preceding 5 tax calendar years and meet the residency criteria.

[70] Personal Income Tax Code, Articles 72(6) and 72-A.

[71] Instead of the progressive tax rates 14.5% to 48%.

[72] A "full year" signifies that the taxpayer is not absent from China for over 30 days in a single trip or more than 90 accumulated days in multiple trips.

[73] According to the 2019 Circular No. 34 jointly issued by the Ministry of Finance and the State Administration of Taxation, the 6-year period shall be computed starting from January 1, 2019 onwards. So in fact the first year where such exemption is effective is 2025. (See State Administration of Taxation (SAT)- Art. 1 Public Announcement on the determination of the number of days of staying of non-domiciled individuals [2019] 34 and 35).

[74] As per Article 4 of the Implementing Rules of the IITL. Translation provided by *RsA asia*: "*An individual who has no domicile in China but has resided in China for not more than six consecutive years in each of which he resided for 183 days or more accumulatively shall be exempted from individual income tax on his income derived outside the territory of China and paid by any overseas entity or individual, subject to record –filing with the competent tax authority; where an individual left China for more than 30 days on a single trip in any year during which he resided in China for 183 days or more accumulatively, the consecutively years in each of which he resided in China for 183 days or more accumulatively shall be counted again*". (Online: www.rsa-tax.com/single-post/ 2019/01/08/China-Tax-six-year-rule). Accessed on July 27, 2019; China: Changes with significant impact to the taxation of non-China domiciled individuals (Online): www.pwc.com/gx/en/services/ people-organisation/publications/assets/pwc-changes-to-the-taxation-of-nonchina-domiciled-individuals.pdf?elq_mid=16775&elq_cid=542669) Accessed on July 24, 2019.

the 6 years may be deemed as a "grace period", the completion of which would trigger the liability on worldwide income.

Going forward, *albeit* they have close ties with the salary *per se*, annual one-off bonuses[75] may, upon election by the taxpayer, be computed and taxed on a standalone basis.[76] This would entail the likely application of a lower progressive rate (35% rather than 45%). However, this option is applicable solely for the transitory period from January 1, 2019 to December 31, 2021.[77]

The beneficial tax treatment is predicated on the fact that year-end bonus apportionment into 12 months, similar to salary averaging, may take place so as to have the taxable bonus amount distributed evenly during the fiscal year, and this would lead to the application of an even lower tax bracket. As the difference in the tax payable may be considerable,[78] the amount agreed as annual bonus shall be monitored. Over the amount of CNY 80,001 per month, 45% is the applicable tax bracket, while the next lower rate is 35%.[79] That said, the agreed annual bonus (if any) shall not be equal or higher to CNY 960,012[80] (grossly EUR 125,175.00). If so, once the monthly apportionment is made, the amount for each month would fall into the highest tax bracket of 45%, instead of 35%.

6. Gross-up clauses and employment contracts

Gross-up agreements are very often concluded in the framework of an international transfer of a football player. Whether or not such agreements are separate from the employment contract depends on the national sport regulations.

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[75] Please note that other bonuses are to be included in the employment remuneration at taxed at the respective tax bracket appied for that amount *in toto*.

[76] Thus, not consolidated with employment income.

[77] As from January 1, 2022, it would be imperative to incorporate such bonus in the comprehensive income to compute the tax liability.

Last Update: the revised implementation rules of the New IIT Law (online): https://mp.weixin.qq.com/s/17bhBsSZEIoKyNW6c5hUCg (Accessed on July 25, 2019); and China Tax: Year-end bonus and treatment of deductible allowances for expats from 2019 (online): www.rsa-tax.com/single-post/2018/12/28/China-year-end-bonus-and-treatment-of-foreigners%E2%80%99-deductible-allowances-from-2019 (Accessed on July 25, 2019); and China clarified favourable Individual Income Tax treatments (online).

[78] Let's assume that a player agrees with a Chinese club to receive an annual bonus of CNY 600.000 (grossly EUR 78.000).

Example 1: Should the annual bonus be consolidated with the monthly salary (which for the purposes of this example should fall within the marginal tax bracket of 45%), then the tax burden on the bonus is CNY 270.000 (grossly EUR 35.200).

Example 2: Should the option be exercised and hence the annual bonus is not added in the montly employment salary, then in order to conclude as to the applicable tax bracket, we would need to divide the total amount by 12 in order to achieve the averaging for the calendar year. This would lead to a CNY 50.000 per month (being the 1/12) which essentialy falls into the tax bracket of 30%. As a result, the tax burden on the bonus is CNY 180.000 (grossly EUR 23.470), ending up to a tax saving of CNY 90.000 (grossly EUR 11.700).

[79] For monthly income ranging from CNY 55.001 to CNY 80.000.

[80] CNY 80.001 x 12 – as tax bracket applicable on the bonus is contingent on the tax rate applicable to 1/12 of the bonus.

In Italy, for example, employment contracts of football players must indicate a gross remuneration, therefore should the parties (the player and the club) intend to agree on a net remuneration they must do so in a separate agreement.

Under gross-up agreements it may be stipulated that any payment made by the club to the player must be made in the full amount, i.e. free of any deduction concerning income taxes and/or other charges (see below).

The drafting of gross-up agreements must take into account a number of issues with a view to ensuring that the player is paid the agreed "net remuneration". For example, it is important to define the scope of the agreement that, in addition to taxes, it could be extended to other charges, such as social security contributions[81] or even administrative penalties, which might be charged to the player in case of tax audit (e.g. regarding the alleged existence of a fringe benefit). With regard to the scope, it is recommendable to include both current taxes and future taxes, which can be introduced in the upcoming years. The scope of the agreement can be limited to taxes related to employment income, including taxes that the Club is required to withhold or deduct, and taxes that the player is required to pay directly.

Interestingly, the CAS jurisprudence has provided an interpretation of the "net amount", which is extraordinarily broad, in a case whereby the contract provided that any payments were to be made "without any deduction" with no clear indication of the scope of the gross-up agreement. In particular, "[t]*he proper interpretation of 'net amount' is 'without any deduction', in the sense that the agreed net amount must exactly correspond to the amount which is received in the creditor's bank account or is anyway collected by the creditor. It is a common understanding in the practice of sports contracts – particularly in employment contracts between clubs and footballers – that 'net amount' refers to the final amount the creditor expects to receive in its bank account. Under this approach, all sorts of taxes, expenses and charges due to the tax authorities or to other third parties (for example the banks involved in the payment) in connection with the payment, whether recoverable or*

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[81] *[Arbitration CAS 2014/A/3854 AFC Astra v. Nikola Michellini & Fédération Internationale de Football Association (FIFA), award of 27 August 201510. With regard to the monthly net amount due to the Player, Clause III, lit. (i) of the Contract specifies that the Club "has the obligation to pay only the income tax".*

109. With respect to the amount allegedly deducted by the Club for fiscal charges, the Sole Arbitrator observes that while, on the one hand, Clause II.1 (a) of the Contract establishes that only the income tax was to be borne by the Club, thus assuming the possibility that, in theory, the Player was meant to bear other additional charges, on the other hand the Appellant failed to prove that it was allowed to deduct those amounts from the Player's salaries. In addition, the wording in Clause V of the Contract ("the player shall receive 4.000 euros netto monthly") quite contrasts with the alleged right of the Club to deduct any amount from the Player's remuneration. Moreover, it was not demonstrated that the amount of EUR 3,392.55 was actually deducted from the Player's salaries and paid by the Club, since the documentation already submitted during the FIFA proceedings does not constitute sufficient and valid evidence thereof, as correctly established by the Appealed Decision].

not by the creditor, are to be paid by the debtor on top of the agreed net amount".[82]

This stated, the gross-up agreement should also be drafted in such a way that it displays its effects also after the termination of the employment agreement, in which case it should take into account the fact that the player takes up tax residence in another jurisdiction that may apply higher tax rates.[83] There are cases in which the player obtains a deferred remuneration after several years. For example, it may happen that following a court decision in a judicial dispute between the club and the player, the latter is entitled to receive from the club a certain remuneration that is paid to the player after he became tax resident in another jurisdiction in which such remuneration is subject to income tax.

7. Conclusions

The chapter has demonstrated that when a football player is transferred between two different jurisdictions, the tax consequences of the transfer must be investigated under a two-sided analysis, i.e. from the tax perspective of the State of origin and that of the State of destination.

The sections dealing with issues related to tax residence make it clear that only such an analysis, which takes into account the tax laws of the two States involved, ensures that the player is protected from negative consequences, e.g. dual residence and unresolved double taxation, which may negatively impact on the remuneration of the football player.

The chapter has also indicated certain tax risks that football players may encounter upon their transfer to a foreign jurisdiction. The analysis has made reference to selected jurisdictions in which local tax authorities have investigated the position of football players with regard to fees paid to intermediaries or the taxation of income derived by the player in connection with the economic use of his image rights. Such risks must be assessed upon the transfer and in some circumstances, such as for taxation of fringe benefits, they could be taken into account in the framework of the negotiation phase where the player and the club may convene on the stipulation of *ad hoc* indemnification agreements.

Finally, the analysis has addressed the drafting of gross-up agreements under which any payment from the club to the player must be made in the full amount, i.e. free of any deduction concerning income taxes and/or other charges. The drafting of such agreements requires local tax expertise in the State where the player is transferred, in order to ensure that the scope of the agreement is properly identified and that it also displays its effects after the termination of the employment agreement and regardless of any changes to personal circumstances (such as changes to the tax residence status of the player).

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[82] Arbitration CAS 2012/A/2806 SC Corinthians Paulista v. Panathinaikos FC, award of 17 December 2012 (operative part of 23 November 2012).

[83] This issue was dealt in the Arbitration CAS 2006/O/1055 Del Bosque, Grande, Miñano Espín & Jiménez v. Beşiktaş, award of 9 February 2007.

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