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Dear ECA Members,

Here at ECA we take your feedback and suggestions on the services we provide with great pride and attention.

Many of you will remember the ECA Legal Bulletin, our annual publication designed to provide you with useful and practical information regarding football law matters. As part of our revamp of ECA Legal Services, some of which have already been launched, with others in the pipeline, it's my pleasure to introduce you to the new ECA Legal Journal, which will be a key pillar in our new programme of legal activities.

Based on your feedback and legal needs, this Journal will have a different structure than its predecessor and will be more recurrent, with volumes being released in November and May of each year.

It will be divided in two parts: the first one containing articles from ECA's in-house counsels and guest authors, with the second comprising the most recent and relevant jurisprudence from the newly established FIFA Football Tribunal, the Court of Arbitration for Sport and/or the Swiss Federal Tribunal. Relevant domestic caselaw will also be monitored and referred to whenever appropriate.

The ECA Legal Journal, together with the frequent Legal Alerts (which we launched last year), have the overall objective to provide you with the most up-to-date information and relevant judgements, so you can take the most informed day-to-day business decisions possible.

In this first volume, it was impossible for our authors not to talk about the COVID-19 pandemic. You will, therefore, find an article about the contractual disputes originating from the pandemic and the first findings of the FIFA DRC. Likewise, you will find articles related to Third Party Investment, Article 17 RSTP and the Swiss law concept of loss of chance, as well as some useful and important tips related to proceedings before the Court of Arbitration for Sport. In the jurisprudence section, you will find cases covering a wide range of topics, ranging from issues related to the jurisidiction of FIFA's deciding bodes to unilateral extension options and the calculation of compensation de to a club on the basis of Article 17 RSTP.

I trust that this new ECA publication will be of significant added value to our Member Clubs and their legal teams. In the meantime, our Legal Department will continue to work on developing the legal services that we offer to our members for the benefit of our entire ECA community.

As ever, our Legal Team and entire administration remains at your disposal to assist your clubs in any way we can.

Yours sincerely,

Charlie Marshall
ECA CEO

I. DOCTRINE

II. JURISPRUDENCE

DOCTRINE

Article 18bis of the FIFA Regulations on the Status and Transfer of Players: Redefining the influence standard

By Mario Flores Chemor[1]

Preamble

> *"At first it seemed like a prank, the idea that two of the hottest talents in South America were about to joinWest Ham (…) Pardew's response was predictable when the idea was put to him. 'Don't be ridiculous,' he said. 'It's never going to happen.' Only it was."* [2]

It is not possible to write about Article 18bis of the FIFA Regulations on the Status and Transfer of Players **(RSTP)** without referring to one of the most famous legal cases in football's history. The Tevez-Mascherano saga.

We all know by now how the story goes. In August 2006, West Ham United **(WHU)** – a historic but relatively small club compared with England's big six – signed two of the most coveted Argentinian players at the time: Carlos Tevez and Javier Mascherano. Perhaps understandably, the alarms went off when it was reported that WHU, which had finished 18th in the Premier League in the previous season, had seemingly not paid a single penny for neither of them.

Later on, it came to light that WHU had been able to sign the Argentinian stars by concluding certain undisclosed agreements with, on the one hand, Tevez, MSI Group Ltd and Just Sports Inc and, on the other hand, Mascherano, Global Soccer Agencies and Mystere Limited Services.

In essence, the above agreements gave the companies some key rights over Tevez, Mascherano and WHU, in particular:[3]

- the companies could procure during any transfer window the termination of the players' contracts and compel WHU and the players to enter into all necessary arrangements for the transfer of the player to another club, without the consent of either WHU or the players;
- WHU had no right to seek the transfer of the players; and
- WHU and the players were prohibited from varying the terms of the player's contract without the consent of the companies.

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1. Head of Sports Legal at the European Club Association (ECA). The opinions expressed in this article are those of the author. They do not purport to reflect the opinions or views of the ECA or its members. The designations employed in this publication and the presentation of material therein do not imply the expression of any opinion whatsoever on the part of the ECA or its members. The author would like to thank Mr José Luis Andrade for his most valuable and helpful advice and feedback on various issues examined in this article. This article was first published in Football Legal #15 – June 2021.

2. Steinberg J.,Signings of Tevez and Mascherano nearly burst West Ham's bubble, The Guardian (2019)

3. Arbitration Award pursuant to Section S of the Rules of the Football Association Premier League of 3 July 2007 between Sheffield United Football Club Limited and Football Association Premier League Limited.

Following an investigation conducted by the Premier League, WHU was found guilty of breaching, *inter alia*, Rule U18 of the FAPL Rules which governed third-party influence[4], and ended up settling a dispute with Sheffield United reportedly for GBP 25,000,000[5].

Back then, FIFA did not have in place any rule preventing third-party influence over transfer and player contracts. The only relatively close-related rule was Article 18(2) of the 2007 FIFA Statutes[6] which obliged member associations to ensure that all its affiliated clubs "*can take all decisions on any matters regarding membership independently of any external body*" and that no natural or legal person "*exercises control*" over more than one club "*whenever the integrity of any match or competition could be jeopardized*".

Possibly as a response to the Tevez and Mascherano affairs, on 20 December 2007, FIFA published its Circular no. 1130 by which it communicated the creation of a new provision "governing third-party influence" to be included in the January 2008 edition of the RSTP as Article 18bis.

Initially, such article read as follows:

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.

By 2015, FIFA realised that there was an issue with such wording as it only covered the "enabler" party and not the "enabling" party and thus the following amendment was introduced:

> *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.*

To date, Article 18bis has not suffered any other amendment despite the relations in football substantially changing during the past 5 years[7] and, for the reasons that follow, the author considers that such time has come.

4. *"No Club shall enter into a contract which enables any other party to that contract to acquire the ability to materially influence its policies or the performance of its teams in League Matches or in any other of the competitions set out in Rule E10"*
5. https://bit.ly/3fS8u9c
6. Currently Article 20(2) of the FIFA Statutes
7. It is worth mentioning that article 18ter prohibiting third-party ownership, even if connected, regulates a completely different conduct.

To influence or not to influence: the true meaning of Article 18bis

It is widely recognised by football law experts that the concept of influence in the sense of Article 18bis may be subject to numerous and inconsistent interpretations[8] and therefore it often raises difficult matters of construction to determine whether or not a third party has acquired the ability to influence the clubs' decisions and policies[9].

Given its disciplinary nature, Article 18bis is of great relevance for clubs. Such importance has been dramatically increased in the recent past due to FIFA's substantial change of approach in its application. Whilst during its first eight years of existence there were only a handful of clubs sanctioned for a breach of Article 18bis[10], almost 70 clubs have been sanctioned for that same reason in the past three to four years.[11]

The rationale behind such a shift is unclear. Particularly because, as mentioned before, during its more than 10 years of existence, Article 18bis has suffered only a slight modification which does not seem to be the source of such a substantial change.

It should also be recalled that, due its disciplinary nature, the application of Article 18bis must comply with the fundamental principles of legality and predictability[12]. In order to respect such principles, FIFA must only sanction clubs which effectively incur in the conduct that is being sanctioned. But, with Article 18bis, which exact conduct is that?

To provide a proper answer, it is necessary to take a deep dive in the true meaning of Article 18bis. Given that FIFA is an association constituted under the laws of Switzerland[13], it is on the basis of such law that the relevant article needs to be construed.

In terms of how the FIFA Regulations should be interpreted under Swiss law, the reasoning of the panel in CAS 2017/A/5173 Joseph Odartei Lamptey. FIFA serves as perfect guidance:

> *The Panel notes that according to the jurisprudence of the Swiss Federal Tribunal (...), the interpretation of the statutes and rules of FIFA, a large sport association with seat in Switzerland,* ***starts from the literal meaning of the rule****, which falls to be interpreted,* ***but must show its true meaning****, which is shown by* ***an examination of the relation with other rules and the context, of the purpose sought and the interest protected, as well as of the intent of the legislator.***

8. See ONGARO, Omar, The new art. 18ter of the Regulations on the Status and Transfer of Players, presentation at the 6th International Congress on Football Law on 13 November 2015. See also, CAVALIERO, Marc, Third-party Influence & Third-party Ownership – A regulatory approach, Football Legal #5 (June 2016), Special Report on TPO/TPI.
9. See EGAN, Donnacha in One Neymar and A Coffee To Go: An Analysis of the Legality of the FIFA Ban on Third Party Ownership with European Union Competition Law and the Free Movements of People and Capital.
10. See CAVALIERO, Marc, Third-party Influence & Third-party Ownership – A regulatory approach, Football Legal #5 (June 2016), Special Report on TPO/TPI. See also Ongaro supra.
11. See FIFA Manual on "TPI" and "TPO" in Football Agreements at page 19
12. See CAS 018/A/5622 Londrina Esporte Clube v. Fédération Internationale de Football Association (FIFA), at para.
13. Article 1 of the FIFA Statutes 71

It follows that in order to determine the true meaning of Article 18bis – besides a strictly literal interpretation – the following tests need to be conducted:

- which is the purpose sought by the rule and the interest protected in accordance with the intent of the legislator (objectively construed)? and
- which is the relation of the rule with other rules and context?

It is also worth pointing out that – again due to its disciplinary nature – any interpretation of Article 18bis must be narrowly construed.[14]

A. The literal interpretation

According to the Oxford Dictionary, influence means, as is relevant, the effect that somebody has on the way a person thinks or behaves.[15]

From a strictly literal interpretation, Article 18bis would seem to suggest that the sanctioning conduct is to conclude contracts providing for any influence affecting clubs' decision-making power, no matter its degree, extent, or intensity.

However, such interpretation does not seem to reflect the real meaning of the rule, particularly because it does not stand scrutiny under any of the other available methods of interpretation, as we will show below.

B. The purpose of Article 18bis (teleological interpretation)

Swiss scholars hold that the most important guiding principle for interpretation is the rule's purpose (teleological interpretation)[16]. For the reasons that follow, it is evident that Article 18bis' purpose is not to sanction situations in which any and all types of influence are present.

First, it must be underlined that the purpose of the different FIFA rules needs to be analysed in accordance with FIFA's own purpose and objectives as defined in Article 2 of the FIFA Statutes. Along these lines, Article 2(g) establishes as one of FIFA's objectives to:

> ***promote integrity***, *ethics and fair play with a view to preventing all methods or practices, such as corruption, doping or match manipulation,* ***which might jeopardise the integrity of matches, competitions***, *players, officials and member associations or* ***give rise to abuse of association football.***

14. Specifically about Article 18bis, see TAS 2020/A/7158 Real Madrid CF c FIFA, at paras. 116 - 119

15. https://bit.ly/3fpJasv

16. See CAS 2013/A/3365 & 3366 Juventus FC & A.S. Livorno Calcio v. Chelsea FC at para. 142 quoting (HEINI/SCHERRER in Basel Commentary, 4th ed. N 22 to Art. 59 CC)

By reading Article 18bis under the light of Article 2(g) of the FIFA Statutes, it follows that its purpose seems to be aimed at preventing clubs from concluding contracts which allow the existence of an influence that may jeopardise the integrity of matches and competitions or that could give rise to abuse of football.

Such understanding is further confirmed by the FIFA Manual on TPI and TPO in Football Agreements (the **"FIFA Manual"**) which, despite providing that Article 18bis covers *"all types of influences"*[17], holds that *"by means of article 18bis of the FIFA RSTP, the FIFA judicial bodies have the duty to protect the integrity of the game of football"*. In fact, the FIFA judicial bodies have already confirmed that not "*all types of influences*" qualify as a violation of Article 18bis. Thus:

- in its decision, 190046 TMS BRA ZH, the FIFA Disciplinary Committee (the **"FIFA DC"**) concluded that *"by means of Article 18bis, the FIFA judicial bodies have the duty to protect the integrity of the game of football and avoid that the influence of third parties to the game extends to **direct** influence, and in particular in the matters of employment and transfer-related matters"*;

- in its decision 200145 APC, the FIFA Appeal Committee held that "*The Appellant infringed art. 18bis of the RSTP, a provision aiming at protecting the clubs' freedom and independence in relation to recruitment and transfer-related matters as well as to ensure that the integrity of the game of football and its most essential values were safeguarded"*;

- crucially, in its decision FDD-5844, the FIFA DC concluded that, although the conditions set out in the relevant clause, *"could affect somehow the decisions taken by Cork in relation to the Player, they do not enable Arsenal to exercise a real influence on Cork"*. In reaching such conclusion, the FIFA DC considered that the potential influential effect was in the way of an *"incentive"*, that the amounts at stake were *"modest"* and that the player was *"only 20 years old"*.

The above reasoning was also shared by the tribunal in CAS in 2018/A/6027 Sociedade Esportiva Palmeiras v. FIFA, where it "*concurr*[ed] *with FIFA" that the purpose of Article 18bis is to "increase the independence of clubs and protect the integrity of football and increase transparency*".

Finally, the doctrine supports that notion: "[Article 18bis] *was considered important and essential to protect the integrity of the game itself. As it has been mentioned above, fair-play is key in sport and the unpredictability of the results is of its essence.*"[18]

From all the above, it can be safely concluded that the doctrine, CAS and FIFA itself have confirmed that not all forms of influence constitute a sanctioning conduct as per Article 18bis, but – considering the purpose of such article – only those that constitute "direct" and "real" influences, and which jeopardise the "integrity of the game".

17. See page 12 of the FIFA Manual: The wording of the provision is broad in order to encompass all types of influence on clubs

18. See Cavaliero ut supra

C. The relation of Article 18bis with other rules and its context (systematic interpretation)

The exact same conclusion is reached if one adopts the so-called systematic interpretation which considers the rule's relationship with other legal provisions and its context.

In the words of *Cavaliero*, Article 18bis *"represents a concretization of the principle enshrined in Article 18 par. 2 of the FIFA Statutes of the protection of the club's independence"*. Therefore, Article 18bis seems to be intrinsically connected with the older Article 18(2) of the 2007 FIFA Statutes (current Article 20(2)), which speaks about "exercising control" over clubs and protecting the *"integrity of any match or competition"*.

In addition, and as mentioned above, the rule was enacted within the context of the Tevez-Mascherano saga in which a club completely abandoned its decision-making power to a set of companies, with no saying whatsoever over its contractual or transfer rights over the players[19]. As such, in the author's view and considering the context, it could not have been FIFA's intention that Article 18bis would cover any and all types of influences, but rather only those by which clubs would completely abandon its decision-making power to third parties and which jeopardise the integrity of the game.

To conclude, from both, a teleological and a systematic interpretation, the conduct that Article 18bis prohibits is the conclusion of contracts which grant a club or third party the ability to influence the decision-making of another club, to the extent that such influence effectively allows the exercise of control and jeopardises the integrity of the game[20].

D. The legal nature of Article 18bis

The above conclusion is further supported by the very legal nature of Article 18bis. It should be recalled that Article 18bis is a prohibitive provision aimed at limiting the clubs' freedom of contract. In this respect, as mentioned before, Swiss law has a preponderant weight when analysing all FIFA rules.

Under Swiss law – as under many (if not most) of the modern legal systems – freedom of contract is a fundamental right which constitutes one of the pillars of the entire Swiss legal system. It can be defined as the right that a person possesses to freely create and develop its relations with others and to carry out all judicial acts it deems in its best interests, as long as they are within the limits of the law[21].

19. Along the same lines, in the Tampere matter, which also occurred around the same time, it was established that the investing company was granted the ability to control a significant part of the club's squad (dictate which players would play, which players could be transferred, etc...) with the aim of manipulating sporting results – See Cavaliero ut supra.

20. See CAS 2019/A/6301 Chelsea Football Club Limited vs FIFA, at para. 177

21. See Commentaire Romand, Thérvenoz Werro, p. 182. See also Article 19 of the Swiss Code of Obligations

It follows that the only limits to the freedom of contract are those that the law explicitly imposes. Generally speaking, Swiss law establishes only two provided, respectively, in Articles 20(1) of the Swiss Code of Obligations and 27 of the Swiss Civil Code[22].

Consequently, an overly broad interpretation of Article 18bis may be incompatible with the clubs' fundamental right to conclude contracts they deem in their best interests even if it entails slightly curtailing its "independence". We ought not to forget that the process of negotiating a contract is usually a complex one where the parties mutually give considerations to one another and which would, in most of times, inevitably require limiting its "independence" to a certain extent[23].

FIFA's current approach

The above notwithstanding, an analysis of the recent practice of FIFA's judicial bodies seems to suggest that such bodies have been interpreting Article 18bis in the broadest possible way. Indeed, it appears that clubs are currently being sanctioned in cases where they have "limited its independence" without however putting in real danger its sporting and economic behaviour and where the relevant clause does not jeopardise in any way or form the game of football[24].

In fact, as mentioned before, FIFA itself has stated that *"all types of influences"* constitute a violation of Article 18bis[25].

In the author's view, the main reason for such an approach is the current wording of Article 18bis which does not reflect its true meaning and purpose, providing little guidance to FIFA's judicial bodies. Indeed, on its face, Article 18bis does seem to include any and all types of influence, irrespective of whether they jeopardise the integrity of the game or effectively allow a third party or club to exercise control over another club.

It is for that reason that in the lines that follow a new standard of *influence* is proposed.

A new standard for *influence*

In the author's view, the most logical solution is to redefine the standard of *influence* necessary to trigger a violation of Article 18bis.

22. Article 20(1): A contract is void if its terms are impossible, unlawful or immoral.

    Article 27: (1) No person may, wholly or in part, renounce his or her legal capacity or his or her capacity to act. 2 No person may surrender his or her freedom or restrict the use of it to a degree which violates the law or public morals.

23. One obvious scenario are contractual conditions by which parties limit their "independence" by the obligation to refrain from specific acts which would jeopardise the fulfilment of a contractual condition and to do what is appropriate to safeguard the prospect of the fulfilment - See CAS 2017/A/3647 Sporting Clube de Portugal SAD v. SASP OGC Nice Côte d'Azur

24. For instance, one wonders which type of influence would Manchester City have over Real Madrid when concluding a contract? Evidently, none. Indeed, it is difficult to argue that either of those clubs could exercise on the other the type of influence which would put in danger their economic of sporting behaviour. Despite that, FIFA sanctioned the Spanish club for allegedly allowing City to "influence" in its decision-making independence (See page 53 of the FIFA Manual)

25. See footnote 17 above

It is worth mentioning that CAS jurisprudence already provided for some guidance as to which is the correct standard of *influence* to be applied.

In CAS 2017/A/5463 Sevilla FC c. FIFA[26] the arbitral tribunal held that:

> *The typical act described and prohibited in Art. 18bis consists in the attribution by means of a contract to a third party (...) of the ability to "produce effects" or "exercise predominance" (i.e. "ability to influence") over the independence, policy or performance of the teams of a club, in matters relating to the field of employment and the transfer of players. Therefore, in the opinion of the Arbitral Tribunal, such a prohibition will be incurred to the extent that the said contract confers on a third party a real ability to produce effect, condition or affect the behaviour or conduct of a club on such matters (employment and/or transfer), so that the club's independence or autonomy is restricted, thereby conditioning its sporting policy or its ability to direct such matters and/or the performance of its football teams.*

For its part, the tribunal in TAS 2020/A/7158 Real Madrid v. FIFA concluded that:

> *the infringement of Article 18bis presupposes the fulfilment of the following joint requirements: i) the existence of an influence; 2) that this influence limits a club's independence; and 3) that such limitation undermines the integrity of the relevant competition, in the sense of Article 2 (g) of the FIFA Statutes*

Finally, the panel in CAS 2020/A/7026 Futebol Clube do Porto v. FIFA considered in an obiter dictum that:

> *Also, the rationale behind Article 18bis RSTP is clearly to prevent third-party influence, not necessarily to prevent influence being exercised between football clubs.*

The following can be concluded from the arbitral awards mentioned above:

- First, that Article 18bis' purpose is not to sanction any type of influence, but only those which allow a club or third-party to exercise over another club an influence which effectively restricts such club's decision-making. It is not therefore sufficient that the existing influence merely makes a business transaction more appealing than other as this would constantly be the case in a contractual transaction in which both parties give concessions to each other;

- Second, the existing influence needs to effectively jeopardise the integrity of a competition; and

- Third, the article should not be applied in the same way when contracts only between clubs are at stake.

26. Unpublished

With that mind, how can the influence standard be redefined? In the author's view the key change in the provision should rest upon a combination of qualifying the term "influence" with the word "determinative" (i.e. determinative influence) with the express addition of the interest which is being protected (i.e. the integrity of competitions).

The provision should therefore prohibit agreements that would grant a party a determinative influence over another, so as to pose a "threat to the integrity of competitions". In fact, this is in line with the Real Madrid award, where the panel held that one of the conditions for Article 18bis to be breached is that the existing influence not only effectively limits a club's independence but that *"that such limitation undermines the integrity of the relevant competition".*

According to the Merriam-Webster dictionary, determinative means:

having power or tendency to determine: tending to fix, settle, or define something.

It is the author's view that the standard of *determinative influence* would better fit the purpose and meaning of Article 18bis. Indeed, such article should aim at protecting clubs' independence from situations where any existing influence is capable of determining, fixing or defining their decision-making in their day-to-day business.

Put differently, in light of the objectives of Article 18bis, the more adequate test in the context of a prohibition of external influence should be whether, by virtue of the overall agreement in question, a club has effectively surrendered control over its decisions in such a manner that it can no longer be said that it is the new club who determines any course of action and to such an extent that it could jeopardise the integrity of the game. That must therefore translate into a degree of *determinative* control over the club's decisions.

Even if such an assessment will still be made on a case-by-case basis, the *determinative influence* standard, together with the express indication of the interest being protected (ie integrity of the game) would provide significantly more certainty than the current provision which simply rests upon the definition of *influence* (ie any potential effect on the behaviour of a person).

Indeed, under *the determinative influence* standard, such an effect would have to effectively curtail a club's decision-making power to such an extent that it is no longer in control of such power, and which could present a potential threat to the integrity of competitions. For instance, by deciding which players must be fielded, indicating situations in which a player must be transferred, or forcing clubs to accept an offer with certain conditions.

If the provision would be adjusted as suggested above, the deciding body would, therefore, need to answer two questions: (i) did the club/third party acquire/grant determinative influence over another club? (Namely, has the club's behaviour been fixed or defined by the existence of the relevant *determinative influence?*) and (ii) if so, did it do so in terms in which the integrity of competitions could be affected? A positive answer to both questions should then lead to the conclusion that the prohibition of third party influence has been breached.

It is worth noting that the standard of *determinative influence* also seems to be in line with other similar concepts found in set of regulations of other governing bodies.

For instance, the analogous provision provided in the Premier League Rules prevents clubs from entering contracts which *"enables any other party to that contract to acquire the ability to **materially** influence its policies or the performance of its teams in League Matches"*. Similarly, UEFA Competitions Rules speak of *"**decisive** influence"* when referring to the integrity provisions on multi-club ownership.

Conclusion

The purpose and objective of Article 18bis was clearly to prevent that third parties would take advantage of clubs by concluding agreements which would effectively curtail their independence and decision-making in their daily business and where the integrity of competitions could be jeopardised. Indeed, the r*aison d'être* of Article 18bis was to prevent the existence of agreements such as those found in the Tevez-Mascherano affairs.

During the past three to four years, FIFA's judicial bodies have been interpreting Article 18bis too broadly and in a manner which does not appear to be consistent with such article's purpose and objective. The main reason for such inconsistency appears to be the vague wording of Article 18bis and, in particular, the complete lack of guidance as to the standard of influence which should be applied giving Article 18bis' objective and purpose.

In view of the above, the author's view is that FIFA's judicial bodies need more clarity as to which is the correct standard and therefore proposes the standard of *determinative influence*.

The standard of determinative influence would prevent that a club or third party reaches an agreement with another club which fixes, defines or determines situations in the future thereby effectively curtailing all independence and decision-making of that other club, and which jeopardise the integrity of the competitions.

COVID-19 – Contractual Disputes Originating from the Pandemic
First findings from the jurisprudence of the Dispute Resolution Chamber

by Omar Ongaro[27]

Introduction

In 2020 the COVID-19 outbreak, that was declared a pandemic by the World Health Organisation (WHO), has, to say the least, whirled around the habits, the private and professional lives, the social contacts and the everyday routine of all of us. All of a sudden we had to realise that things that we had taken for granted during years, did not function or matter anymore. We all were faced with an uncertain, unstable and unknown "new reality".

The impressive disruption did obviously not stop at football. The game was forced to suspend all of its activities in almost every corner of the planet. The majority of the associations member of FIFA, respectively the relevant leagues, had to take the difficult and far-reaching decision to, at least temporary, pause their pertinent competitions and championships at the beginning or mid of March 2020. This point in time is a recurrent reference in many of the disputes that have so far been brought for decision before the Dispute Resolution Chamber (DRC) of FIFA.

Against this background, at the beginning of April 2020 FIFA proceeded to issue a set of guidelines, *"the COVID-19 Guidelines"*, which aim at providing appropriate guidance and recommendations to member associations and their stakeholders to both mitigate the consequences of the disruption caused by the situation of the pandemic and ensure that any response is harmonised in the common interest. Equally, the guidelines should suggest possible measures, *inter alia*, to protect contracts for both players and clubs[28]. These guidelines represent the outcome of various intense and comprehensive discussions between representatives from the FIFA administration, confederations, member associations, the European Club Association (ECA), FIFPro and the World Leagues Forum.

Subsequently, and following a series of workshops with representatives from its member associations and confederations, members of the World Leagues Forum and members of the ECA, as well as further consultations and discussions with all of the stakeholder groups mentioned in the previous paragraph, in June 2020 FIFA issued an additional document, referred to as *"FIFA COVID-19 FAQ"*, which, in particular, provides clarification about the most relevant questions in connection with the regulatory consequences of the COVID-19 outbreak[29].

27. Expert technical advisor in football regulatory matters and Deputy Chairman of the Dispute Resolution Chamber of FIFA

28. FIFA Circular no. 1714 of 7 April 2020

29. FIFA Circular no. 1720 of 11 June 2020

It did certainly not come as a surprise that, despite all these efforts, the outbreak of the pandemic generated a number of (contractual) disputes between the various participants in the game. With the first few of the relevant decisions having in the meantime been published on FIFA's webpage[30], time has now come to throw a first glance at the main findings that can be retrieved from the pertinent jurisprudence.

In this respect, it needs to be emphasised that the present short essay will focus solely on employment-related disputes between players and clubs pertaining to agreements which could not be performed as the parties originally anticipated, and the so far available respective jurisprudence of the DRC.

"The COVID-19 Guidelines" and the "FIFA COVID-19 FAQ"

1. Aim and effect of the guidelines

At the outset, it needs to be emphasised that by means of the COVID-19 Guidelines FIFA aimed at providing appropriate guidance and recommendations. In other words, the directions, guiding principles and possible measures contained therein were meant as suggestions and advice, with the deciding authorities being at liberty to evaluate a case and make decisions they deem correct in accordance with the relevant FIFA regulations and possibly other applicable laws and rules. This fundamental principle was reiterated on various occasions in the documents at stake[31].

In particular, on page 2 the COVID-19 Guidelines read that *"[t]he principles set out in points* 1 [expiring agreements and new agreements] *and* 2 [agreements that cannot be performed as the parties originally anticipated] *of this document are to be considered as* ***general (non-binding) interpretative guidelines*** *to the RSTP"* (emphasis added). Specific to agreements that cannot be performed as originally anticipated, the FIFA COVID-19 FAQ explicitly state that *"FIFA has* ***recommended*** *guiding principles on how clubs and their employees (players and coaches) should amend their employment relationship (where appropriate) during any period when a competition is suspended.* ***The guiding principles*** *are listed in the preferred order in which FIFA believes clubs and employees should address variations to an employment agreement during any period when a competition is suspended. FIFA strongly* ***recommends*** *that clubs and employees make their best efforts to find collective agreements before following any other guiding principle"* (emphasis added)[32].

Notwithstanding, it should be noted that the DRC has so far opted for following the respective recommendations quite closely and that it adheres to the suggested guiding principles. Indeed, bearing in mind that the guidelines have been elaborated together with all the stakeholders concerned and following an extensive consultation process, a deviation from the recommendations would appear appropriate only in case of a really important and decisive reason speaking for it. Otherwise, the DRC does not see any reason to depart from the contents of the guidelines.

30. https://www.fifa.com/legal/football-tribunal/dispute-resolution-chamber-decisions

31. E.g. par. 4 on page 1 of FIFA Circular no. 1714; par. 3 on page 1 and par. 4 on page 6 of the COVID-19 Guidelines; par. 4 on page 3 of the FIFA COVID-19 FAQ

32. Cf. page 8 of the FIFA COVID-19 FAQ

2. Topics addressed by the guidelines

Essentially, the guidelines focus on the following areas:

- expiring agreements (i.e. agreements terminating at the end of the season 2019/2020) and new agreements (i.e. those already signed and due to commence at the start of the 2020/2021 season);
- agreements that cannot be performed as the parties originally anticipated as a result of the COVID-19 outbreak; and
- the appropriate timing for registration periods ("transfer windows").

As already mentioned the present article will concentrate on employment agreements between players and clubs that could not be performed as the parties originally anticipated.

Agreements that cannot be performed as the parties originally anticipated

1. Scope

Regarding the scope of application of the guidelines, there are two important limitations to be observed.

1.1 Applicable only in case of a suspended competition

Any dispute concerning the alleged disrespect of originally agreed contractual terms will need to be addressed taking into account the guidelines only if the competition in which the club concerned participates has been suspended[33]. This is, if a unilateral alteration/variation of the terms of a contract occurred in times of the pandemic, but without the respective competition being suspended, and such act is being contested or challenged, the DRC will address the issue without making reference to the guidelines.

1.2 Applicable only to unilateral alterations/variations of the terms of a contract

The second important limitation concerning the applicability of the guidelines is constituted by the fact that they refer to "*unilateral variations to existing employment agreements*" only[34].

Therefore, the guiding principles do not apply to the evaluation of unilateral terminations of existing employment agreements, which are not preceded by a unilateral alteration to the contract. In such a case, the dispute on the premature termination of the contract shall be assessed by the competent authority on the basis of the FIFA regulations, chiefly the Regulations on the Status and Transfer of Players (RSTP), as well as the established jurisprudence of the DRC. [35]

33. Cf. point (i) on page 6 of the COVID-19 Guidelines; par. 3 and 4 on page 8 of the FIFA COVID-19 FAQ

34. Cf. question (16) of the FIFA COVID-19 FAQ: "The FIFA guiding principles in this section only refer to unilateral variations to existing employment agreements. Do they also apply to unilateral terminations of existing employment agreements? No, the RSTP shall apply in the assessment of disputes that arise before the FIFA judicial bodies concerning unilateral terminations."; and also pages 6 and 7 of the COVID-19 Guidelines.

35. DRC decision of 20 July 2020 Bodurov; DRC decision of 24 November 2020 Markovic; DRC decision of 24 November 2020 Silva Perdomo-ES; DRC decision of 10 December 2020 Sastre; DRC decision of 30 [recte 20] July 2020 Grozav; DRC decision of 29 September 2020 Kitanov; DRC decision of 29 September 2020 Pisano-SP; DRC decision of 29 September 2020 Ejianreh; DRC decision of 29 September 2020 Katsumi; DRC decision of 24 November 2020 Perales Najera; DRC decision of 25 November 2020 Barrow

2. The "three-step approach"

As previously mentioned, the guidance and recommendations should help mitigate the consequences of the disruption caused by the situation of the pandemic and ensure that any response is harmonised in the common interest. In particular, some form of remuneration to a club's employees (coaches and players) should be secured, to the extent possible litigations should be avoided, contractual stability protected and clubs prevented from going bankrupt.

In order to achieve these goals, and while also taking into account the financial impact of the pandemic on clubs, a "three-step approach" is suggested by the guidelines[36].

- First, joint efforts of clubs and employees (coaches and players) to find appropriate collective agreements for any period where the competition is suspended due to the COVID-19 outbreak;
- Secondly, where no agreement can be found, an unilateral variation to the terms of a contract are only possible if the applicable national law permits it or in case it is envisaged by an existing collective bargaining agreement (CBA);
- Thirdly, if the applicable national law does not address the situation or does not allow an unilateral alteration to the terms of a contact and CBAs are not an option or are not applicable, unilateral variations to the terms of a contract will only be recognised by the DRC where they were made in good faith, are reasonable and proportionate.
- When looking at the so far existing jurisprudence of the DRC, one will easily recognise that when addressing and assessing the pertinent disputes, the deciding body closely follows this approach[37].

2.1 Mutual agreement

The guidelines express a warm recommendation for clubs and their employees (players and coaches) to work together in order to find mutual agreements on possible alterations to the terms of their contracts during the period of suspension of a competition due to the pandemic. If successful, this course of action certainly constitutes the most beneficial way forward for all parties concerned, since any mutual agreement will take into consideration the particular needs and interests of the parties concerned.

While the guidelines emphasise the objective to find collective agreements on a league or at least on a club basis[38], the DRC regularly also considers the possible agreement between a specific player and his/her club. In this respect, it should also be noted that genuine and properly documented attempts to find an agreement may positively be taken into account by the DRC when having to evaluate the good faith of a club that has decided to unilaterally alter the terms of a contract (cf. point III., 2.3.1 below).

36. Cf. pages 6 and 7 of the COVID-19 Guidelines

37. DRC decision of 24 November 2020 Nkoudou Mbida; DRC decision of 24 November 2020 Perales Najera; DRC decision of 24 November 2020 Özcan; DRC decision of 24 November 2020 Silva Perdomo-ES; DRC decision of 25 November 2020 Barrow; DRC decision of 10 December 2020 Sliti

38. Cf. point (i) on page 6 of the COVID-19 Guidelines

Finally, it is worth mentioning that on one occasion the deciding FIFA body established that a variation to the terms of an employment contract concluded between a club and a player in case of certain conditions being met, may of course also be agreed by the parties concerned in advance by means of a specific and pertinent contractual clause. As always, such possibility is subject to the relevant provision not being potestative. In the concrete matter, the employment contract stipulated that in case of a force majeure situation, defined in the contract as a circumstance beyond the power of the club, which caused the competition to be suspended during the period of validity of the contract, the amount of the monthly salary due to the player by the club would be reduced to 25% of the contract value per month. The respective clause was considered valid and applicable, and consequently the club was deemed in a position to reduce the player's salary accordingly for the period of time during which the competition had been suspended[39].

2.2 Unilateral variation/alteration permissible under applicable national law or CBA

In case no mutual agreement on a variation/alteration of the terms of the contract can be found, a relevant unilateral action may only be recognised if permissible under the applicable national law or within the structures of a CBA.

This is a real novelty. If one is to go through the hundreds of decisions rendered by the various FIFA decision-making bodies in the past almost 20 years, one will hardly ever find a substantial reference to national law. It is an established fact, that the respective instances assess the disputes brought to their attention primarily on the basis of the RSTP, if appropriate and necessary while referring to the FIFA Statutes and other FIFA regulations. Furthermore, general principles of (contractual) law are also consulted and considered. And finally, reference to Swiss law is also made, in case the aforementioned sources do not suffice.

This approach is essentially guided by the aspiration of and desire for equal treatment of all the parties involved in a dispute before the international bodies dedicated to the resolution of disputes within the framework of football, independently of the country of their activity and the nationality of the actors involved. Such stance contributes to consistent, comprehensible and clearly traceable jurisprudence, by means of which also legal security and certainty should be enhanced. The diversity of national laws definitely is an obstacle to this legitimate goal. The creation of general principles prevailing over national laws appears to be an adequate and justified solution.

Hence, it is the first time you find a clear recommendation to apply national law in a FIFA document. Yet, the suggestion is made for a very narrow and specific constellation only, and is bound by particular circumstances That is, it exclusively applies to situations in which the competition has been suspended due to the outbreak of the pandemic and the latter has led to a unilateral decision to vary the terms and conditions of an existing contract. It does, however, not apply in particular to the assessment of an early termination of a contract.

39. DRC decision of 29 September 2009 no. 09200937

2.2.1 Choice of law

When looking at this second step in the process, the logic and pertinent question that arises is, which is the applicable national law?

According to the DRC, as a general rule, in order for a specific national law to become applicable, it has to be selected by the parties in their contract[40]. Consequently, in the absence of a choice of law, the law of the country in which the activity is performed, normally the country where the club is domiciled, will not be automatically applied. That is, the dispute will rather be assessed on the basis of the RSTP and the pertinent jurisprudence.

This basic approach is corroborated by a decision of the DRC that is based on a contract in which the parties had explicitly stipulated that the regulations of the different football governing bodies should govern their contractual relationship[41]. Under the circumstances, the DRC deemed it appropriate to assess the dispute exclusively in the light of the football regulations, chiefly the RSTP, rather than make reference to national law.

In another quite peculiar matter, the DRC was confronted with a situation where the contract at the basis of the dispute did not contain an explicit choice of law. However, amongst other things, the club tried to justify its actions on the basis of a Government Emergency Ordinance, which had been issued following the state of emergency declaration as a result of the COVID-19 outbreak. Since the player did not object to the application of the said Ordinance, the DRC found that it should consider and apply it when evaluating the unilateral alteration to the contract decided by the club[42].

The conclusion of the DRC was no doubt also guided by the fact that the club had provided extensive and convincing documentation pertaining to the Ordinance and its pertinence for the case at stake. This consideration leads us to the next point of significant relevance.

2.2.2 The burden of proof

This is a central aspect. It is a well-known general legal principle. A party that asserts a fact has the burden of proving it. The Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber explicitly recall it[43].

The DRC has repeatedly shown that it attaches particular importance to this principle, when it comes to the assessment of employment-related disputes between a club and a player in relation to the COVID-19 outbreak.

40. DRC decision of 10 December 2020 Momcilovic

41. DRC decision of 10 December 2020 Sliti

42. DRC decision of 29 September 2020 Kitanov

43. Art. 12 par. 3 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber

First and foremost, this applies to the contention by a party of the existence of a *force majeure* situation. In this respect, the following has to be considered. While the COVID-19 Guidelines state that the Bureau of the FIFA Council "r*ecognised that the disruption to football caused by COVID-19 was a case of force majeure*", and that "[t]*he COVID-19 situation is, per se, a case of force majeure for FIFA and football*"[44], the FIFA COVID-19 FAQ provided an important clarification. By means of the aforementioned statements the Bureau of the FIFA Council had not declared a *force majeure* situation in any territory. Specifically, it "*did not determine that the COVID-19 outbreak was a force majeure situation in any specific country or territory, or that any specific employment or transfer agreement was impacted by the concept of force majeure*" (emphasis in the original text). As a result, "*clubs or employees cannot rely on the Bureau decision to assert a force majeure situation (or its equivalent). Whether or not a force majeure situation (or its equivalent) exists in the country or territory of a [member association] is a matter of law and fact, which must be addressed on a case-by-case basis vis-à- vis the relevant laws that are applicable to any specific employment or transfer agreement*" (emphasis in the original text)[45].

In its hitherto jurisprudence, the DRC has constantly insisted on the party asserting the existence of a situation of *force majeure*, normally the club, having to provide convincing documentary evidence in this respect. The mere indication or claim that the very outbreak of the pandemic was a *force majeure* situation, since it made it impossible for both clubs and employees to comply with their respective contractual obligations (i.e. on the one side to provide work, and on the other side to work), and/or that the COVID-19 crisis coupled with the suspension of any football activity, that caused important financial losses, resulted in a *force majeure* situation, was consistently not accepted as sufficient to demonstrate the actual existence of a *force majeure* situation in a specific territory[46].

More specifically, the deciding body does also not consider a simple reference to national law as sufficient, but requires the submission of respective corroborating documentation[47].

The particular importance that the DRC attaches to the burden of proof is manifested also in other areas. Notably when it comes to assessing whether national law shall apply and what exactly the relevant law stipulates. Once again, a simple reference to the invoked law is not sufficient. The party making reference to it is requested to provide at least the pertinent excerpts of the law, always making sure that the general context is cognoscible, and, if necessary, to accompany it with a translation into one of the four official languages of FIFA (English, French, Spanish and German)[48].

44. Cf. page 2 of the COVID-19 Guidelines

45. Cf. question (1) on page 4 of the FIFA COVID-19 FAQ

46. DRC decision of 24 November 2020 Perales Najera; DRC decision of 24 November 2020 Nkoudou Mbida; DRC decision of 29 September 2020 Katsumi; DRC decision of 29 September 2020 Lopez Martinez; DRC decisions of 20 July 2020 no. 0720728, 0720729, 0720730

47. DRC decision of 24 November 2020 Markovic; DRC decision of 29 September 2020 Pisano-SP

48. DRC decision of 25 November 2020 Barrow; DRC decision of 24 November 2020 Perales Najera; DRC decision of 24 November 2020 Nkoudou Mbida

In this regard, it is worth mentioning that, despite a respective indication in the FIFA COVID-19 FAQ[49], the DRC has so far not attached particular importance to independent legal advice from a qualified legal practitioner possibly provided by a party, when evaluating whether a unilateral alteration/variation to an employment agreement was in accordance with national law or a CBA. Without intending to offend or to impute bad faith to anybody, this is probably due to the fact that the neutrality of a legal advice prepared by a practitioner mandated by a party, which is seeking confirmation for its position, may require further scrutiny. A different approach might be taken in case of a party presenting an academic analysis (e.g. the commentary) of the law at stake by a professor in law, scholar or similar.

Equally, asserted attempts to find a common agreement regarding adjustments to the terms of a contract should be properly documented. Indeed, the DRC is looking for any available documentary evidence to this effect. As already mentioned earlier, the relevant documentation may positively be taken into account by the deciding body when having to evaluate the good faith of a club that has decided to unilaterally alter the terms of a contract (cf. point III., 2.3.1 below).

2.3 Unilateral variation/alteration recognised if done in good faith, if it is proportionate and reasonable

If the applicable national law does not address the situation or does not allow an unilateral alteration to the terms of a contact and CBAs are not an option or are not applicable, unilateral variations to the terms of a contract will only be recognised by the DRC where they were made in good faith, are reasonable and proportionate. The determination of what is reasonable and proportionate must be undertaken on a club-by-club basis (i.e. a subjective basis)[50].

According to the COVID-19 Guidelines, "[w]*hen assessing whether a decision [to unilaterally alter the terms of a contract] is reasonable, the DRC … may consider, without limitation:*

- *whether the club had attempted to reach a mutual agreement with its employee(s);*
- *the economic situation of the club;*
- *the proportionality of any contract amendment;*
- *the net income of the employee after contract amendment;*
- *whether the decision applied to the entire squad or only specific employee*."[51]

This list of criteria is not exhaustive, as explicitly clarified in the FIFA COVID-19 FAQ[52].

49. Cf. question (15) on page 10 of the FIFA COVID-19 FAQ
50. Cf. question (13) on page 9 of the FIFA COVID-19 FAQ
51. Cf. point (iii) on page 7 of the COVID-19 Guidelines
52. Cf. question (17) on page 10 of the FIFA COVID-19 FAQ

2.3.1 Unsuccessful attempt to find a mutual agreement

When evaluating the good faith of a club that has decided to unilaterally alter the terms of an existing contract it has signed with one of its players, in general the DRC positively values the genuine attempts of the club to find a mutual agreement prior to proceed with the unilateral action. As already mentioned above, in line with the importance attached to the discharge of the burden of proof, it is essential for the respective efforts to be properly documented.

The club should not only submit evidence that it has made a proposal to the player, which the latter has indeed duly received, but it should also be able to provide convincing documentation that it has tried to discuss the offer with the player, to no avail. Equally, the good faith of a club can be corroborated by the fact that the player appeared to show some readiness for discussion, only to later plainly dismiss the proposal. In this respect, and under the circumstances, the time until the player objects to the suggested reduction of salary may also be an indication for the good faith of the club[53].

In case no attempts nor efforts to find a mutual agreement can be shown and documented, the DRC will normally tend to deny the good faith of the club. The fact that overdue payables existed already before the outbreak of the pandemic does certainly also strengthen such finding[54]. The latter important aspect will be further developed below (cf. point IV., 1.2 below).

2.3.2 Important financial impact on the club

While making once again reference to the particular importance attached to the burden of proof by the DRC, it must be pointed out that it is for a club asserting a substantial financial impact of the pandemic on its resources to provide the respective convincing evidence.

In this respect, the attention shall be drawn to a case[55], where the existence of a force majeure situation was not established. The DRC therefore proceeded to evaluate the unilateral alteration of the player's salary decided by the club in the light of the "third step" of the process, as suggested by the guidelines. When addressing the question of the club's good faith, the deciding authority was satisfied with the fact that the club had suffered from an important financial impact due to the suspension of the competitions and the football activity as a result of the outbreak of the pandemic.

Furthermore, it recognised that the offer and subsequent decision to unilaterally reduce the player's salary had been made in order for the club to overcome the particularly difficult financial situation and to survive. Equally, the club had shown a positive stance and readiness to comply as good as it could with its contractual obligations under the circumstances, by actually paying a reduced salary to the player for the months subject to the suspension of the competition.

53. As regards all of these elements, cf. DRC decision of 10 December 2020 Sliti

54. In this respect, cf. DRC decision of 24 November 2020 Özcan

55. DRC decision of 24 November 2020 Nkoudou Mbida

In view of all of these elements, the DRC assumed the good faith of the club. Yet, when it came to evaluate the proportionality and reasonability of the unilateral reduction of the player's salary, the DRC considered that a cut which was based on the player's entire yearly salary appeared to be excessive. Indeed, as a general rule, such a reduction should only impact and refer to the period of time during which the football activity was suspended and both the club and the player were not able to comply with their respective contractual obligations (i.e. on the one side to provide work, and on the other side to work).

Consequently, the deciding body accepted a deduction of 15% to the player's monthly salary for the months during which the competition had remained suspended, while rejecting as disproportionate the reduction imposed by the club of 15% of the player's yearly salary.

2.3.3 Parties' statements

As a final remark regarding the proportionality and reasonability of a unilateral alteration to an employment contract, it should be noted that the DRC may also consider statements made by the parties or their representatives during the relevant proceedings in order to assess a reasonable and proportionate level of deduction from a player's salary.

In another quite peculiar dispute[56], in one of his submissions the player's legal representative had mentioned that a reduction of the player's salary by 25% could be seen as acceptable and reasonable. The deciding body duly considered such position and, in line with the previously mentioned approach that a salary cut should only impact and refer to the period of time during which the football activity was suspended, concluded that in the case at hand a deduction of 25% from the monthly salary for the months during which the competition paused had to be deemed proportionate and reasonable.

3. Principles of non-discrimination and equal treatment

The "three-step approach" described in the preceding paragraphs should always be seen and interpreted in the spirit of the principles of non-discrimination and equal treatment, which serve as an overarching frame to the entire guidelines. Employees (players or coaches) should be treated as equally as possible when considering (unilateral) alterations to existing employment agreements[57].

An illustrative example in this respect can be found in a DRC decision[58], in which the chamber found that the applicable national law would actually have permitted a more significant reduction in salary. However, since the other players of the club had apparently accepted a deduction of 50% originally suggested by the club, which was then applied on them by the club, bearing in mind the principles of non-discrimination and equal treatment the deciding body concluded that the same reduction should be applied to the salary of the player concerned by the dispute also.

56. DRC decision of 10 December 2020 Sliti

57. Cf. par. 5 on page 8 as well as question (14) on pages 9 and 10 of the FIFA COVID-19 FAQ

58. DRC decision of 10 December 2020, Momcilovic

4. Alternative income support arrangements

As an alternative to the "three-step approach" the guidelines suggest that "*all agreements between clubs and employees should be "suspended" during any suspension of competitions … , provided proper insurance coverage is maintained, and adequate alternative income support arrangements can be found for employees during the period in question."* [59]

Following what was emphasised and mentioned above in relation to the burden of proof, it appears evident that the DRC expects the party alleging the existence and applicability of such alternative income support arrangements (normally the club), to provide documentary evidence in this regard. Not only will it be necessary to prove that the state authorities of the territory or country concerned have set up such a programme on the basis of specific national law. The club will also have to demonstrate that the arrangements apply to its employees, i.e. players, and that the latter have actually been admitted to the programme and receive the pertinent income support.

The alternative income support arrangements normally provide for a certain percentage of the players' monthly salary, up to a fixed maximum amount, to be paid by the state in question for the time in which the football activity is suspended.

In this respect, the DRC had to consider a dispute, where the club, *inter alia*, invoked the applicability of a governmental alternative income support programme for the period of the suspension of the competition[60]. The player did not contest the club's assertion that certain Governmental Emergency Ordinances, which had been issued in the country concerned following the state of emergency declaration as a result of the pandemic, had to be applied. Consequently, and while not conclusively dealing with the question of the applicable law, the deciding body found that, in any case, the ordinances at stake had to be taken into account.

On this basis it was established that national law allowed for the suspension of the contract signed between the player and the club in case of a temporary interruption or reduction of the activity, without termination of the employment relationship, for economic, technological, structural or similar reasons. Furthermore, the DRC found that based on the Governmental Emergency Ordinances submitted by the club, during the suspension of the contract, the player would be entitled to 75% of the *"average gross earnings provided by the law of the state social insurance budget"*. Such amount would be paid by the state. Finally, the deciding body noted that the state of emergency had been declared, following several extensions, for a period running from 16 March to 31 May 2020, and that the football activity had resumed as of June 2020.

In summary, the DRC concluded that the club had discharged its burden of proof in relation to the applicability of the relevant alternative income support programme, and consequently, the suspension of the contract in conjunction with the payments to be received by the player from the state, had to be accepted for the time during which the competition paused.

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59. Cf. point (iv) on page 7 of the COVID-19 Guidelines

60. DRC decision of 29 September 2020 Kitanov

Other aspects of interest

Besides all of the above-described and illustrated points, which concern the process suggested by the guidelines issued by FIFA for the assessment of an employment-related dispute between a club and a player that has been originated by the COVID-19 outbreak, the following aspects deriving from the hitherto existing jurisprudence of the DRC deserve particular attention also.

1. Specifics regarding non-payment

1.1 General obligation to pay agreed remuneration

To some people it may sound like a matter of course, but it should nevertheless be highlighted that the guidelines are not exempting an employer, i.e. club, from paying its employees', i.e. players and coaches, salaries and other contractually agreed remuneration. The DRC reminds of this basic principle over and over again[61]. That is, the situation of the pandemic does not per se justify a blatant stop of payment of due amounts. It is thus not sufficient for a club to invoke financial difficulties because of COVID-19 in order to validly explain its failure to comply with contractual financial obligations.

1.2 Payments overdue before the pandemics

Within the same line of argument, and probably even more self-evident, the outbreak of the pandemic shall not be used as an opportunity to escape from debts that arose from contractually agreed payments that fell due already at an earlier stage[62]. This fundamental policy was established by the DRC already from its very first decisions, and then constantly maintained in its jurisprudence[63].

The COVID-19 outbreak does not justify the non-payment of older debts[64], and even less can the latter be affected by any attempt to unilaterally alter the terms of a contract.

2. No retroactive application of unilateral variations/alterations to a contract

Another principle installed by the DRC in its jurisprudence is the non-retroactive application of any unilateral variation/alteration to the terms of a contract. In this respect, it should be noted that, as a general rule, the notification of the decided contractual change to the player is considered the trigger[65]. However, there might be exceptions justifying an earlier application of the alteration/variation, for example in cases where the player did not react to a respective proposal of the club. Under the circumstances, it can be justified to apply the contractual change as of the day when the relevant suggestion was submitted by the club to the player, and not only as of the day when the unilateral decision was actually and ultimately notified to the player. [66]

61. DRC decision of 29 September 2020 Wanderson da Silva; DRC decision of 29 September 2020 Arribas Garrido ES; DRC decision of 20 July 2020 Karius
62. DRC decision of 29 September 2020 Lopez Martinez
63. DRC decisions of 20 July 2020 no. 0720728, 0720729, 0720730; DRC decision of 20 July 2020 Bodurov; DRC decision of 29 September 2020 Ejianreh; DRC decision of 24 November 2020 Özcan
64. DRC decision of 25 November 2020 Barrow
65. DRC decision of 10 December 2020 Momcilovic; DRC decision of 29 September 2020 no. 09200937; DRC decision of 29 September 2020 Kitanov
66. DRC decision of 10 December 2020 Slit

For the sake of good order, of course, the unilateral alteration/variation will in any case only be applicable if it can be considered as such valid and acceptable under the pertinent guidelines and principles.

3. Club's right to direct and instruct

Finally, amidst all the particularities that need to be observed in these challenging times of the pandemic, one should not forget that the employers' right to direct and instruct, which derives from the employer/employee relationship, continues to be valid.

In particular, this means that within the context of the COVID-19 outbreak, pursuant to the above-mentioned right, clubs may implement reasonable health and safety measures in conjunction with the labour relationship with their players (and coaches). For example, they may issue directives limiting a player's right to leave the country without the club's authorisation. Indeed, such a journey may negatively impact the availability of a player, who might encounter difficulties in entering the country where the club is domiciled again, or might have to put himself under quarantine for several days once he comes back to the club. Clear instructions are essential in this regard.

The violation of such instructions by a player can be considered as a mitigating factor by the DRC, when having to assess the consequences of the termination of a contract by a player with just cause, or by a club without just cause, specifically when it comes to the calculation of the compensation due[67].

Conclusions

In summary, looking at the so far available jurisprudence of the DRC regarding employment-related disputes between players and clubs pertaining to agreements which could not be performed as the parties originally anticipated due to the COVID-19 outbreak, one can highlight the following takeaways.

- there is a general close adherence of the DRC to the guiding principles suggested by the guidelines issued by FIFA;
- the threshold for accepting unilateral alterations/variations to an employment contract has been set quite high. Indeed, a unilateral reduction of a player's salary due to the pandemic has been confirmed on very few occasions only[68];
- the principle of the burden of proof is of outstanding importance;
- it is essential to provide complete and convincing documentary evidence to support any assertion regarding force majeure, applicable law and any attempt and effort made to find a mutual agreement.

67. DRC decision of 30 July 2020 Grozav

68. DRC decision of 10 December 2020 Sliti; DRC decision of 10 December 2020 Momcilovic; DRC decision of 24 November 2020 Nkoudou Mbida; DRC decision of 29 September 2020 Kitanov; DRC decision of 29 September 2020 no. 09200937

Article 17(1) RSTP and recoverability of the loss of a chance under Swiss Law

By Marco Vedovatti and Tim Isler, Schellenberg Wittmer[69]

Introduction

FIFA introduced Article 17 of the FIFA Regulations on the Status and Transfer of Players **(RSTP)** in 2001 with the aim of fostering contractual stability (i.e. pacta sunt servanda, also called "sanctity of contract") in international football[70]. Article 17 RSTP was then modified four times and in June 2018, FIFA adopted the version of Article 17 RSTP currently in force[71].

Much has been written about Article 17 RSTP since its adoption as to how compensation must be calculated in the event of a unilateral termination of the contract without just cause (Article 17(1) RSTP) . Case law of the Court of Arbitration for Sport **(CAS)** has also come into play concerning how to construe Article 17(1) RSTP, evolving from the residual value approach in the WEBSTER case[73], to a positive interest approach in the MATUZALEM case in 2009[74].

That said, does Article 17(1) RSTP allow for a claim to be made for the loss of a chance? What does loss of a chance mean under Swiss law? Is it recoverable under Swiss law? In this Article, the authors reflect on the meaning of Article 17(1) RTSP under Swiss Law, and namely whether Article 17(1) RSTP allows a party to recover the loss of a chance.

Compensation criteria under Article 17(1) of RSTP

According to Article 17(1) RSTP:

> *"The following provisions apply if a contract is terminated without just cause:*
>
> *"1. **In all cases,** the party in breach s**hall 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, and any other objective criteria.** These criteria shall include, in*

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70. FERRER Lucas, 17 Years of Article 17 RSTP: An Overview, in: Football Legal, The international journal dedicated to football law, 9/2018, p. 42.

71. For the RSTP version currently in force see https://digitalhub.fifa.com/m/b749cc4c9afcbf56/original/qdjmoxn91xciw41tojii-pdf.pdf (last access on 23 August 2021. The RSTP version 2021 did not modify Article 17 RSTP.

72. GRADEV Georgi, The application of loss of chances, player's market value, replacement costs, and specifity of sport criteria under Art. 17 RSTP in CAS jurisprudence, in: Football Legal, The international journal dedicated to football law, 13/2020, pp. 198 et seqq.; KAISER Martin, Rechtliche Überlegungen zur Vertragskündigungen eines Spielers gemäss Art. 13 ff. des FIFA Reglements bezüglich Status und Transfer von Spielern (RSTS), Unter Berücksichtigung der Rechte und Pflichten des Arbeitnehmers betreffend vorzeitige, einseitige Beendigung eines Arbeitsvertrages gemäss Art. 337 ff. OR, in: Jusletter 23 Mai 2016; ONGARO Omar, 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: European Sports Law and Policy Bulletin, Contractual Stability in Football, Sports Law and Policy Centre, 1/2011, pp. 27-68; PARRISH Richard, Contract stability: The case law of the court of arbitration of sport, in: European Sports Law and Policy Bulletin, Contractual Stability in Football, Sports Law and Policy Centre, 1/2011, pp. 69-94; ROUMELIOTIS Panagiotis C., Automatic joint liability mechanism of Article 17 FIFA RSTP re-visited, April 2020.

73. CAS 2007/A/1298, 1299 & 1300 Webster & Wigan Athletic FC v. Heart of Midlothian, award of 30 January 2008, paras. 152 to 153.

74. CAS 2008/A/1519 FC FC Shakhtar Donetsk v. Matuzalem Francelino da Silva & Real Zaragoza SAD & FIFA & CAS 2008/A/1520 Matuzalem Francelino da Silva & Real Zaragoza v. FC Shakhtar Donetsk & FIFA award of 19 May 2009

*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 whetherthe contractual breach falls within a protected period.*

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 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." (emphasis added)

Article 17(1) RSTP does not specifically mention the loss of a chance. Assuming that Swiss law applies, does it allow to recover the loss of a chance? The authors deem appropriate to first explain how the concept of loss of a chance is dealt with under Swiss law, before addressing whether the loss of a chance may be recoverable under Article 17(1) RSTP.

Swiss Contract Law

General Provisions

Under Swiss law, Articles 97 to 109 of the Swiss Code of Obligations **(CO)** govern the general conditions for contractual liability.

In addition to a fault and a contractual breach, first there must be a **loss or damage**. Swiss law defines it as an involuntary reduction of the assets, which may consist of a reduction of assets or an increase of liabilities *(damnum emerges)* or in lost profits *(lucrum cessans)*[75]. According to the prevailing and applicable theory of difference (*Differenztheorie, principe de la différence)*, the current status of the damaged party's assets at the time of the termination is to be compared with the status that the assets would have had, had the damaging event not occurred.[76]

75. Decision of the Supreme Court 129 III 331, p. 332 para. 2.1. SCHWENZER Ingeborg/FOUNTOULAKIS Christiana, p. 86 Fn. 14.03.

76. SCHWENZER Ingeborg/FOUNTOULAKIS Christiana, p. 86 Fn. 14.03.

According to Article 42(1) CO, the burden of proving the damages incurred lies with the party claiming them. Where the exact value of damages cannot be quantified, the adjudicating body shall estimate the value at its discretion in the light of the normal course of events and the steps taken by the person suffering damages (Article 42(2) CO). It follows that, based on the theory of difference, damages are recoverable under Swiss law only if they are certain[77].

In relation to the calculation of damages, Swiss law distinguishes between **positive interest and negative interest.** The positive interest – also called "positive interest in the performance of the contract" – aims at putting the aggrieved party in the situation as if the contract had been correctly performed. Compensation thus equals the difference between the current financial situation of the aggrieved party and the hypothetical situation in which the aggrieved party would have been had the contract been correctly performed. Positive interest therefore includes the loss sustained (damnum emergens) and loss of profits (*lucrum cessans*)[78]. On the contrary, negative interest – also called "negative interest in the entering into the contract" – places the aggrieved party in the situation as if the contract had never been concluded[79]. Negative interest allows the aggrieved party to recover the costs incurred in connection with the negotiation of a contract, such as for instance, the costs connected with the preparation of an offer. That said, the aggrieved party may also claim lost profits if able to prove that they would have gained such profit from a contract with a third party that it could not enter into because of the contract eventually concluded with the aggrieved party[80].

Second, there must be a causal connection (causation) between the contractual breach and the damages suffered. Swiss law distinguishes on this front between:

- The "natural" causation, also referred to as the *conditio sine qua non:* The contractual breach must be the necessary condition for the damage incurred; and
- The "adequate" causation: In the ordinary course of life and human experience, the act in question was likely to lead to a result of the same kind as that which actually occurred.

Both the "natural" and the "adequate" causation must be met for a party to be contractually liable. While the "natural" causation is a factual test, the "adequate" causation is a legal one: The latter is determined by the adjudicating body by taking into consideration all circumstances underlying the events at the time the contractual breach occurred, up until the time when the damages were suffered. The "adequate" causation allows the adjudicating body to set limits to liability, by considering disruptive events that may have interrupted the causal link between the loss incurred and the non-performance or incorrect performance of the obligation, for instance force majeure, contributory fault of the aggrieved party or a third party's fault. If a disruptive event has interrupted the "adequate" causation, the breaching party cannot be held liable.

77. WERRO Franz, Le dommage: l'etat d'une notion plurielle, in: Le dommage dans tous ses états, Sans le dommage corporel ni le tort moral - Colloque du droit de la responsabilité civile 2013, Université de Fribourg, p. 12.
78. WIEGAND Wolfgang, Basler Kommentar Obligationenrecht I, Art. 1-529 OR, Widmer-Lüchinger Corinne/Oser David (Eds.), 7. ed., Basel 2019, Art. 97 para. 38a.
79. GAUCH Peter et al., Schweizerisches Obligationenrecht Allgemeiner Teil – Band I und Band II, 11th ed. Zurich 2020, para. 2899.
80. GAUCH Peter et al., paras 2901 and 2903; SCHWENZER Ingeborg/FOUNTOULAKIS Christiana, p. 102 Fn. 14.31.

The Loss of Chance Doctrine

The general concept of loss of a chance

The concept of loss of a chance has been established in a number of jurisdictions such as the UK and in particular, France where it is referred to as the *"perte d'une chance"*[81]. Examples of loss of a chance are given in the literature and include, among others, chances of recovery after illness, probability of prevailing in legal proceedings, chances in connection with competitions or lotteries[82].

The concept of loss of a chance is different from lost profits in that what is recoverable is not a (certain) lost profit, but the damage resulting from the consequences of a person having been deprived of the chance for a beneficial event to occur[83]. In other words, under the loss of a chance doctrine, the damage is the lost chance to have a profit or to avoid a loss. The peculiarity of the loss of a chance is thus that there is no certainty that the beneficial event would have indeed occurred. The aggrieved party receives compensation based on the likelihood of the chance taking place, which is calculated by quantifying said likelihood as a percentage[84]. In practice, compensation is limited to that part of the damage (the lost chance to have a profit or to avoid a loss) which corresponds to the degree of probability that the party liable has caused the damage[85].

For example, an injured horse cannot take part in a race and is therefore deprived of the opportunity to compete and, in turn, of the chance to win and be awarded the prize money[86]. This example shows that it may *prima facie* be difficult to reconcile the doctrine of the loss of a chance with the requirement of causation (factual and adequate) and loss with the prevailing and applicable theory of difference. Indeed, had the horse not been injured, would it have won the race ("natural" causation)? – This is simply not possible to know. Further, based on the attributes and career history of the horse, can the (non-awarded) prize be sufficiently certain to be considered part of the hypothetical assets of the aggrieved party (*theory of difference*)? And fundamentally, is the loss of a chance an issue for establishing causation or of quantification of the damage? What is the approach under Swiss law?

Decision of the Swiss Supreme Court BGE/ATF 133 II 462

In a landmark decision of 2007, the Swiss Supreme Court expressly rejected the loss of a chance doctrine, both from the point of view of causation and of quantification of the damage[87].

The court first recalled that under Swiss law, an event is the natural cause of a result if it constitutes one of the conditions sine qua non, meaning that there is a natural causation between two events when, without the first, the second would not have occurred, even if it is not necessary that the event in question be the sole or

81. SCHWENZER Ingeborg/FOUNTOULAKIS Christiana, p. 93 Fn. 14.12a.

82. SCHWENZER Ingeborg/FOUNTOULAKIS Christiana, p. 93 Fn. 14.12a

83. ZINGG Nicolas, La réparation des vacances gâchées en droit suisse – Vers une redéfinition du préjudice au regard de la jurisprudence européenne, in: AISUF – Arbeiten aus dem Juristischen Seminar der Universität Freiburg, Schweiz, Band/Nr. 309, para. 837.

84. WEBER H. Rolf/EMENEGGER Susan, BK OR 97-109, Art. 97 para. 236.

85. WEBER H. Rolf/EMENEGGER Susan, BK OR 97-109, Art. 97, para. 236.

86. ZINGG Nicolas, La réparation des vacances gâchées en droit suisse – Vers une redéfinition du préjudice au regard de la jurisprudence européenne, in: AISUF – Arbeiten aus dem Juristischen Seminar der Universität Freiburg, Schweiz, Band/Nr. 309, para. 839.

87. Decision of the Swiss Supreme Court 4A_61/2007 of 13 June 2017, BGE/ATF 133 III 462; see also decision of the Swiss Supreme Court 4A_516/2012 of 8 February 2013, para. 8; WIEGAND Wolfgang, BSK OR-I, Article 97 para. 38b.

immediate cause of the result[88]. The court then explained that the existence of a natural causal link between the event giving rise to liability and the damage is a question of fact which the judge must decide according to the rule of the preponderant degree of probability[89]. Further, the court underscored that damage is defined as the involuntary reduction of net assets, and that it corresponds to the difference between the current value of the injured party's assets and the value of these assets if the harmful event had not occurred. It can take the form of a decrease in assets, an increase in liabilities, a non-increase in assets or a non-decrease in liabilities[90]. The Swiss Supreme Court proceeded with explaining that the purpose of Article 42(2) CO is to lighten the burden of proof, yet not to exempt the aggrieved party from providing the judge, as far as possible, with all the factual elements evidencing the existence of the damage and allowing for the evaluation *ex aequo et bono* of the amount of the damage[91]. The court in particular pointed out that the aggrieved party must show that the damage is practically certain and that a mere possibility is not sufficient to award damages, Article 42(2) CO being in any event an exceptional rule that must be applied restrictively[92].

The Swiss Supreme Court concluded that the loss of a chance doctrine in a nutshell boils down to admitting compensation for damages on the basis of the *probability* – whatever it may be – that the event giving rise to liability caused the damage[93]. For this reason the court rejected the loss of a chance doctrine under Swiss law. On the one hand, the court considered that the "natural" causation between the damaging event and the loss of an advantage cannot be proven in the event of a lost chance[94]. On the other, it concluded that even if a chance may have an economic value, a chance as such does not belong to the current assets nor to the hypothetical ones, making it impossible to quantify the damage by applying the theory of difference:

> *"La chance ne se trouve pas dans le patrimoine actuel dès lors qu'elle a été perdue. Mais elle ne figure pas non plus dans le patrimoine hypothétique car, soit elle se serait transformée en un accroissement de fortune, soit elle ne se serait pas réalisée pour des raisons inconnues. Par nature, la chance est provisoire et tend vers sa réalisation: elle se transmuera en un gain ou en rien. Vu son caractère dynamique ou évolutif, la chance n'est pas destinée à rester dans le patrimoine. Or, la théorie de la différence, applicable en droit suisse au calcul du dommage, se fonde sur l'état du patrimoine à deux moments précis; elle ne permet ainsi pas d'appréhender économiquement la chance perdue."*[95]

Unofficial translation into English:

> *"A chance is not part of the current assets because it has been lost. But it is not to be found in the hypothetical assets either, because it would either have turned into an increase in wealth, or it would not have been realized for unknown reasons. By nature, a chance is provisional and tends towards its realization, it will be transmuted into a gain or into nothing. Given its dynamic or evolutionary character, a chance will not remain in the assets. The theory of difference, which is applicable in Swiss law to the calculation of damages, is based on the state of the assets at two specific points in time, and thus does not allow for an economic assessment of the lost chance."*

88. Decision of the Swiss Supreme Court 4A_61/2007 of 13 June 2017, BGE/ATF 133 III 462, para. 4.4.2.
89. Decision of the Swiss Supreme Court 4A_61/2007 of 13 June 2017, BGE/ATF 133 III 462, para. 4.4.2.
90. Decision of the Swiss Supreme Court 4A_61/2007 of 13 June 2017, BGE/ATF 133 III 462, para. 4.4.2.
91. Decision of the Swiss Supreme Court 4A_61/2007 of 13 June 2017, BGE/ATF 133 III 462, para. 4.4.2.
92. Decision of the Swiss Supreme Court 4A_61/2007 of 13 June 2017, BGE/ATF 133 III 462, para. 4.4.2.
93. Decision of the Swiss Supreme Court 4A_61/2007 of 13 June 2017, BGE/ATF 133 III 462, para. 4.4.3.
94. Decision of the Swiss Supreme Court 4A_61/2007 of 13 June 2017, BGE/ATF 133 III 462, para. 4.4.3.
95. Decision of the Swiss Supreme Court 4A_61/2007 of 13 June 2017, BGE/ATF 133 III 462, para. 4.4.3.

In conclusion, the Swiss Supreme Court has expressly refused to accept the loss of a chance doctrine under Swiss law.

Opinions among Swiss scholars

While among Swiss scholars it is unsettled whether the loss of a chance is a matter of causation or damage[96], prominent scholars consider that the loss of a chance should be admissible under Swiss law based on Article 42(2) CO, pursuant to which:

> *"Where the exact value of the damage cannot be quantified, the court shall estimate the value at its discretion in the light of the normal course of events and the steps taken by the person suffering damage."*

The loss of a chance would then pertain to the quantification of the damage and not to causation. In particular, such an approach would allow a damage to be quantified based on its likelihood by applying a "probability percentage", thereby avoiding the disadvantages for the "all or nothing" approach of the Swiss Supreme Court[97]. Indeed: If we take as an example the horse case mentioned above, based on the Swiss Supreme Court's approach, the aggrieved party would simply not be entitled to any compensation, because it would not be possible to be establish a sufficient "natural" causation between the horse's injury and winning the race prize, and the lost chance of winning the prize would in any event not qualify as a damage under the theory of difference. On the contrary, based on the loss of a chance doctrine, if the aggrieved party can demonstrate the percentage of probability that had the horse not been injured it would have won the race prize, the aggrieved party can be compensated of that percentage applied to the race prize[98]. In other words, the loss of a chance doctrine would provide more flexibility and avoid the disadvantages of the "all or nothing" approach of the Swiss Supreme Court.

Provisions Specific to Employment Law

Swiss employment law contains a specific provision for termination without just cause by the employer (*ungerechtfertigte Entlassung/résiliation injustifiée/licenziamento ingiustificato*), which applies as a lex specialis to the general provisions of Swiss contracts law. According to Article 337c CO:

> *"1. Where the employer dismisses the employee with immediate effect without good cause, the employee is entitled to damages in the amount he would have earned had the employment relationship ended afterthe required notice period or on expiry of its agreed duration.*
>
> *2. Such damages reduced by any amounts that the employee saved as a result of the termination of the employment relationship or that he earned by performing other work or would have earned had he not intentionally foregone such work.*

96. ZINGG Nicolas, La réparation des vacances gâchées en droit suisse – Vers une redéfinition du préjudice au regard de la jurisprudence européenne, in: AISUF – Arbeiten aus dem Juristischen Seminar der Universität Freiburg, Schweiz, Band/Nr. 309, para. 840; MÜLLER Christoph, Schadenersatz für verlorene Chancen – Ei des Kolumbus oder Trojanisches Pferd?, in: AJP 2002 p. 389, p. 396.
97. MÜLLER Christoph, Schadenersatz für verlorene Chancen – Ei des Kolumbus oder Trojanisches Pferd?, in: AJP 2002 p. 389, p. 397.
98. Assuming for instance that the race price is 100,000 euros, and the probability for the horse to win the race is 80% (for instance, based on statistic data from previous races), the aggrieved party would be compensated of 80% of the race price, i.e. 80,000 euros.

> *3. The court may order the employer to pay the employee an amount of compensation determined at the court's discretion taking due account of all circumstances; however, compensation may not exceed the equivalent of six months' salary for the employee."*

The authors consider unnecessary, for the purpose of this contribution, to explain more into detail Article 337c CO. It suffices to mention that under Article 337c CO the employee is entitled to claim positive interest[99]. Article 337c CO, however, does not address the loss of the chance doctrine.

Recoverability of the loss of a chance under Article 17(1) RSTP

Having explained the core principles of Swiss law on contractual liability and the approach taken under Swiss law regarding the loss of a chance doctrine, the authors now turn to the analysis of whether the loss of a chance could nevertheless be recovered under Article 17(1) RSTP.

Preliminary remarks: Article 17(1) RSTP and contractual freedom under Swiss law

CAS panels have ruled that positive interest applies when calculating compensation under Article 17(1) RSTP, irrespective of whether the contract is terminated without just cause by the player or the club[100]. As explained, under Swiss law positive interest may include the direct damage (*damnum emergens*) or lost profits (lucrum cessans). It does not, however, include the loss of a chance[101]. Bearing this in mind, and assuming that Swiss law applies in a given case, does it mean that the loss of a chance cannot, in any event, be awarded under Article 17(1) RSTP?

Given that according to Article 1(1) FIFA is a Swiss association of private law (Articles 60 to 79 CC), the RSTP is a contractual document in character[102],to which Swiss contract law applies. On this front, Swiss contract law is based on the core principle of the parties' contractual freedom to decide the content of a contract (Article 19(1) CO), within the limits of the law. Clauses that deviate from those prescribed by law are admissible only where the law does not prescribe mandatory forms of wording or where deviation from the legally prescribed terms would contravene public policy, morality or personality rights (Article 19(2) CO). A contractual obligation is namely null and void if its terms are impossible, unlawful or immoral (Article 20(1) CO). In addition, within the personality rights, Article 27(2) CC prohibits excessive commitments:

> *"No person may surrender his or her freedom or restrict the use of it to a degree which violates the law or public morals."*

Whether an obligation violates Article 27(1) CC must be assessed on a case-by-case basis and cannot be determined *in abstracto*.

99. CARRUZZO Philippe, Le contrat individuel de travail, Commentaire des articles 319 à 341 du Code des obligations, Schulthess 2009, p. 542.

100. CAS 2008/A/1519 FC Shakhtar Donetsk v. Matuzalem Francelino da Silva & Real Zaragoza SAD & FIFA & 2008/A/1520 Matuzalem Francelino da Silva & Real Zaragoza SAD v. FC Shakhtar Donetsk & FIFA of 19 May 2009, para. 42.

101. Decision of the Swiss Supreme Court 4A_61/2007 of 13 June 2017, BGE/ATF 133 III 462.

102. Decision of the Swiss Supreme Court BGE/AFT 132 III 285, para. 1.3.; KREN KOSTKIEWICZ Jolanta, Zürcher Kommentar zum IPRG, 3. ed., Zurich 2018, Art. 116 para. 86.

Based on the above, one may argue that Article 17(1) RSTP constitutes a contractual agreement by means of which the parties involved have decided how to calculate the consequences of a termination without just cause. In other words, provided that Article 17(1) RSTP may be construed so as to include the loss of a chance, one could argue that the parties involved have agreed to make the loss of a chance recoverable under Article 17(1) RSTP, even if Swiss law does not accept the loss of a chance doctrine. Articles 20 CO and 27(2) CC would in any event intervene as boundaries to determine what can be claimed as a loss of a chance.

That said, the authors now turn to analyze whether Article 17(1) RSTP can be construed as to include the loss of a chance.

Do the compensation criteria of Article 17(1) RSTP have the potential scope to include the loss of a chance?

According to Article 17(1) RSTP, compensation must be calculated with due consideration for the three categories of factors; (i) the law of the country concerned, (ii) the specificity of sport and (iii) any other objective criteria. The scope for each criterion to include and or make way for a compensation to be calculated for loss of a chance is addressed in turn below:

Loss of a chance under Swiss law as *"the law of the country concerned"*

The first option could be to contend that it could be feasible to claim the loss of a chance under Swiss law as the law applicable to the employment contract[103]. That said, it is clear where Swiss law stands and there has been yet no change in stance since the landmark decision of 2007 when the Swiss Supreme Court explicitly rejected the possibility to claim the loss of a chance based on Article 42(2) CO, despite Swiss scholars contending that claiming the loss of a chance should be possible by applying Article 42(2) CO[104].

Recovering the loss of a chance under Swiss law as the "law of the country concerned" has therefore very little chances of success. That said, it is important to mention that in the WEBSTER case the CAS panel ruled that:

> *"It is clear from its wording that the reference to the "law of the country concerned" is not a choice- of-law clause, since it merely stipulates that such law is among the different elements to be taken into consideration in assessing the level of compensation. In other words, article 17 par. 1 does not require that compensation be determined in application of a national law or that the rules on contractual damage contained in the law of the country concerned have any sort of priority over the other elements and criteria listed in article 17 par. 1. It simply means that the decision-making body shall take into consideration the law of the country concerned while remaining free to determine what weight is to be given to the provisions thereof in light of the content of such law, the criteria for compensation laid down in article 17 par. 1 itself and any other criteria deemed relevant in the circumstances of the case."*[105]

103. Decision of the Swiss Supreme Court 4A_61/2007 of 13 June 2007, BGE/ATF 133 III 462, para. 4.4.2.

104. BREHM Roland, Berner Kommentar, Obligationenrecht – Die Entstehung durch unerlaubte Handlungen, Art. 41-61 OR, 4th ed., Berne 2013, Art. 42 para. 56f;; WERRO Franz, La responsabilité civile, 3rd ed., Berne 2017, MÜLLER Christoph, La perte d'une chance, in: Foëx Bénédict/Werro Franz (eds.), La réforme du droit de la responsabilité civile, Geneva/Zurich,Basel 2004, p. 143-181, MÜLLER Christoph, La perte d'une chance - Etude comparative en vue de son indemnisation en droit suisse, notamment dans la responsabilité médicale, Berne 2002, p. 372 paras. 548 et seqq.; THÉVENOZ Luc, La perte d'une chance et sa réparation, in: Werro Franz (ed.), Quelques questions fondamentales du droit de la responsabilité civile: actualités et perspectives, Colloque du droit de la responsabilité civile 2001, Université de Fribourg, Fribourg 2001, pp. 254 et seq. ENGEL Pierre, Traité des obligations en droit suisse, 2nd ed., Berne 2007, pp. 479-481.

105. CAS 2007/A/1298, 1299 & 1300 Webster & Wigan Athletic FC v. Heart of Midlothian, award of 30 January 2008, paras. 22-23.

In particular, in the WEBSTER case, the panel did not rely on local law when determining the level of compensation:

> *"Article 17 par. 1 itself refers to the specificity of sport and that it is in the interest of football that solutions to compensation be based on uniform criteria rather than on provisions of national law that may vary considerably from country to country."*[106]

In other words, national law should not be seen as precluding the applicability of the other compensation criteria set forth under Article 17(1) RSTP, which are addressed below.

Loss of chance as "*specificity of sport*"

The second option would be to consider that claiming the loss of a chance could be found within the consideration of the criterion of the *"specificity of sports"* even though the loss of a chance is not recognized under Swiss law.

The RSTP does not define this concept, only that it shall be taken into consideration[107]. According to CAS case law, while assessing the criterion of the *"specificity of the sport"* of Article 17(1) RSTP, the judging body needs to take into due consideration the:

> *"[...] specific nature and needs of sport, so as to attain a solution which takes into account not only the interests of the player and the club, but also, more broadly, those of the whole football community" including its stakeholders."*[108]

The criterion of specificity of sport goes back to the notion of how important sport is to the society, especially to social and educational function[109].The Panel of the Webster focused on the specific nature of football and the need to balance the conflicting needs of players and clubs:

> *"In light of the history of article 17, the Panel finds 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."*[110]

106. CAS 2007/A/1298, 1299 & 1300 Webster & Wigan Athletic FC v. Heart of Midlothian, award of 30 January 2008, para. 64.
107. CAS 2007/A/1298, 1299 & 1300 Webster & Wigan Athletic FC v. Heart of Midlothian, award of 30 January 2008, para. 66.
108. CAS 2008/A/1644 M. v. Chelsea Football Club Ltd of 31 July 2009, para. 57; CAS 2008/A/1568 M. & Football Club Wil 1900 v. FIFA & Club PFC Naftex AC Bourgas of 24 December 2004, para. 47.
109. CAS 2008/A/1519 FC Shakhtar Donetsk v. Matuzalem Francelino da Silva & Real Zaragoza SAD & FIFA & 2008/A/1520 Matuzalem Francelino da Silva & Real Zaragoza SAD v. FC Shakhtar Donetsk & FIFA of 19 May 2009, para. 106.
110. CAS 2007/A/1298, 1299 & 1300 Webster & Wigan Athletic FC v. Heart of Midlothian, award of 30 January 2008, para. 67.

Examples of factors which CAS panels considered as pertaining to the specificity of sport include the particularities of the football labour market and the organization of the sport[111]. Bearing this in mind, particularly relevant in the context of Article 17(1) RSTP might be the loss of a top player due to early termination of the contract without just cause and the speculative damage to a club such as a possible failure to win the championship or an early elimination in an (international) competition (for e.g. the national cup or the Champions or Europa League), which could lead to less income e.g. television income, less other income e.g. sponsorships support and further lost profit e.g. merchandise and ticket sales. In this sense, in the case *FC Pyunik Yerevan v. L. AFC Rapid Bucaresti & FIFA*[112], the panel explained that:

> *"[...] 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 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.[113]" (emphasis added)*

The lost *"possible gain"* resulting from the potential transfer of a player to another club would very likely qualify as a lost chance under Swiss law in that the player's transfer at the moment of the termination is a mere speculation. The resulting "possible damage" would therefore not be recoverable under Swiss law. In the same vein, the CAS panel in the MATUZALEM case ruled that while specificity of sport is about fairness it should not add an additional amount of compensation where the facts have already been accounted for – and the compensation must be clearly compensable and it is acknowledged that lost chance is indeed an example of damages which are not clearly compensable:

> *"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)[114].*

That said, as explained above prominent Swiss scholars are of the opinion that the loss of a chance should be accepted under Swiss law for fairness reasons, i.e. to counterbalance the "all or nothing" approach of the Swiss Supreme Court[115]. That said, as explained above prominent Swiss scholars are of the opinion that the loss of a chance should be accepted under Swiss law for fairness reasons, i.e. to counterbalance the "all or nothing" approach of the Swiss Supreme Court[115].

111. CAS 2007/A/1298, 1299 & 1300 Webster & Wigan Athletic FC v. Heart of Midlothian, award of 30 January 2008, para. 63.

112. CAS 2007/A/1358 FC Pyunik Yerevan v. L., AFC Rapid Bucaresti & FIFA of 26 May 2008, para. 40.

113. CAS 2005/A/902 Philippe Mexès & AS Roma c. AJ Auxerre and CAS 2005/A/903 AJ Auxerre c. Philippe Mexès & AS Roma, of 5 December 2005, paras. 122 et seqq.; more restrictive CAS 2007/A/1298, Wigan Athletic FC v/ Heart of Midlothian, CAS 2007/A/1299, Heart of Midlothian v/ Webster & Wigan Athletic FC and CAS 2007/A/1300 Webster v/ Heart of Midlothian of 30 January 2008, paras 120 et seqq.; CAS 2007/A/1358 FC Pyunik Yerevan v. L., AFC Rapid Bucaresti & FIFA of 26 May 2008, para. 105 as well as CAS 2007/A/1359 FC Pyunik Yerevan v. E., AFC Rapid Bucaresti & FIFA of 26 May 2008, paras. 48, 108; CAS 2008/A/1568 M. & Football Club Wil 1900 v. FIFA & Club PFC Naftex AC Bourgas of 24 December 2004, para. 47.

114. CAS 2008/A/1519 FC Shakhtar Donetsk v. Matuzalem Francelino da Silva & Real Zaragoza SAD & FIFA & CAS 2008/A/1520 Matuzalem Francelino da Silva & Real Zaragoza SAD v. FC Shakhtar Donetsk & FIFA award of 19 May 2009, para. 110.

115. MÜLLER Christoph, Schadenersatz für verlorene Chancen – Ei des Kolumbus oder Trojanisches Pferd?, in: AJP 2002 p. 389, p. 397.

CAS case law as well refers to the specificity of sport as a "correcting factor to other factors" and has the sole purpose of verifying whether the solution reached is fair, prior to assessing the final amount of the compensation:

> *"[...] in the Panel's view, the concept of specificity of sport only serves the purpose of verifying the solution reached otherwise prior to assessing the final amount of compensation. In other words, the specificity of sport is subordinated, as a possible correcting factor, to other factors."*[116]

The underlying rationale of both the loss of a chance doctrine and the specificity of sport of Article 17(1) RSTP is therefore to reach a solution which is fair. One may therefore argue that specificity of sport includes the loss of chance if claiming a lost chance is justified by fairness reasons.

Be as it may, the authors consider that the main obstacle would in fact be a practical one. How to calculate in practice the percentage of a probability of a "sports event" (e.g. the transfer of a player where no negotiations are ongoing or winning a championship)? Sport is as per its very nature speculative and sporting results depend on several factors, which may be speculated based on the consistency of wins for example but which are, however, otherwise highly unpredictable upfront. Claiming the loss of a chance would at the end of the day depend on the probative value of the evidence submitted to the adjudicative body.

To conclude, successfully claiming the loss of a chance under the concept of specificity of sport of Article 17(1) RSTP would ultimately be a question of evidence and assessment of the evidence.

Loss of a chance as "*any other objective criteria*"

When referring to *"any other objective criteria"*, Article 17(1) RSTP states that these 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 (amortized over the term of the contract) and whether the contractual breach falls within a protected period. The compensation criteria of Article 17(1) RSTP are not exhaustive[117].

The third option would therefore be to consider that the loss of a chance would be covered by "other objective criteria" that warrant compensation under the examples mentioned under Article 17(1) RSTP.

The same comments regarding specificity of sport apply though. The authors consider that while the loss of a chance could intervene as a correcting factor with the aim to reach a fair solution, whether the loss of chance would entitle the club or the player to additional compensation, or lead to a reduction thereof, would ultimately depend on the probative value of the evidence submitted and the adjudicating body's assessment of evidence.

116. CAS 2009/A/1880 FC Sion v. Fédération Internationale de Football Association (FIFA) & Al-Ahly Sporting Club and CAS 2009/A/1881 E. v. Fédération Internationale de Football Association (FIFA) & Al-Ahly Sporting Club of 1 June 2010, para. 109; CAS 2013/A/3411 Al Gharafa S.C. & Mark Bresciano v. Al Nasr S.C. & Fédération Internationale de Football Association (FIFA) of 9 May 2014, para. 118.

117. Decision of the Dispute Resolution Chamber REF 20-01802 Abdoulaye Sissoko (Mali) vs. Moghreb Athletic Tetouan (Maroc) of 8 April 2021, p. 7 para. 19.

Conclusions

The loss of a chance doctrine is not accepted under Swiss law. While Swiss scholars opine that it should be possible, for fairness reasons, to claim the loss of a chance under Swiss law, the Swiss Supreme Court expressly rejected the loss of a chance doctrine under Swiss law. According to the Switzerland's highest court, a loss of a chance does not meet the requirement of "natural" causation and it is not possible to quantify the chance by applying the theory of difference. Both are requirements that must be met under Swiss law for a party to be held contractually liable.

In addition, Swiss employment law, while containing a *lex specialis* provision on how to calculate compensation in the event of a termination without just cause by the employer, does not regulate the loss of a chance. That said, Swiss law is based on the core principle of contractual freedom. Within the limits of the law, the parties are therefore free to agree on the content of their obligations. On this front, the parties may contractually agree on making the loss of a chance a recoverable damage, provided that this is not consideredan excessive commitment as per Article 27(2) CC. Whether this may be the case cannot be answered *in abstracto* but must be determined on a case-by-case basis.

Within the limits of Article 27(2) CC, Article 17(1) RSTP may be construed as a contractual agreement allowing the parties to claim the loss of a chance. The loss of a chance could fall under the concept of "*specificity of sport*" or *"other objective criteria"*, both referred to under Article 17(1) RSTP. The loss of a chance could for instance be considered inherent to specificity of sport and intervene as a correcting factor with the aim to reach a fair solution which takes into consideration the special nature of sport and the interests at stake.

Notwithstanding the above, the authors consider that it may be difficult to quantify the loss of a chance in practice. A successful claim will thus ultimately depend on the probative value of the evidence submitted and on the adjudicating body's assessment of evidence. At the end of the day, the main obstacle to claim the loss of a chance under Article 17(1) RSTP would therefore be a practical one, namely the claiming party's capability of quantifying the chance.

Everything you always wanted to know about CAS procedures* (*But were afraid to ask)

William Sternheimer (Partner) & Ben Cisneros (Trainee Solicitor), Morgan Sports Law

Introduction

The Court of Arbitration for Sport (the "**CAS**") hears more disputes related to football than any other sport – and by some considerable margin[118]. The business of football and its regulation, of both clubs and players, dominates the CAS jurisprudence and has seen the emergence of a specialised field of "football law". The CAS is the ultimate adjudicatory body for the footballing world, by virtue of its recognition by FIFA and its provision of a dedicated and centralised forum for resolving disputes in a flexible and efficient manner.

This article will introduce some of the key features of CAS procedures, highlighting the areas in which the CAS is a unique institution and with which clubs ought to be familiar. It will focus, in particular, on how clubs can make CAS procedures both efficient and effective.

How to make CAS procedures effective

The primary objective of any party before the CAS is, ultimately, to prevail in their dispute. The following points thus ought to be borne in mind, to ensure the effectiveness of any procedure.

Statement of Appeal

The majority of football-related disputes before the CAS are of an appellate nature and are therefore dealt with under the appeal procedure[119]. Such procedures are initiated by the filing of a Statement of Appeal, within the time limit specified in the applicable rules. In the absence of such a time limit, the default position is that the Statement of Appeal must be filed within 21 days of receipt of the decision appealed against[120].

Selection of arbitrator(s)

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Whilst FIFA, for example, has adopted the 21-day limit for CAS appeals[121], UEFA notably provides that such

118. 'The CAS: Explained (Part 1: An Introduction)', Morgan Sports Law (2020)

119. Articles R47-R59 of the CAS Code

120. See Article R49 of the CAS Code

121. Article 57(1) FIFA Statutes

appeals must be brought within 10 days of receipt of the decision in question[122]. Such time limits may seem incredibly short. However, it is important to note that this limit applies only to the Statement of Appeal, which need only include[123]:

- the name and full address of the Respondent(s);
- a copy of the decision appealed against;
- the Appellant's request for relief;
- the nomination of the arbitrator chosen by the Appellant from the CAS list, unless the Appellant requests the appointment of a sole arbitrator;
- if applicable, an application to stay the execution of the decision appealed against; and
- a copy of the provisions of the statutes or regulations or the specific agreement providing for an appeal to CAS.

Clubs therefore need not rush into filing submissions before the short initial deadline – save where they wish to expedite proceedings and thus combine their Statement of Appeal and Appeal Brief (on which see further below). Indeed, as noted below, parties are free to amend their requests for relief after filing their Statement of Appeal. The tight deadlines, therefore, are not so scary after all.

Selection of arbitrator(s)

One of the most important features of CAS procedures is that arbitrators must be chosen from a closed list[124]. Whilst some might consider this unduly restrictive, the benefit of such an approach is that CAS arbitrators carry appropriate expertise for resolving sports-related disputes. Indeed, the CAS has created a (non-binding) "football list", consisting of CAS arbitrators who specialise in football law specifically, and clubs would be well-advised to use this as a starting point when considering who to nominate.

Parties to CAS proceedings – both ordinary and appeal procedures – have the choice between a panel of three arbitrators and a sole arbitrator, though it should be noted that a panel of three arbitrators is the default position for appeals[125]. Considerations of time and cost will inevitably guide this choice, as more arbitrators means higher arbitration costs and more schedules to align, in addition to the complexity and nature of the dispute in question.

Languages

Another key consideration when nominating an arbitrator will inevitably be the language(s) they speak. The CAS working languages are French, English and Spanish, although the parties may request that another language be used, subject to the agreement of the arbitrator(s) and of the CAS Court Office – and CAS arbitrators do work in other languages, including for instance German and Portuguese[126].

122. Article 62(3) UEFA Statutes

123. See Article R48 of the CAS Code

124. See Articles R40.2 and R48 of the CAS Code.

125. See Articles R40.2 and R50 of the CAS Code.

126. See Articles R29 of the CAS Code

A party may also be allowed to use a language other than the language of the arbitration at hearing(s), but this will be at the party's own cost, and parties are likely to be ordered to file any documents submitted in languages other than that of the proceedings with a certified translation[127].

Requests for Relief

In any Request for Arbitration or Statement of Appeal, parties must set out their request(s) for relief[128]. These must be sufficiently precise to allow the subject-matter of the dispute to properly be identified. In an appeal procedure, requests for relief may subsequently be amended in a party's appeal brief or answer[129], but it is vital that they are prepared with care. CAS arbitrators cannot make orders which go beyond the scope of a party's requests for relief, nor (in appeal proceedings) which exceed the powers of the first instance tribunal.

Standing to be Sued

Linked to the formulation of a party's requests for relief is the question of standing to be sued. Ultimately, if a party requests the CAS to make an order against a particular party, that party must be named as a respondent to the arbitration, else the CAS will decline to make such an order – the respondent(s) that has/have been named will not have standing to be sued.

Where appeals are brought against, for example, a FIFA disciplinary decision, it is clear that FIFA must be named as a respondent – only they have standing to be sued. However, some debate has arisen in the context of horizontal, contractual disputes. Where, for example, the FIFA Dispute Resolution Chamber **(the "DRC")** rejects a club's claim for compensation against a player, and the club wishes to appeal to CAS, the club must obviously name the player as a respondent, in order to claim compensation from them, but should the club also name FIFA as a respondent because the DRC's decision is to be overturned?

The CAS jurisprudence makes clear that, while FIFA may be named as a respondent in such situations, they do not need to be named[130], provided that relief is sought also against the player[131]. The CAS will simply decline to make any orders against FIFA (such as requiring FIFA to impose a conditional disciplinary sanction on the player) and the club would have to rely upon FIFA's rules to seek enforcement of the CAS award later down the line. Failing to name FIFA as a respondent in such scenarios will not prevent the CAS from examining and determining the underlying dispute. For the avoidance of any doubt, it may nonetheless be prudent to name FIFA as a respondent and thus to allow FIFA or the CAS to determine its involvement.

Evidence

Of course, each party must substantiate and prove (to the applicable standard) the facts on which it relies in support of its claim or defence. There are no strict limits on the means by which evidence may be presented

127. Ibid.

128. See Articles R38 and R48 of the CAS Code

129. See Article R48 of the CAS Code

130. See, for example, CAS 2014/A/3690 Wisla Krakow SA. v. Genkov

131. In CAS 2016/A/4838 Piquer v. FC Rubin Kazan, the appellant's requests for relief sought merely that the FIFA decision be set aside (and did not seek relief against the club itself). Thus, having failed to name FIFA as a respondent, the appeal was dismissed because the club did not have standing to be sued.

before the CAS, and the arbitrator(s) have a broad discretion as to the admissibility and/or weight to be placed on evidence.

However, parties are required to submit all documentary/written evidence on which they intend to rely with their written submissions and may only be able to file further evidence exceptionally. Though formal witness statements or expert reports are not required before the CAS, parties must list the name of any witnesses (or experts) they intend to call in their written submissions and must include a *"brief summary of their expected testimony"*[132].

Crucially, in appeal proceedings, CAS arbitrators have the power (under Article R57 of the CAS Code) to exclude any evidence presented by the parties if it was available to them or could reasonably have been discovered by them but was not adduced at first instance[133]. Though this provision has rarely been applied, clubs must be aware of the importance of filing all relevant and available (and reasonably discoverable) evidence in first instance proceedings, where the applicable rules provide for a right of appeal to CAS.

How to make CAS procedures efficient

There are various ways to make CAS procedures as efficient as possible, from responding to procedural requests quickly, to combining one's Statement of Appeal and Appeal Brief, and seeking to agree procedural and substantive issues with the other party(ies). Indeed, this article has also already noted above that appointing a sole arbitrator can be one way to streamline the process. Three further options require further consideration: provisional measures, expedited procedures, and bifurcation.

Provisional Measures

In cases of urgency, the most direct way to seek relief is to apply for "provisional measures" under Article R37 of the CAS Code. The availability of such interim relief is one of the CAS's most important features and, though rarely granted, can be used in appeal and ordinary procedures to avoid gross injustice.

The CAS Code provides that the relevant test is the same as for interim relief in Swiss law generally. The criteria are thus:

- Whether the relief is necessary to protect the applicant from irreparable harm;
- The likelihood of success on the merits of the claim; and
- Whether the interests of the Applicant outweigh those of the Respondent(s).

Whilst the latter two criteria are highly fact-specific, it is worth noting the approach of the CAS to the "irreparable harm" threshold in the context of football disputes. For example, the CAS has held that a club being required to play one match without one of its players does not amount to irreparable harm[134], but that a transfer ban *can* risk such harm[135]. Likewise, for clubs, a prohibition from participating in a competition may amount to

132. See Articles R44.1, R51 and R55 of the CAS Code

133. Notably, Article 62(6) of the UEFA Statutes contains an equivalent provision.

134. CAS 2008/A/1448 Fadhl-Allah & Zamalek SC v. Paok FC & FIFA, order on provisional measures of 7 February 2008, para 7.6

135. CAS 2006/A/1137 Cruzeiro Esporte Clube v. FIFA & PFC Krilja Sovetov, order on provisional measures of 17 August 2006, para 8.4

irreparable harm, given the reputational damage and (impossible to quantify) loss of opportunity[136]. Crucially, though, financial harm alone will not be sufficient (unless it is impossible to recover), as such harm is reparable by compensation[137]. Applications for provisional measures must therefore be framed in terms of moral damage and/or damage to a sporting interest[138].

Applications for provisional measures may only be made after all internal remedies have been exhausted. However, they can be made before a Statement of Appeal or Request for Arbitration has been filed (provided that they are filed shortly thereafter) by providing brief reasons establishing the three criteria noted above. In cases of extreme urgency, provisional measures applications can even be heard *ex parte* – i.e. without hearing the party against whom relief is sought[139].

It is also worth noting that a party is free to re-apply for provisional measures if they are not at first successful, if new evidence arises, if a new urgent situation arises, or if it ultimately becomes impossible for a final award on the merits to be rendered sufficiently quickly. Applications can effectively be submitted for re-consideration. However, if such re-applications are not well-founded, the applicant party may find themselves hit with cost consequences.

Expedited Procedures

Given the rarity of provisional measures and that the fast-moving nature of sport, it is often preferable to proceed to the final resolution of the dispute in an expedited manner. In both ordinary and appeal procedures, the parties may request that the proceedings are expedited[140], and this can enable disputes to be resolved in a matter of days. Deadlines will be shortened, and limits may be imposed on the amount or length of submissions filed, and on the length of any hearing.

However, such an approach requires the consent of all parties. Thus, though expedition can greatly enhance the efficiency of CAS procedures, its availability is subject to the willingness of an opponent to co-operate[141]. More cynically, refusing to agree to an expedited procedure can be a tactic for delaying proceedings.

Bifurcated Procedures

A final option for parties seeking to optimise the efficiency of proceedings is to request bifurcation[142] – that is, the division of the proceedings. In particularly complex cases, there may be preliminary issues (such as, for example, whether the CAS is competent to hear the dispute) which may be determinative of the whole case and which require significant argument in and of themselves.

In such circumstances, it may be appropriate to request that the proceedings be bifurcated and that a decision be made on the preliminary issue(s) first, prior to the consideration of the further, substantive arguments. This can be a useful tool for saving time and costs for both parties, and for promoting settlement on certain issues. Ordering such division of the proceedings, though, is entirely at the arbitrator/panel's discretion.

136. CAS 98/200 AEK PAE & SK Slavia v. UEFA, Order of 17 July 1998, p.10, para 43

137. *'Article R37 CAS Code – Rigozzi/Hasler'*, pp.1494-1495

138. Ibid.

139. See Article R37 of the CAS Code

140. See Articles R44.4 and R52 of the CAS Code

141. Expedited procedures may also not be possible where witnesses/experts are unavailable, or where the necessary evidence cannot be collected sufficiently quickly

142. This may be ordered under Articles R39 and R55 of the CAS Code.

JURISPRUDENCE

CAS 2019/A/6621 Club O v. Player X & Club M[143]

Date of the Award: 7 October 2020
Panel: Mr Alexander McLin (Switzerland), Mr Michele Bernasconi (Switzerland), Mr João Nogueira Da Rocha (Portugal)

MAIN TOPICS

- Arbitrability of a dispute and CAS' power of review.
- Jurisdiction of ordinary courts versus FIFA jurisdiction.
- Scope of application of Article 22(a) of the RSTP.

DECISIONS DEALING WITH SIMILAR ISSUES

- CAS 2015/A/3896 Elias Mendes Trindade v. Club Atlético de Madrid
- CAS 2015/A/4152 Cerro Porteño v. Roberto Antonio Nanni & FIFA
- CAS 2018/A/5624 Dominique Cuperly v. Club Al Jazira
- CAS 2019/A/6569 FC Würzburger Kickers AG v. Elia Soriano, Korona SK & FIFA
- DRC 20-01585 Aliaksandr Paulavets v. Dynamo Brest

KEY CONCLUSIONS

- In international arbitrations seated in Switzerland, the sole restrictions to the arbitrability of a dispute are those established by the Swiss Private International Law Act **(PILA)**. This understanding has been constantly held by the Swiss Federal Tribunal **(SFT)** and in CAS jurisprudence on the arbitrability of labour disputes, even in cases where mandatory jurisdiction of the national state courts existed. Pursuant to Swiss jurisprudence, the non-observance of mandatory foreign provisions subjecting certain disputes to the jurisdiction of state authorities does not *per se* amount to a violation of public policy.

- The Panel is not bound or limited by the assessment that the first instance body made of its own jurisdiction. In particular, the power of the Panel is not limited to assessing the correctness of the Appealed Decision. It reviews the facts and the law in full, in order to issue a new decision that will decide the dispute at stake. Indeed, as the SFT has acknowledged, even if the first instance judicial body refused to issue a decision on the merits, this does not prevent the CAS *"from itself issuing a decision on the merits if it considered that decision unjustified..."*

- Article 22(a) of the Regulations on the Status and Transfer of Players **(RSTP)** is intended to cover those cases which acquire an international dimension because the contractual dispute at stake arises from the fact that the player intends to move internationally. That is to say, Article 22(a) RSTP applies whenever a football player unilaterally terminates an employment agreement with his club as a result of the inducement of a third club belonging to a different national association, or because he has planned to move to this third club, and *the* latter requests the issuance of the player's ITC.

143. This summary has been anonymised as the relevant award is yet to be published. This summary contains both quotations and paraphrasing of the original Award. Some parts have been amended for length and consistency purposes, however without altering the meaning of the original Award.

- If the dispute between a club and a player arose two months before the player's ITC request, it cannot be held that the dispute resulted from, or was sufficiently related to, the ITC request, or that is due to an envisaged international transfer.

RELEVANT FACTUAL BACKGROUND

Mr. X (the **"Player"**) and Club O, both nationals of Country S, concluded two contracts bounding the Player to Club O until 30 June 2017 (jointly referred to as the **"Contract"**).

The Contract granted Club O a unilateral option to extend the contractual relationship for three seasons, ie until the end of the 2019/2020 season.

In addition, the Contract provided for a jurisdiction clause which read:

> *In matters not provided for in this contract, the provisions of [the Country S National Law] which governs the special labour relationship of professional athletes, the Collective Bargaining Agreement in force and other applicable regulations will apply (...)*

On 25 May 2017, the Player sent a letter to Club O stating, as is relevant:

> *Dear Sir,*
>
> *Currently and until 30 June 2017, I have a contract with [Club O] ...*
>
> *It envisages the possibility of extending the same, in favour of [Club O], provided that it is expressly accepted by the undersigned...*
>
> *Remaining the extension possibility subject to my acceptance, hereby I communicate, expressly, that Ido not accept such extension and that, therefore, my contract will end at its natural term, on 30 June 2017, being hence free to continue my career as a football player with any other club that I may consider convenient for my interests.*
>
> *This need of express acceptance for my part is, besides of contractual nature, also legal, as it is foreseen in the article 8 of the [National Law], which only admits extensions 'by means of successive agreements atthe end of the contractual term originally agreed' which is not the case here.*
>
> *The content of this document is communicated to you, with the aim of expressly declare the expiration of my contract on 30 June 2017, without the possibility of any extension, because of the stipulated in the contract as well as because of the applicable legislation in force...*

On 30 May 2017, the Player's agent sent a fax to Club M explaining that the Contract with Club O was going to expire on 30 June 2017 and offering the professional services of the Player to Club M. Eight days later, Club M informed its interest on the Player.

On 16 June 2017, Club O sent a letter to the Player stating that it did not accept his rejection to the extension of the Contract:

> *…[Clause 6 of the Contract] provides that [Club O] reserves the option to sign a professional player contract for three more seasons, establishing the receipt of a bonus too (…) the total amount of XXXX euros that has been already paid by the club during 24 monthly instalments distributed between the seasons 2015/2016 and 2016/2017, without you having opposed or renounced to it, which implies your acceptance to the extension option granted to the Club for the next three seasons…*

On 20 June 2017, the Player reiterated to Club O its rejection to any contractual extension and on 10 July 2017 he entered into a contract with Club M.

On 21 July 2017, Club O filed a *"request for a conciliation and mediation procedure"* before a national court requesting compensation from the Player, which it withdrew 10 days later.

Subsequently, Club O filed a claim before FIFA against both the Player and Club M. On 16 August 2019, the FIFA DRC rendered a decision by which it declared Club O's claim *"inadmissible"* due to the fact that in the Contract, the Player and Club O *"accepted the exclusive jurisdiction of the Country S national courts to decide upon any employment-related dispute arisen between them in accordance with Article 19 of the Country S National Law"*

Club O appealed such decision before the CAS.

LEGAL CONSIDERATIONS

Considering the applicable legal framework, the Panel considers that CAS has jurisdiction to hear the present case. Notwithstanding this, the Panel observes that the Player holds that CAS lacks jurisdiction to hear the present Appeal.

This question has to be assessed under the *lex arbitrii*, in accordance with the PILA, which grants the Panel the power to decide upon its own jurisdiction.

The Panel notes that, in essence, the Player is sustaining that (i) the merits of the case are not arbitrable and that (ii) in any case, they would fall outside the CAS jurisdiction, either because they are not within the Panel's power of review or because they would have to be settled by the Country S Labour Courts, which would have exclusive jurisdiction in this matter. For the sake of good order, the Panel addresses each issue separately.

Arbitrability

Art. 177.1 PILA provides that "*Any dispute involving an economic interest may be the subject-matter of an arbitration*". Bearing in mind that the Appellant is seeking monetary compensation from the Respondents, the Panel finds that the present dispute involves an economic interest that can be assessed in financial terms, despite the fact that it derives from a labour relationship. As such, the dispute at hand is in principle arbitrable under Swiss international private law.

However, the Player sustains that under Country S national law, the dispute is not arbitrable. Therefore, the Panel should establish whether it is bound by mandatory national provisions and, in particular, by this alleged prohibition to arbitrate labour disputes. The Panel notes that this question was settled by the Swiss Federal Tribunal **(SFT)** a long time ago, in its *Fincantieri* judgment, in which it clarified that the Swiss legislator had decided to exclude conflict of law issues in the assessment of the arbitrability of a dispute, establishing instead a substantive rule of private international law, regardless of the law applicable to the merits (ATF 118 II 353, para. 3c).

This in turn means that in assessing the arbitrability of the dispute, the Panel need not take into account public policy or any mandatory provisions resulting from the law governing the merits of the dispute or from the place where the award would in principle be enforced, the risk of any potential non-recognition of the award being borne by the parties to the arbitration (ATF 118 II 353, para. 3c).

Therefore, the sole restrictions to the arbitrability of the dispute would be those established by the PILA and, in particular, the potential incompatibility of the award with public policy. This understanding has been constantly held by the SFT and in CAS jurisprudence[144] on the arbitrability of labour disputes, even in cases where mandatory jurisdiction of the national state courts existed. In these cases, both the SFT and the CAS have confirmed that such circumstance does not prevent the arbitrability of the dispute as long as it does not contravene Swiss public policy.

In this regard, the Panel notes that pursuant to Swiss jurisprudence, the non-observance of mandatory foreign provisions subjecting certain disputes to the jurisdiction of state authorities does not per se amount to a violation of the relevant public policy. Taking into account the foregoing, the Panel considers that the dispute at hand is arbitrable in accordance with Art. 177(1) PILA.

The scope of the Appeal and the Panel's power of review

In essence, the Player questions the extent of the CAS jurisdiction and the power of the Panel to decide the merits of the dispute in case it finds that the FIFA DRC had jurisdiction to decide Club O's claim. The Player intends to narrow the scope of the present arbitration and to limit the Panel's power of review to strictly determine if the FIFA DRC had jurisdiction to hear the case in the first instance or not. And, in the affirmative, the Player holds that the Panel would not have jurisdiction to decide the merits of the case and that it would have to refer the case back to the FIFA DRC, provided that this does not entail an extra *petita* ruling.

The Panel does not endorse this position.

The Player may be to some extent right in stating that, in principle, the Panel cannot review the case in relation to matters that were not the object of the first instance procedure, and that its power of review cannot be wider than that of the appellate body. However, this circumstance does not arise in the present case.

Indisputably, the Panel's power of review is limited by the object of the dispute that was brought before the previous instance that, in the case at hand, consisted in Club O claiming against the Respondents a specific amount of compensation. The Panel observes that such request is precisely the prayer for relief of the Appeal.

144. The Panel referred to these decisions: ATF 4A_388/2012, ATF 4A_654/201, CAS 2010/A/2174, CAS 2015/A/3959 and CAS 2012/A/3007

Therefore, the Panel does not see how this prayer for relief can fall outside the jurisdiction of CAS in the event the Panel finds that the FIFA DRC was competent to rule on the dispute in the first instance.

In this regard, as is well-known to CAS practitioners, the Panel is not bound or limited by the assessment that the first instance body made of its own jurisdiction. In particular, the power of the Panel is not limited to assessing the correctness of the Appealed Decision. It reviews the facts and the law in full, in order to issue a new decision that will decide the dispute at stake. Indeed, as the SFT has acknowledged, even if the first instance judicial body refused to issue a decision on the merits, this does not prevent the CAS from itself issuing a decision on the merits if it considered the decision unjustified. Contrary to what the Appellant argues, such a solution is not at all inconsistent with the nature of appeal proceedings. It is rather a characteristic of an appeal that the higher body may decide the merits itself. Neither does the solution chosen by the CAS go against the mission of the arbitral jurisdiction, no matter what the Appellant claims: it is apt to facilitate quick disposition of disputes.

In other words, if the Panel deems it appropriate, it can decide to issue a new decision on the merits or to annul the appealed decision and refer the case back to the previous instance. In addition, and for the sake of completeness, in private disputes akin to the instant case, such an alleged right to a second instance is not recognized by any applicable regulation, law or international treaty.

In view of the foregoing, the First Respondent's motion challenging the jurisdiction of the CAS is dismissed.

On the other hand, the issue of whether the Country S Labour Courts had exclusive jurisdiction to deal with the present dispute in the first instance or not will be decided further below given that it relates to the merits of the case.

Did the DRC have jurisdiction to hear Club O's claim against the Player and Club M?

For the reasons that will be explained below, the Panel agrees with the FIFA DRC and considers that in this case FIFA did not have jurisdiction to hear the dispute. In this regard, the Panel firstly observes that the relevant clause reads:

> *In matters not provided for in this contract, the provisions of [the National Law] which governs the special labour relationship of professional athletes, the Collective Bargaining Agreement in force and other applicable regulations will apply (...)*

The Panel notes that the wording of this clause corresponds to a standard clause provided for in the official contract forms of the Country S national association, pursuant to which, the parties in football employment contracts agree to submit their employment relationship to the legal regime established in the Country S National Law, as well as to the applicable Collective Bargaining Agreement. In this regard, Art. 19 of Country S National Law provides as follows:

> *Any conflict that may arise between professional athletes and their clubs or sport entities, as a consequence of the employment contract, will fall under the jurisdiction of the labour courts.*

With regard to this standard clause, the Panel notes that it has been already thoroughly analysed and interpreted by another Panel in the case CAS 2015/A/3896, that shares many similarities with the present case, and which concluded that the labour courts were indeed competent and not FIFA.

In the present case, the Panel does not find any reason to deviate from the above finding, and considers that, by reference to the Country S National Law, the relevant clause contained an indirect choice of forum by means of which Club O and the Player agreed to submit their disputes to the exclusive jurisdiction of the national labour courts. Furthermore, in the Panel's view, this interpretation is confirmed by Club O's behaviour, which clearly demonstrates that its understanding of this clause was the same. In particular, this is evidenced by the fact that, when the controversy between Club O and the Player arose, Club O filed a request for conciliation before the national courts, claiming the same compensation that it later claimed in front of the FIFA DRC.

Notwithstanding this, the Panel observes that the present case has some differences with the dispute that was decided in CAS 2015/A/3896, because the present matter is not limited to a dispute between a player and his former club, but it also involves a third club from a different national association (Club M), which entered into an employment agreement a short time after the dispute between the Player and Club O began. This is not entirely devoid of significance, and it is precisely for this reason that Club O contends, pursuant to Art. 22(a) RSTP, that the FIFA DRC had jurisdiction in the present case.

In that regard, Art. 22(a) RSTP provides that FIFA is competent to hear:

> *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.*

Club O holds that the fact that on 25 August 2017 the national association of Club M requested the ITC of the Player from its own national association and that the latter rejected such request due to the opposition of Club O, triggers the jurisdiction of the FIFA DRC in accordance with Art. 22(a) RSTP.

The Panel does not share Club O's interpretation. First of all, the Panel notes that the rule contained in Art. 22(a) RSTP is established "without prejudice to the right of any player or club to seek redress before a civil court for employment-related disputes", which occurs in the case at hand. On the other hand, the Panel is of the opinion that this provision is precisely intended to cover those cases which acquire an international dimension due to the fact that the contractual dispute at stake arises from the player's intention to move internationally. In other words, depending on the circumstances at stake, if a football player unilaterally terminates an employment agreement with his club as a result of the inducement of a third club belonging to a different national association, or because he has planned to move to this third club, and the latter requests the issuance of the player's ITC, these circumstances could trigger the applicability of Art. 22(a) RSTP and confer jurisdiction to the FIFA DRC, which would be competent to decide the merits of the case.

However, in this case these factual premises do not concur. Contrary to what Club O sustains, the present dispute did not arise as a result of the request by Club M of the Player's ITC. To the contrary, the dispute between the Player and Club O started a couple of months before, on 25 May 2017, when the Player notified

to Club O that he did not accept the extension of the Contract and that their labour relationship was going to end on 30 June 2017. Therefore, the dispute between Club O and the Player started exactly 2 months before the ITC request, which was made on 25 July 2017. Indeed, when the dispute between Club O and the Player began (i.e. 25 May 2017), the Player's agent had not contacted Club M to offer the Player's services yet, which he did on 30 May 2017. This is further evidenced by the fact that Club O filed its request for conciliation before the Country S national courts exclusively against the Player on 21 July 2017.

Consequently, in the present case, it cannot be held that the dispute resulted from or was sufficiently related to the ITC request, or that is due to an envisaged international transfer. On the contrary, the Panel finds that the present dispute derives from a controversy that arose exclusively between Club O and the Player due to the latter's decision not to extend the Contract.

As a result of the foregoing, the Panel concludes that the FIFA DRC did not have jurisdiction to hear the Appellant's claim and, therefore, the Appeal must be dismissed.

CAS 2020/A/7195 Club Deportivo Leganés v. Leonardo Miranda Rocha[145]

Date of the Award: 26 February 2021
Arbitral Tribunal: Mr Gustavo Albano Abreu (Argentina)

MAIN TOPICS

- Personality rights of a player and excessive commitment.
- Limits to the parties' contractual freedom.
- Assignment of a player's economic rights in favour of a club in exchange for the cancellation of a compensation clause.

DECISIONS DEALING WITH ONE OR MORE SIMILAR ISSUES

- CAS 2004/A/701 Sport Club Internacional v. Galatasaray Spor Kulübü Dernegi
- CAS 2006/A/1024 FC Metallurg Donetsk v. Leo Lerinc
- CAS 2015/A/4204 CA Velez Sarsfield v. Club Central Español FC
- CAS 2017/A/5180 Club Antalyaspor v. Sammy Ndjock & Club Minnesota United

KEY CONCLUSIONS

- The principles of pacta sunt servanda and freedom of contract are basic pillars of the FIFA Regulations and Swiss law. However, there are limits to those principles provided, in particular, by Articles 20 of the Swiss Code of Obligations (SCO) and 27(2) of the Swiss Civil Code, which prevent that parties to a contract alienate their freedom to an extent that is contrary to morality or that compromises the debtor's most important vital assets, paralysing the free development of his economic activity putting its very existence in danger.

- A clause which commits a player to pay to his previous club 20% of his economic rights every time that he concludes a new employment contract, and which extends beyond the period of validity ofthe original contract violates the principles described in Articles 20 SCO and 27(2) CC and is therefore null and avoid; even if such commitment was given as a consideration to cancel a EUR 20,000,000 compensation clause contained in the employment contract.

145. The original award is published in Spanish here. This summary contains both quotations and paraphrasing of the original Award freely translated into English. Some parts have been amended for length and consistency purposes, however without altering the meaning of the original Award.

RELEVANT FACTUAL BACKGROUND[146]

On 1 August 2017, Mr Leonardo Miranda Rocha (the **"Player"**) and Club Deportivo Leganés (the **"Club"** or **"Leganés"**) signed an employment contract valid until 30 June 2019 (the **"Contract"**). The Contract also provided for an option to extend the Contract until the end of the 2021/2022 season.

Besides the Player's remuneration, the Contract provided for a clause which provided that in case the Player would wish to put an end to the Contract before its expiry date he must pay EUR 20,000,000 to Leganés (the "Compensation Clause"). The Compensation Clause read, as is relevant, as follows:

> *Both parties expressly agree that, in the event of termination of this contract by THE PLAYER under the provisions of article 16, paragraphs 1 and 2 of Royal Decree 1006/85, on professional sportsmen, the Player must compensate CD LEGANÉS SAD, with the sum of TWENTY MILLION EUROS (20,000,000 Euros)…*

On 31 December 2017, the Player and Leganés concluded a Termination Agreement, by which they put at end to the Contract. In particular, the Termination Agreement provided for a clause which read, as is relevant, as follows (the **"Economic Rights Clause"**):

> *That it is the wish of the player, by virtue of the faculty granted by art. 13 i) of the royal decree 1006/1985, to terminate the employment relationship.*
>
> *That both parties expressly agreed in the [Contract] that in the event of termination by the sole will of THE PLAYER, THE PLAYER should compensate CD LEGANÉS SAD with the sum of TWENTY MILLION EUROS (20.000.000)…*
>
> *That in relation to the provisions of the preceding paragraph (…) the parties now agreed as INDEMNIFICATION in favour of THE CLUB (which replaces the [Compensation Clause]) the recognition of 20% OF THE ECONOMIC RIGHTS ARISING FROM A HYPOTHETICAL FUTURE TRANSFER OF THE PLAYER'S FEDERATIVE RIGHTS, regardless of the team in which he plays and until 23 May 2022, the date on which THE PLAYER reaches 25 years of age. The payment of such compensation shall be made within 30 days from the date of signing the transfer contract.*
>
> *That in the event that the aforementioned future transfer of THE PLAYER's federative rights takes place and the above agreement is not respected, THE PLAYER, in addition to the compensation resulting from the 20% of the economic rights deriving from a hypothetical future transfer of THE PLAYER's federative rights, shall pay an additional amount of ONE HUNDRED THOUSAND EUROS (100,000) as a penalty. […]*

On the same day, Leganés handed the Player a release letter so that he could be freely registered with another club.

146. All the quotes are freely translated from Spanish

After having previously concluded a contract with an Spanish club, on 19 July 2018, the Player and the Belgian club, Lommel SK signed an employment contract valid from 19 July 2018 until 30 June 2019.

On 22 July 2019, Lommel SK, the also Belgian club, KAS Eupen and the Player concluded an agreement whereby it was agreed that the Player was to be transferred from Lommel SK to KAS Eupen for a transfer fee of EUR 350,000.

On 23 July 2019, the Player and Kas Eupen signed an employment contract valid until 30 June 2022.

On 30 October 2019, Leganés sent an email to the Player, Kas Eupen and Lommel SK, referring to the transfer of the player and requesting the amount of EUR 200,000 plus 5% interest from 23 August 2019, comprised of:

- EUR 100,000 EUR as compensation; and
- EUR 100,000 as penalty for late payment.

On 31 October 2019, Lommel SK replied to the said email, arguing that the Termination Agreement, including the Economic Rights Clause, had been agreed between Leganés and the Player only. Lommel SK further stated that "Since Lommel SK is not a party to this agreement, it is obvious that [Leganés] cannot claim any amount from Lommel SK on the basis of this agreement". Neither the Player nor Kas Eupen responded to the Club's email.

On 11 November 2019, Leganés filed a claim with FIFA against the Player and Kas Eupen for breach of contract, requesting EUR 170,000 plus 5% p.a. on that amount from 23 August 2019 until the date of effective payment

By a decision rendered on 20 May 2020, the FIFA Dispute Resolution Chamber rejected Leganés' claim (the **"DRC Decision"**) as it considered that Economic Rights Clause was abusive and therefore could not be considered valid and enforceable.

Leganés appealed the DRC Decision before the CAS.

LEGAL CONSIDERATIONS

The underlying issue of the present matter is to determine whether the Economic Rights Clause is valid and enforceable.

It should be recalled that the Parties agreed, by means of the Compensation Clause, that in case the Player would want to unilaterally terminate the Contract, he would have to pay Leganés the amount of EUR 20,000,000.

Thereafter, the parties concluded the Termination Agreement by which, besides putting an end to the Contract, they replaced the Compensation Clause with the Economic Rights Clause which basically granted Leganés the right to receive from the Player 20% of his economic rights related to any of his future transfers until 31 May 2022. Likewise, the parties agreed to a penalty of EUR 100,000 in case the Player would be in default of payment.

In its submissions, Leganés argues that the Economic Rights Clause is lawful in view of the principle of pacta sunt servada.

It is to be noted that Leganés itself interprets the Economic Rights Clause in the sense that "the Player was only obliged *(...) to introduce a clause [in any future transfer agreement] reserving to Leganés or to himself a percentage of 20%"* of the transfer fee or "it was sufficient for the Player not to consent to his own transfer to a third party club unless the transfer included the acknowledgement of such percentage".

The Sole Arbitrator acknowledges that the principle of *pacta sunt servanda* is one of the pillars of the FIFA Regulations and Swiss law. Given that the Player claims that the Economic Rights Clause is null and void and that this issue is not addressed by the FIFA Regulations, the Sole Arbitrator must analyse the provisions of Swiss law relating to contractual freedom and its possible limits. It is on the basis of these provisions that the Sole Arbitrator must assess whether the nullity invoked by the Player must be upheld.

First, the Sole Arbitrator notes that Article 19(1) SCO establishes the principle of contractual freedom in the following terms:

> *The terms of a contract may be freely determined within the limits of the law.*

By virtue of the aforementioned principle, persons are free to decide whether or not to contract, with whom and on the basis of which agreements. To quote *Thévenoz* and *Werro* (Commentaire Romand, Code des Obligations I, Helbing Lichtenhahn):

> *contractual freedom traditionally encompasses the following elements: freedom to conclude a contract or not, freedom to determine the content of the contract, freedom to choose one's contractual partner and freedom of the form of the contract. To that it may be added, with nuances, the freedom to annul or modify the contract.*

The above notwithstanding, as can be seen from the wording of Article 19(1) SCO itself, contractual freedom must nevertheless be exercised "within the limits of the law". The provisions limiting the relevant principle are, mainly:

Article 19(2) SCO:

> *Clauses that deviate from those prescribed by law are admissible only where the law does not prescribe mandatory forms of wording or where deviation from the legally prescribed terms would contravene public policy, morality or rights of personal privacy.*

and

Article 20 SCO:

Nullity

> *1 A contract is void if its terms are impossible, unlawful or immoral.*
>
> *2 However, where the defect pertains only to certain terms of a contract, those terms alone are void unless there is cause to assume that the contract would not have been concluded without them.*

According to the doctrine and case law of the Swiss Federal Tribunal, the concept of "morality" referred to in the aforementioned articles is closely linked, inter alia, to the protection of the freedom of the individual within the meaning of Article 27 SCC which states:

> *1 No person may, wholly or in part, renounce his or her legal capacity or his or her capacity to act.*
>
> *2 No person may surrender his or her freedom or restrict the use of it to a degree which violates the law or public morals.*

In that regard, Thévenoz and Werro (op. cit.) state that:

> *19-20 CO and 27 CC are points of convergence between law and morality. The Federal Tribunal has defined contracts contrary to morality as those which violate (...) the ethical principles and the scales of values inherent in our legal system (...) Article 19 CO refers to the rights linked to the personality (...) and in particular to Article 27 of the CC which protects the individual against the alienation of his own freedom. Article 27 CC reflects the ambiguity inherent in the right to self-determination, since it is both a protection of the rights of the personality and a limitation thereof. This ambiguity is also reflected in matters of private autonomy and, consequently, contractual freedom. It has already been pointed out that personality rights both underpin and limit contractual freedom.*

For their part, Syboz, Gilliéron and Branconi (Code Civil Suisse et Code des Obligations Annotés, 8e édition, Helbing Lichtenhahn), commenting on Article 20 SCO, cite various decisions of the Swiss Federal Tribunal, one particularly illustrative being ATF 102 II 201, which states that

> *Article 20 CO has the same scope as Article 27(2) CC in the sense that it prevents that parties to a contract alienate their freedom to an extent that is contrary to morality, in particular to the extent of compromising the debtor's most important vital assets, paralysing the free development of his activity and subjecting it to the unlimited will of the creditor. [Such articles also prevent] restrictions that go beyond the measure of what can be tolerated by their duration, their scope of application, their material content or a combination of these different elements.*

Finally, it should also be pointed out that the conduct contrary to the "morality" referred to in Articles 19 and 20 SCO also includes situations of manifest imbalance in the contractual considerations.

In casu, the Sole Arbitrator notes that the Contract concluded between the Player and Leganés was for two seasons, from 1 August 2017 until 30 June 2019, with the Termination Agreement being signed in December 2017, namely, when only 5 months of the Contract had been executed.

Although it could be reasoned, as the Appellant did, that it was sufficient for the player to introduce in his future employment contracts a clause reserving 20% of his economic rights for Leganés or not to consent to his own transfer to a third party club unless the transfer included the acknowledgement of such percentage, the condition agreed between the parties in substitution of a Compensation Clause of EUR 20.000.000 appears at first sight disproportionate.

More in particular, the Sole Arbitrator's attention is drawn to something that was rightly highlighted by the DRC, the Economic Rights Clause covers each and every transfer that the Player could be subject of until 22 May 2022. This is notoriously disproportionate for two different reasons: i) the condition obliged the Player to pay 20% of his economic rights related to any future transfer (even if the Player did not receive a single Euro from such transfers) and, ii) it exceeded the time span of the Contract, which was to expire on 30 June 2019.

As regards the first point, it is manifestly disproportionate and unreasonable that the Player was obliged to obtain 20% of his economic rights every time he negotiated a new employment contract, mainly because it would have been a virually insurmountable obstacle to the Player's transfer. For example, if the Player would have sought to obtain 20% of the transfer fee paid by Kas Eupen to Lommel SK, once he was aware of the negotiations between such clubs, the Player would have had to demand Kas Eupen to recognise Leganés' right to receive 20% of the transfer fee.

Along those lines, it is well known that, in general, economic rights attached to the transfer of a player are extinguished with the termination of the employment contract resulting from the Player’s first transfer.

Therefore, it was highly unlikely, if not impossible, that Kas Eupen would have agreed to the Player’s demands, which would have put the Player in an impossible situation.

As regards the second point, it is also unreasonable to impose on a player an obligation to comply with a condition restricting his freedom to contract for a period exceeding that of the original contract. In a context of an increasingly competitive labour market, the Player's obligation to demand in all his future transfers a clause whereby he would reserve to Leganés or to himself a percentage of 20% for a period of five years, not only seriously compromised his chances of being recruited by any club, but clearly violated his right to work and to access employment on equal terms as other players.

All in all, the Player is right in arguing that the Economic Rights Clause is null and void. The DRC Decision must therefore be confirmed.

CAS 2020/A/7029 Club G v. Club C and Player X[147]

Date of the Award: 27 April 2021
Panel: Mr Luigi Fumagalli (Italy), Mr Ulrich Haas (Switzerland), Mr Mark A. Hovell (United Kingdom)

MAIN TOPICS

- Admissibility of new evidence under Article R57 of the CAS Code
- Definition of a professional under Article 2(2) RSTP
- Calculation of compensation for breach of contract as per Article 17 RSTP and the role of the specificity of sport.

DECISIONS DEALING WITH ONE OR MORE SIMILAR ISSUES

- CAS 2009/A/1781 FK Siad Most v. Clube Esportivo Bento Gonçalves
- TAS 2009/A/1895 Le Mans Union Club 72 c. Club Olympique de Bamako
- CAS 2014/A/3568 CD La Equidad v. Santiago Arias Naranjo & Sporting Clube de Portugal & FIFA
- CAS 2016/A/4843 Hamzeh Salameh & Nafit Mesan FC v. SAFA Sporting Club & FIFA
- CAS 2017/A/5366 Club Adanaspor v. Mbilla Etame Serges Flavier

KEY CONCLUSIONS

- Article R57, third paragraph of the CAS Code[148] gives a CAS tribunal the discretion, but not the obligation, to exclude evidence if the conditions therein mentioned are met. Such discretion is to be used with restraint in order to preserve the *de novo* power of review of the dispute, which is a fundamental feature of CAS adjudication in the appeals proceedings. As a result, such discretion to exclude evidence should be exercised only if there is a clear showing of bad faith, because the party deliberately retained evidence, available to it, in order to bring it for the first time before CAS.

- From Article 2(2) RSTP[149] it transpires that a player is either a professional or an amateur. Such article also indicates that what is decisive for the allocation of a player to one or the other category is (further to the existence of an agreement in writing) the amount of the payment received by the player for his footballing activities.

147. The award has been anonymised as it is yet to be published. This summary contains both quotations and paraphrasing of the original Award. Some parts have been amended for length and consistency purposes, however without altering the meaning of the original Award.

148. *The Panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenge decision was rendered.*

149. *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

- Even if the amount received by a player appears minimal, if European standards are applied, the "absolute" value of the payment is not conclusive for the determination of the status of the player. The RSTP do not stipulate a minimum wage, and a player can still be considered as a non-amateur, even if he agrees to perform services for a meagre salary, much lower than the average salary in his country. On the other hand, he could be considered as an amateur even if his "salary" equals or exceeds the minimum salary for employees in that country. In fact, what is relevant to qualify a player as a "professional" is whether the amount he receives from his club is "more" than the expenses he effectively incurs; if this amount is "much more" or only a "little more" is of no relevance.

- When determining the amount of compensation due to a club, the value of the player's services is only partially reflected in the remuneration paid to the player. In the absence of any acquisition costs, the only element that could be equated to such costs is the investment in training. In the absence of any evidence to the contrary, it is possible to assume as a point of reference the amount of training compensation which the Club would be entitled to receive.

- The "specificity of sport" is not an additional head of compensation, nor a criterion allowing to decide *ex aequo et bono,* but a correcting factor either to increase or reduce the payable compensation.

RELEVANT FACTUAL BACKGROUND

On 30 April 2017, Club G (the **"Appellant"**) and Mr X (the **"Player"**), born on 3 October 2000, entered into a Trainee Contract (the **"Contract"**) valid from 1 May 2017 to the end of the 2018/2019 season.

According to the Contract, the Player was entitled to receive a monthly salary of [National Currency] 35,000 (approximately EUR 55 at the time the Contract was concluded) with an increase in every new season to [National Currency] 60,000 on the condition that the Player would play a given number of official matches.

On 3 April 2018, the Appellant contacted FIFA to inform it that: (i) the Player, after a match played with his national team, had failed to return to the Appellant and (ii) it had learnt that, on the advice of his agent, the Player had undergone a test for a third club abroad. The Appellant therefore requested the opening of disciplinary proceedings for an alleged violation of the FIFA regulations concerning the transfer of minors.

On 4 April 2018, the agent of the Player answered to such letter noting that there was no ground for a complaint, since no transfer of a minor had taken place. At the same time, the Player's agent noted that the Appellant is an amateur club and that the Player was not contractually bound to it.

Further correspondence was exchanged between the Player's agent and the Appellant between April and June 2018.

On 20 July 2018, Club Z (the **"New Club"**) communicated to the Appellant its interest in the Player and its intention to invite him for a training, and that "in case of successful trainings, we will be ready to discuss a possible transfer of the player." On or around the same day, the Appellant replied expressing its consent to the trial and conforming its availability to discuss a possible transfer.

On 24 July 2018, the national association of the Appellant (the "**Former NA")** provided the New Club with a certificate attesting that the Player was an *"amateur international A player"*.

On 27 August 2020, the Former NA issued a *"Passport"* for the Player indicating that in the seasons from 2014/2015 to 2017/2018 he had been registered with the Appellant as an *"amateur"*.

On 4 October 2018, the Player and the New Club signed an employment contract valid from 4 October 2018 to 31 May 2023.

On 25 October 2018, the Appellant contacted the New Club to express its surprise that an employment contract had been signed with the Player and requested information as to whether the New Club intended to compensate the Appellant for the damages caused.

On 9 November 2018, the New Club contacted the Former NA requesting it, *inter alia,* to: *"reconfirm that the Player is an amateur football player"*. In reply thereto, the Former NA confirmed to the New Club that "*all players who are registered with our registries, are amateurs"*.

Further correspondence was exchanged between the Appellant and the New Club each defending its position, i.e., the former that the Player was a professional player with whom it had concluded a valid employment contract and the latter that the Player was an amateur and therefore free to sign a contract with the club of his choosing.

On 31 January 2019, the national association of the New Club requested the issuance of an International Transfer Certificate for the transfer of the Player from the Former NA, to which the latter opposed.

On 15 February 2019, the Single Judge of the Players' Status Committee of FIFA authorized the provisional registration of the Player with the New Club.

On 23 August 2019, the Appellant filed a petition with FIFA against the Player and the New Club alleging that the Contract had been terminated without just cause and requesting compensation for breach of contract in the total amount of EUR 4,000,000 plus interest, and the imposition of sanctions.

On 20 February 2020, the FIFA Dispute Resolution Chamber **(DRC)** issued a decision (the **"Decision"**) rejecting the claim of the Appellant, which then appealed the decision before the Court of Arbitration for Sport.

LEGAL CONSIDERATIONS

The object of this arbitration is the Decision, which dismissed the claim brought by the Appellant against the Player and the New Club (jointly the **"Respondents"**). The Appellant submits that the FIFA DRC was wrong in finding that the Player had not terminated the Contract without just case, because he was an amateur who could freely register for a new club. Therefore, according to the Appellant, the Decision should be set aside, and the remedy already sought before FIFA granted. On the other hand, the Respondents request the Panel to dismiss the appeal and to confirm the Decision.

As a result of the Parties' submissions, the main question to be addressed in this arbitration is whether the Player was an amateur, not bound by a professional contract, at the moment he concluded a contract with the New Club. In fact, only in the event the Panel finds, contrary to the conclusions of the DRC, that the Player was not an amateur, would the claim for compensation for breach of the Contract become material.

Preliminary Question: Admissibility of the new evidence submitted by the Appellant

Before turning to the examination of such question, the Panel needs to give reasons for its decision to dismiss the Respondents' procedural motions contained in their answers. In their submissions, the Respondents requested the Panel to discard, on the basis of Article R57 para. 3 of the CAS Code, some exhibits to the Appeal Brief lodged by the Appellant, because those documents were available to the Appellant at the time of the FIFA proceedings and could have been, but were not, submitted to the DRC.

Article R57 para. 3 of the CAS Code gives the Panel discretion, but not the obligation, to exclude evidence if the conditions therein mentioned are met. In this Panel's opinion, such discretion is to be used with restraint, in order to preserve the *de novo* power of review of the dispute, which is a fundamental feature of CAS adjudication in the appeals proceedings, pursuant to Article R57 para. 1 of the CAS Code. It means that the Panel is not limited to considerations of the evidence that was adduced before the instance below and can examine all new evidence produced before it. As a result, such discretion to exclude evidence should be exercised only if there is a clear showing of bad faith, because the party deliberately retained evidence, available to it, in order to bring it for the first time before CAS.

In the case at hand, no evidence exists to prove that the Appellant failed negligently to present a complete case file to the FIFA DRC, knowing that in any event its case would be heard by CAS. To the contrary, those documents appear to be linked to an important criticism to the Decision, i.e. that it failed to consider the expenses covered by the Appellant in assessing the level of remuneration and the status of the Player. On this basis, the Panel decided that the submission of the relevant documents could be admitted.

The status of the Player when he signed the Employment Agreement

As said, the main issue to be examined in this arbitration concerns the status of the Player at the time of signature of the employment contract with the New Club. Put differently, the issue is whether, at that time, the Player was bound to the Appellant by a professional contract.

The DRC came to the conclusion that the signature of the Contract did not give the Player the status of professional because:

- the Contract itself was denominated as a "Trainee" Contract with an option given to the Appellant to transform it into a proper Professional Contract; and

- the player passport provided by the Former NA as well as a certification submitted by the latter attested to the Player’s amateur status.

The Panel does not agree with the conclusion reached by the DRC.

The Panel remarks that the starting point for any determination as to the status of the Player is Article 2(2) RSTP. Such provision makes it clear that there is no room for a "third" category: a player is either a professional or an amateur. In addition, it indicates that what is decisive for the allocation of a player to one or the other category is (further to the existence of an agreement in writing) the amount of the payment received by the player for his footballing activities.

In this regard, the Panel notes that, as underlined by CAS jurisprudence, the status of a player as a "professional" is exclusively defined in the RSTP, without any reference to national regulations. As a result, in the case at hand, any characterization by the Former NA to the status of the Player, based on its own regulations, is irrelevant. Therefore, the FIFA DRC should not have considered decisive per se elements based on documentation provided by such national association. The analysis by the FIFA DRC had to be conducted by reference to the definition set in the RSTP.

In the case of the Player, the disputed issue revolves around the amount paid by the Appellant to the Player. The Parties have different views as to whether the amount received by the Player made him a professional player.

The amount that the Player received under the Contract at the time relevant for this arbitration appears minimal, if European standards are applied, as that amount corresponds to around EUR 61. The "absolute" value of the payment, however, is not conclusive for the determination of the status of the Player. The FIFA regulations do not stipulate a minimum wage, and a player can still be considered as a non-amateur, even if he agrees to perform services for a meagre salary, much lower than the average salary in his country. On the other hand, he could be considered as an amateur even if his "salary" equals or exceeds the minimum salary for employees in that country. In fact, what is relevant to qualify a player as a "professional" is whether the amount he receives from his club is "more" than the expenses he effectively incurs; if this amount is "much more" or only a "little more" is of no relevance. In addition, the RSTP show that the expenses to be considered, and compared to the payment made by the club, are not those relating to a general cost of living or to a "consumer budget" in the relevant country, but those specifically and effectively incurred for the footballing activity.

The Panel notes in the case of the Player that:

- The definition of a player's status according to the RSTP is "objective": no room appears to be left for the parties to a contract to define it as an "amateur contract" and therefore the player as an amateur. Consequently, the denomination of the Contract as a "Trainee" Contract, or its transformation into a purely "Professional" player's contract at the option of the Appellant, are irrelevant. The choice to adopt the "denominations" mentioned in the Contract appears in any case dictated only by some regulatory issues, i.e. by the intention to deal with the application of a limit set by the Regulations of the Former NA on the conclusion of contracts with minors.

- The Contract provided for: i) an insurance of the Player, according to labour regulations and the provisions of the Former NA, ii) paid holydays, iii) benefits, (iv) transport and accommodation, (v) the payment of "social security" and (vi) the supply of sporting equipment "at the minimum" for the matches.

- The Appellant submitted some documents and declarations to prove that it actually provided the Player with accommodation, full board, transport and training equipment. It is true that the statements filed by the Appellant were not confirmed at the hearing by the individuals who signed them. Their evidentiary value therefore depends upon the facts and circumstances of case. And in that regard, the Panel notes that no evidence was brought by the Player to disprove the written declarations submitted by the Appellant and to show the amount of his monthly football-related expenses: for instance, the pictures of the boots used by the Player and the data of their costs, taken from Internet, have not been supported by any document proving that he directly had bought and paid for them. The Appellant noted that the Player had a sponsorship agreement with Nike, so might have received his boots for free.

In summary, the Panel comes to the conclusion that the remuneration paid to the Player (however small by European standards) exceeded the expenses effectively incurred by the Player to practice football at the time he was registered with the Appellant under the Contract. The conditions set out in Article 2(2) RSTP are therefore met.

As a result, since the Player had to be considered as a professional player, the provisions regarding the maintenance of contractual stability between professionals and clubs - including the consequences of terminating a contract without just cause – do apply.

The Panel finally rejects the argumentation put forth by the Respondents about an alleged de facto termination of the Contract and holds that the Player breached such Contract by entering into a new contract with the New Club.

The compensation for damages

Article 17(1) RSTP sets the principles and the method of calculation of the compensation due by a party because of a breach or unilateral and premature termination of contract. In light of the conclusions reached above, the Panel finds that the termination by the Player of his Contract falls within the scope of application of Article 17 RSTP.

According to such article, primary role is attributed to the parties' autonomy. In fact, the criteria set in that rule apply *"unless otherwise provided for in the contract"*. Then, if the parties have not agreed on a specific amount, compensation has to be calculated "with due consideration" for:

- The law of the country concerned,
- the specificity of sport, and/or

- any other objective criteria, including 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.

The parties to the Contract did not agree on any provision governing the consequences of its breach. As a result, the Panel is called to determine the actual measure of the damages sustained by the Appellant, on the basis of the other criteria set by Article 17(1) RSTP.

The first factor that this Panel considers is the "remuneration element". With regard to this point, the Panel notes that:

- under the Contract, the Player received, at the time of its termination (season 2018/2019), a yearly salary of [National Currency] 480,000, corresponding to EUR 732; and

- under his contract with the New Club, the Player was to receive, in the period originally covered by the Contract, an amount corresponding to EUR 113,000.

In light of the foregoing, the Panel finds that, for the purposes of the calculation of the "remuneration element" under Article 17(1) RSTP, the value that the Parties gave to the services of the Player, at the time of the termination of the Contract and for its remaining duration, can be estimated, on the basis of the average remuneration, to be EUR 56,866.

The Panel is aware that such value is determined by the low compensation paid to the Player by the Appellant, which cannot be compared to the level of remuneration paid on the European football market. However, this is also the result of the Appellant’s remuneration policy for its young players and shows the limited level of investment in players' salaries.

In any case, the value of the services of a player is only partially reflected in the remuneration paid. In the case at stake, however, there are no acquisition costs, paid by the Appellant, to secure the services of the Player. The only element that could be equated to such costs is the investment in training.

In that regard, no evidence has been given to show the actual amount of expenses incurred by the Appellant to train the Player. However, the Panel finds that it is possible to assume as a point of reference the amount of training compensation otherwise payable to the Appellant, which such party mentions as a specific aspect of the damage suffered. The Panel notes that, according to an undisputed calculation submitted by the Appellant, the amount of such training compensation, for a transfer to the New Club would have amounted to EUR 200,000, according to the principles set forth by Annex 4 to the RSTP and its implementing circular letters.

As a result, the Panel quantifies in EUR 200,000 the amount of investment lost.

At the same time, the Panel notes that no compensation for "replacement costs" was claimed or justified by the Appellant, that there is no evidence that the Appellant had received transfer offers and that there is no reason for an adjustment based on the "specificity of sport", which is not an additional head of compensation, nor a criteria allowing to decide *ex aequo et bono*, but a correcting factor which allows the Panel to take into consideration other objective elements which are not envisaged under the other criteria of Article 17 RSTP. In this case, in fact, no elements were brought to the attention of the Panel justifying an increase (or a reduction) of the otherwise determined compensation payable.

Finally, no compelling indications have been given by the Parties as to any role of he "law of the country concerned", or indeed of any country, might have on the calculation of the damages to be compensated to the Appellant.

In light of the foregoing, the Panel concludes that the compensation to be paid by the Player to the Appellant equals EUR 256,866, based on the remuneration factor and the value of the investment in the training of the Player plus the relevant 5% interest as per Articles 104(1) and 339(1) of the Swiss Code of Obligations.

Finally, Article 17(2) RSTP provides indeed that the new club is jointly and severally liable for the payment of compensation, regardless of any involvement in the breach of the Contract. The New Club is therefore jointly and severally liable for the compensation due to the Appellant.

CAS 2020/A/7144 Club A v. Player L[150]

Date of the Award: 4 May 2021
Arbitral Tribunal: Mr Wouter Lambrecht (Belgium)

MAIN TOPICS

- FIFA's standing to be sued when jurisdictional issues are at stake.
- Burden of proof when the jurisdiction of FIFA is challenged in favour of a National Dispute Resolution Chamber (NDRC)
- Conditions that an NDRC must respect in order to comply with the principle of parity provided in FIFA Circular no. 1010

DECISIONS DEALING WITH ONE OR MORE SIMILAR ISSUES

- CAS 2012/A/2983 Aris Football Club v. Márcio Amoroso dos Santos & FIFA
- CAS 2013/A/3364 FC Steaua Bucuresti v. Cristiano Bergodi & FIFA
- CAS 2014/A/3690 Wisla Kraków v. Tsvetan Genkov
- CAS 2015/A/3910 Ana Kuze v. Tianjin Teda FC
- CAS 2016/A/4836 Raúl Gonzalez Riancho v. FC Rubin Kazan
- CAS 2016/A/4846 Amazulu FC v. Jacob Pinehas Nambandi & FIFA & NSL South Africa
- CAS 2018/A/5659 Al Sharjah Football Club v. Leandro Lima da Silva & FIFA

KEY CONCLUSIONS

- When ruling on its own jurisdiction under the rules contained in the FIFA Statutes and the Regulations on the Status and Transfer of Players (RSTP), the FIFA DRC acts as an (quasi-) adjudicative body. Such situation does not differ from the situation in which a civil court, under the national laws and potentially international laws, assesses its own jurisdiction. In the latter case, when a party does not agree with the ruling of a first instance civil court, and the party appeals such a ruling, it must not direct its appeal against nor include the first instance court as a respondent in its appeal. The same logic should apply to appeals before the CAS for what concerns purely jurisdictional issues.

- Holding that an NDRC complies with the minimum procedural standards required to exclude FIFA's jurisdiction simply because it provides for an appeal to the CAS, would give a 'blank cheque' to associations to conduct their procedures as they wish, as long as the NDRC regulations would provide for an appeal possibility to the CAS, or another arbitral tribunal established at national level. This cannot, in the opinion of the Sole Arbitrator, have been FIFA's intention when introducing Article 22(b) RSTP.

150. This summary has been anonymised as the relevant award is yet to be published. This summary contains both quotations and paraphrasing of the original Award. Some parts have been amended for length and consistency purposes, however without altering the meaning of the original Award.

- From the applicable principles of the burden of proof provided by Swiss law and CAS jurisprudence, it transpires that is the party who initially seeks to vacate and rejects the application of a contractually agreed jurisdiction clause that carries the burden of proof and should therefore reasonably demonstrate why the agreed jurisdiction clause should be set aside and why. Therefore, whenever a club and a player contractually agree on the jurisdiction of an NDRC, it is the party arguing that FIFA has jurisdiction, and not the NDRC, which carries the burden of proof.

- If one of the parties' representatives, ie players or clubs, have a dominant position in the body which appoints the members of the NDRC, such NDRC cannot be deemed to comply with the principle of parity foreseen in FIFA Circular no. 1010 in order to exclude FIFA's competence.

RELEVANT FACTUAL BACKGROUND

On 4 September 2015, Club A (the **"Club"** or **"Appellant"**) and Mr L (the **"Player"** or **"Respondent"**) entered into a contract (the **"Contract"**) valid as from 5 September 2015 until 30 June 2019[151]. Article 14 of the Contract, as translated by the Parties, reads as follows:

> *Article 14 Dispute settlement procedure*
>
> *In case of divergence and or dispute deriving from the execution or interpretation of the contract, the parties are obliged to prioritise an amiable settlement.*
>
> *In case of failure, the dispute will be submitted by either party [to] the chamber of resolution of disputes of the [national association]. The decisions of the [NDRC] are susceptible to be appealed before FIFA*

In view of some alleged outstanding payments, the Player filed a claim against the Club in front of the FIFA Dispute Resolution Chamber **(DRC)**.

In its reply, the Club challenged FIFA DRC's jurisdiction to adjudicate on the Player's claim in view of Article 14 of the Contract and argued that the national dispute resolution chamber of Country A (the "NDRC") was the only competent body to do so.

On 25 February 2020, the FIFA DRC rendered a decision dismissing the Club's objection to its jurisdiction and partially accepted the Player's claim (the "Appealed Decision").

The Club then filed an appeal to the CAS.

151. The Contract's original language is French

LEGAL CONSIDERATIONS

As previously mentioned, the issue at the centre of this appeal is whether the FIFA DRC, by means of the Appealed Decision, correctly retained jurisdiction holding that the NDRC did not meet the minimum procedural standards for independent arbitral tribunals as laid down in (i) Art. 22(b) RSTP, (ii) in FIFA Circular no. 1010 as well as in (iii) the FIFA NDRC Standard Regulations.

However, before addressing this main issue, the Sole Arbitrator considers it necessary to address the following preliminary points on the merits.

Standing to be sued

Although not addressed by the Parties *in casu*, the Sole Arbitrator considers it necessary to review and assess the Respondent's standing to be sued, as opposed to that of FIFA, given that under Swiss law, the question of standing to sue or be sued will be reviewed *ex officio*.

In this respect, it must be noted that standing to be sued, or "legitimation passive" in French, refers to the party against whom an appellant must direct its claim in order to be successful. A party has standing to be sued only if it is personally obliged by the claim brought by an appellant.

The review and assessment of the standing to be sued is necessary since the Appellant, among other things, asks the Sole Arbitrator to dismiss the Appealed Decision in its entirety and to confirm that the FIFA DRC did not have jurisdiction to adjudicate the claim filed by the Respondent.

Whilst Article 58(1) of the FIFA Statutes[152] provides that appeals against a decision of a FIFA body must be lodged at the CAS, neither the FIFA Statutes, nor the CAS Code, specify against which party the appeal should be lodged, i.e. who has standing to be sued.

Keeping in mind that the Appealed Decision is to be qualified as an association decision, in German "Vereinsbeschluss", this lacuna is filled by Swiss law, and more precisely by Article 75 of the Swiss Civil Code *iuncto* Article 706 of the Swiss Code of Obligations.

Following those articles, a challenge against an association decision must, in principle, always be filed against the association that issued the decision.

This finding has however been nuanced by jurisprudence of both the CAS and the Swiss Federal Tribunal; nuanced because: (i) an appeal in front of the CAS is quite different to a regular action for voidance in front of Swiss Courts as explained in detail in CAS 2014/A/3690, whilst (ii) according to the same jurisprudence and legal doctrine, one must distinguish between different kinds of association decisions that warrant a flexible approach.

152. Article 57(1) under the current version.

This flexible approach consists in differentiating between decisions entailing a vertical element ("vertical disputes") and decisions entailing a horizontal element ("horizontal disputes") whilst acknowledging that some decisions may entail both vertical and horizontal elements.

The Sole Arbitrator subscribes to the views of Prof. Haas expressed in *Standing to Appeal and Standing to be sued* (International Sport Arbitration, Bern 2018, Editions Weblaw) and considers that for what concerns the case under review, and keeping the above in mind, the better arguments speak in favour of this dispute being considered a horizontal dispute. The Sole Arbitrator reaches this conclusion mindful that different CAS jurisprudence exists regarding who has standing to be sued regarding jurisdictional matters, namely CAS 2016/A/4836.

Firstly, the Sole Arbitrator reaches the above conclusion since the Appellant and Respondent are bound by a bilateral contract whilst the Appellant is seeking the enforcement of his contractual rights, namely, to have his case heard in front of the NDRC and not be sued in front of the FIFA DRC as per the mutually agreed jurisdiction clause between the Parties.

FIFA's decision not to uphold the contractually agreed jurisdiction clause does not alter the membership relations of either one of the Parties *vis-a-vis* FIFA but mainly alters their contractual rights and obligations vis-a-vis one another. Moreover, once FIFA made its decision, its power came to an end and FIFA can no longer dispose of the claim of the underlying dispute whilst the Parties can still reach a different agreement, amending partially or reaching an entirely different agreement than the content of the Appealed Decision, which is typical for horizontal disputes.

Secondly, the Sole Arbitrator holds that the FIFA DRC acted as an (quasi-) adjudicative first instance body ruling upon its jurisdiction under the rules contained in the FIFA Statutes and FIFA RSTP and that such a situation does not differ from the situation in which a civil court, under the national laws and potentially international laws and directives such as the Lugano Convention and Brussels I Regulation, assesses its own jurisdiction. In the latter case, when a party does not agree with the ruling of a first instance civil court considering itself competent, and the party appeals such a ruling, it must not direct its appeal against nor include the first instance court as a respondent in its appeal. The same logic should apply to appeals before the CAS for what concerns purely jurisdictional issues.

In light of all the above, the Sole Arbitrator, conducting an *ex officio* review of the question who has standing to be sued, considers that the Respondent has standing to be sued and that the Appellant could address its appeal and respective requests for relief against the Respondent.

De novo review – Appeal to CAS foreseen in the NDRC Procedural Rules

According to the Appellant, *"decisions rendered by the NDRC may be appealed before the CAS (cf Article 30) meaning that CAS shall remedy any eventual procedural breach which may occur in first instance through the "de novo" doctrine"*.

The Appellant seems to submit that irrespective of whether or not the NDRC would meet the minimum procedural requirements, provided that the regulations of such an NDRC allow for an option of appeal to CAS, then such an appeal would cure any deficiencies of the NDRC and hence FIFA, under its Article 22(b) RSTP, should deny jurisdiction.

Whereas the Sole Arbitrator agrees with the Appellant's submission that procedural deficiencies regarding fair proceedings and equal parity are cured by the de novo appeal and hearing before the CAS, the Appellant's position cannot be upheld.

The Appellant refers to the possibility to appeal the NDRC decision to the CAS, however, Article 30 of the 2017 edition of the NDRC Procedural Rules, first and foremost, provides for an internal appeal to the *Commission Centrale d'Appel* whilst it appears that the appeal possibility to the CAS is temporary and only exists until a *Chambre Arbitrale* du Sport is established in Country A. It is unknown to the Sole Arbitrator whether such a *Chambre Arbitrale du Sport* has been established.

In any case, the Sole Arbitrator notes that it is not the possibility to appeal that cures procedural deficiencies but rather an actual appeal proceeding, which is a rather different thing and depends on an appeal actually being introduced. Hence, the mere temporary possibility to appeal an NDRC decision to the CAS is, in principle, not in and by itself, a reason for the FIFA DRC to deny jurisdiction.

Holding different would otherwise give a 'blank cheque' to associations to conduct their NDRC and internal appeal procedures as they wish, effectively cancelling one or more instances, and this is as long as the NDRC regulations would provide for an appeal possibility to the CAS or another arbitral tribunal established at national level. This cannot, in the opinion of the Sole Arbitrator, have been FIFA's intention when introducing Article 22(b) RSTP, which constitutes an exception to FIFA's jurisdiction.

Burden of proof

In the Appealed Decision, the FIFA DRC established that the Appellant was unable to prove that the NDRC met the minimum procedural standards for independent arbitration tribunals.

In its answer to the Appeal Brief, the Respondent argued that the burden of proof rests on the Appellant.

Pursuant to Article 8 of the Swiss Civil Code, the burden of proving the existence of an alleged fact rests on the person who derives rights from that fact, unless the law provides otherwise. This principle, known as *affirmanti incumbit probatio,* has been recognised by the CAS in other matters

When applying the above to the present dispute, the Sole Arbitrator observes that the Club must substantiate in its appeal to CAS why the FIFA DRC wrongfully considered itself competent, i.e. demonstrate that the NDRC does meet the minimum procedural standards, however, and still according to the same reasoning, the Player, rather than the Club, should have carried said burden of proof in front of FIFA.

In the opinion of the Sole Arbitrator, it is the party who initially seeks to vacate and rejects the application of a contractually agreed jurisdiction clause that carries the burden of proof and should therefore reasonably demonstrate why the agreed jurisdiction clause should be set aside and why, *in casu*, the NDRC had no jurisdiction.

Consequently, the FIFA DRC in its Appealed Decision erred in exclusively putting the onus on the Club to prove that the NDRC met the minimum procedural standards.

Application of the minimum procedural standards to the NDRC

As an introductory remark, the Sole Arbitrator observes that the requirement of whether the NDRC is an independent arbitral tribunal guaranteeing fair proceedings and respecting the principle of equal parity, is to be analysed in abstract terms as correctly held in CAS 2012/A/2983.

In conducting this abstract analysis, the Sole Arbitrator observes that the FIFA Circular no. 1010 indicates that the parties must have equal influence over the appointment of arbitrators and that this means for example that every party has the right to appoint an arbitrator and that the two appointed arbitrators appoint the chairman of the tribunal. According to this Circular, the principle of parity implies that in a scenario where arbitrators are to be selected from a predetermined list, every interest group that is represented must be able to exercise equal influence over the compilation of the arbitrator list.

Hence, the principle of parity does not imply that the parties will, in all circumstances, be entitled to appoint all arbitrators when just one party does not exert more or different influence on the appointment of arbitrators compared to the other party.

Notwithstanding the above, in the Appealed Decision, the FIFA DRC stated that the principle of parity was not respected regarding the appointment of the arbitrators because the parties cannot choose the arbitrators. Rather, the national association's Executive Committee appoints the arbitrators.

Contrary to what is held in the Appealed Decision, the Sole Arbitrator, pursuant to the FIFA Circular no. 1010, considers that the mere fact that the Executive Committee appoints the arbitrators does not necessarily imply that the principle of parity is not respected. For the principle of parity can also be respected if the parties had equal influence over the compilation of the arbitrator's list from which the Executive Committee appoints the NDRC members and/or equal influence over the nomination of the arbitrators deciding the case.

Keeping in mind the relevant provisions of the NDRC Procedural Rules, the Sole Arbitrator concurs with the Appellant that in the case of a dispute between a player and a club, the composition of the panel in the NDRC compulsorily has one arbitrator representing the player and another one representing the club. This can indeed be derived from Article 5, *in fine* of the 2017 edition of the NDRC Procedural Rules.

According to Article 10 of such rules, the NDRC can only meet validly in the presence of at least three members, including the President or a Vice-President.

In addition, according to Article 24 of the NDRC Procedural Rules, the NDRC decides behind 'closed doors' by a simple majority vote. The "President of the session" having a casting vote in the event of a tie.

Hence, in assessing the NDRC's compliance with the principle of parity, the way in which its members are appointed is of utmost relevance, both for what concerns the President or the Vice-President of the NDRC as well as the other members.

For what concerns the President and Vice-President, Article 5 lit. a) of the NDRC Procedural Rules explicitly states that the NDRC's President and Vice-President are appointed by the Executive Committee. For what concerns the other members, including the club and player representative's, Article 71.2 of the NA Statutes ed. 2018 foresees that the Executive Committee appoints the members of the NDRC.

Hence, all members of the NDRC are appointed by the Executive Committee, which again, according to the Sole Arbitrator, in and by itself is not problematic. However, within the Executive Committee, at least 7 of the 17 members are representatives from clubs, including 5 members of professional clubs. Conversely, the Executive Committee includes only 1 member of a group of former players, and it is not clear if and to what extent they represent the active professional players.

Consequently, the Sole Arbitrator considers that clubs' representatives clearly have a more dominant position than players within the Executive Committee, the latter being the body appointing the NDRC members.

Lacking any further evidence demonstrating that each stakeholder gets to designate and submit the names of their own representative to the Executive Committee for the latter's appointment as a kind of "rubber stamp", and lacking any proof as to how the candidates for presidency and vice-presidency are selected, designated and finally appointed, the Sole Arbitrator considers that the club representation on the Executive Committee enables the club representatives to exercise more influence over the compilation of the list of arbitrators when compared to that of the players' representatives.

The principle of parity is thus not respected.

The Appellant's submission holding that the Executive Committee does not directly appoint the members of the arbitration panel of the NDRC in specific cases, cannot be upheld. As set out above, the Executive Committee appoints the President and the Vice-President of the NDRC and, following Article 10 of the NDRC Procedural Rules, the President or Vice-President are included in the quorum to validly hold meetings of the NDRC.

Having considered the above, the Sole Arbitrator rules that the NDRC does not meet the minimal procedural standards for an NDRC to be considered independent and duly constituted.

The FIFA DRC was thus right to declare that it had jurisdiction to rule over the Player's claim.

CAS 2020/A/7145 Club M v. Player J & Club V[153]

Date of the Award: 11 June 2021
Arbitral Tribunal: Mr Frans M. de Weger (Netherlands), Mr Michele A.R. Bernasconi (Switzerland), Mr Joao Nogueira da Rocha (Portugal)

MAIN TOPICS

- Admissibility of an Answer sent only by e-mail.
- Standing to challenge the jurisdiction of FIFA by a third party to a contract.
- Validity of unilateral extension options.

DECISIONS DEALING WITH ONE OR MORE SIMILAR ISSUES

- CAS 2004/A/678 Apollon Kalamarias F.C. v. Davidson Oliveira Morais
- CAS 2005/A/973 Panathinaikos Football Club v. S
- CAS 2013/A/3260 Grêmio Foot-ball Porto Alegrense v. Maximiliano Gastón López
- CAS 2013/A/3375 KSC Lokeren v. Omer Golan & Maccabi Petach Tikva FC
- CAS 2014/A/3852 Ascoli Calcio 1898 v. Papa Waigo Ndiaye & Al-Wahda Sports

KEY CONCLUSIONS

- In accordance with Article R31 CAS Code, the filing of an Answer is valid upon receipt of the email by the CAS Court Office within the deadline, provided that the Answer was also filed by courier or uploaded to the CAS E-filing Platform within the first subsequent business day of the relevant time limit. As such, an Answer being submitted by email only does not meet the formal requirements of Article R31 CAS Code and it is therefore inadmissible.

- If the parties to a contract do not challenge the competence of FIFA to adjudicate a dispute, the player's new club, in its capacity as a third party, is not in a position to object to the jurisdiction of FIFA's deciding bodies.

- It follows from CAS jurisprudence that several elements can be taken into account in order to determine the validity of a unilateral extension option. These are: i) the potential maximum duration of the labour relationship should not be excessive; ii) the option should be exercised within an acceptable deadline before the expiry of the current contract; iii) the salary reward deriving from the option right should be defined in the original contract; iv) one party should not be at the mercy of the other party with regard to the contents of the employment contract; v) the option should be clearly established and emphasized in the original contract so that the player is conscious of it at the moment of signing the contract; vi) the extension period should be proportional to the main contract; and vii) it would be advisable to limit the number of extension options to one sole extension.

153. This summary has been anonymised as the relevant award is yet to be published. This summary contains both quotations and paraphrasing of the original Award. Some parts have been amended or suppressed for length and consistency purposes, however without altering the meaning of the original Award.

- An increase of 30% of the Player's salary during the option period, is a substantial increase which speaks in favour of the validity of the unilateral extension option.

RELEVANT FACTUAL BACKGROUND

On 6 July 2017, Player J (the **"Player"**) Club M (the **"Club"**) concluded a contract valid as from 6 July 2017 until 30 June 2019 (the **"Contract"**).

According to Article 2 of the Contract, the Player was entitled to a certain fixed remuneration.

Article 10 of the Contract read as follows:

> *All cases and situations not provided for in this contract shall be governed by the Collective Bargaining Agreement entered into between the National Union of Professional Football Players and the Portuguese Professional Football League, and the parties expressly state that the period provided for in Article 11 of that document applies to this contract.*

Article 11 of the Contract provided that:

> *The Parties agree to submit any disputes between them to the arbitration committee established under Art. 55 of the Employment Contract for professional footballers*

Pursuant to Article 12 of the Contract (the "Extension Option"):

> *The Club and athlete agree that, by 31 May 2019, the Club has the right to opt for renewal of the employment contract for another season, i.e. until 30 June, 2020, thus requiring the athlete to perform his duties as identified in clause 1, and the Club being required to pay the Player the following gross amounts, hereby established previously:*
>
> *Season 2019/2020 [an amount 30% higher than the Player's initial remuneration]*

On 28 February 2019, the Club sent a correspondence to the Player whereby it expressed *"its intention to exercise its rights to renew the contract until 30/06/2020, which it does through this letter"*. The Player received such letter on 4 March 2019.

On 7 March 2019, the Player sent a letter to the Club in which he stated that he did not intend to renew the Contract for the 2019/2020 season. In such letter, he made reference to Portuguese employment law according to which unilateral extension options are *"not provided for"*. As such, the Player declared that the Club's extension was *"null and void"*.

On 15 April 2019, Club V (the **"New Club"**) informed the Club that it had entered into an employment contract with the Player valid as from 1 July 2019.

Thereafter, the Club filed a claim before the FIFA Dispute Resolution Chamber **(DRC)** against the Player and the New Club seeking compensation for breach of contract. By means of a decision dated 20 February 2020, the FIFA DRC rejected the Club's claim on the basis that the Extension Option was not valid.

The Club appealed to the Court of Arbitration for Sport.

LEGAL CONSIDERATIONS

Admissibility of the Answer

The first preliminary issue that the Panel must address is the finding that the Player's Answer was not admissible due to the failure to comply with the filing requirements under Article R31 CAS Code.

As a starting point, the Panel emphasises that deadlines, including compliance with the formalities for the filing of submissions by the parties, are of crucial importance for the proper conduct of CAS proceedings and must, therefore, be strictly respected by the parties involved. The strict compliance with the rules on time limits is necessary due to the equal treatment of the parties and legal certainty, which has also been confirmed by the Swiss Federal Tribunal (see, inter alia, SFT 4A_54/209, SFT 4A_238/2018, SFT 4A_692/2016 and SFT 5A 741/2016).

With that in mind, the Panel refers to Article R31 CAS Code, which provides that the filing of an Answer is valid upon receipt of the email by the CAS Court Office within the deadline, provided that the answer was also filed by courier or uploaded to the CAS E-filing Platform within the first subsequent business day of the relevant time limit.

In the present case, the Panel observes that the deadline for filing the Answer was 29 June 2020, which was clearly communicated by the CAS Court Office to the Parties per letter of 9 June 2020. From this letter it also clearly follows that the Player had to file his Answer to the CAS also by courier or upload it on the CAS E-filing Platform.

The Panel has, therefore, decided not to admit the Answer, which was sent per email only.

As the Answer was not admitted to the file, the testimony of Mr X was not duly announced in the Player's written submissions, and therefore, so finds the Panel, his testimony had to be rejected, in light of Article R56 and R44.2(3) CAS Code (applicable by reference of Article R57 CAS Code) and the absence of any exceptional circumstances in this respect.

FIFA DRC's jurisdiction to adjudicate the dispute

The New Club submits that the FIFA DRC lacked jurisdiction to adjudicate and decide on the matter in dispute. The New Club maintains that this dispute does not fall under Article 22 of the FIFA Regulations on the Status and Transfer of Players **(RSTP)**, and so, the FIFA DRC had no competence to hear this dispute.

In this regard, the New Club mainly based its argument on the fact that it is affiliated to the same national association as the Appellant. As such, there was no ITC request for the Player nor a claim from an interested party in relation to said ITC request.

The Player, however, did not dispute the competence of the FIFA DRC. To the contrary, during the hearing, counsel for the Player even expressed the position that he agreed that the FIFA DRC adjudicated on his case as there was an international dimension, given the Player's nationality.

The Panel notes that the present dispute concerns a dispute between a club and a player dealing with the question of whether the Extension Option is valid or not. As such, it is clear to the Panel that the case at hand concerns an employment-related dispute pursuant to Article 22(b) RSTP. In this regard and for the sake of clarity, the Panel concurs with the New Club that the dispute does not relate 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. As such, the competence of the FIFA DRC cannot be established based on Article 22(a) RSTP.

However, it is also clear that an international dimension exists as the initial dispute is between a Player and a Club of different nationalities. Pursuant to CAS and FIFA DRC jurisprudence that the international dimension is represented by the fact that the player concerned is a foreigner in the country concerned. As such, the Panel concludes that the FIFA DRC had, in principle, competence to adjudicate the matter on the basis of Article 22(b) RSTP.

However, it also follows from said provision that a body other than the FIFA DRC may have jurisdiction to settle an employment-related dispute between a player and a club of an international dimension as long as this derives from a clear reference in the employment contract at the basis of the dispute. As such, if an independent arbitration tribunal guaranteeing fair proceedings exists at national level, even if an employment-related dispute has an international dimension, the dispute may be referred to that national body, provided that the parties have explicitly chosen that national body by means of a respective agreement on jurisdiction.

In this respect, the Panel observes that the Club and the Player, by means of Article 11 of the Contract agreed to submit any disputes between them to *"the arbitration committee established under Art. 55 of the Employment Contract for professional footballers".*

Notwithstanding the above, the Panel emphasises that, even if an independent arbitration tribunal guaranteeing fair proceedings exists at national level and Article 11 can be considered as a specific arbitration clause, the Panel notes that the Player should have contested FIFA's DRC jurisdiction. In fact, even if written agreements signed between a player and a club contain a clause by means of which the jurisdiction of another body is referred to, the jurisdiction of FIFA must be contested.

With that in mind, the Panel emphasises that it was only the New Club that disputed the competence of the FIFA DRC. The Panel considers that only the Club and the Player are the main parties to the present dispute deriving from the Contract, which is not only relevant in the context of the international dimension, as set out above, but now also in light of the competence of FIFA in the sense of Article 22(b) RSTP. In other words, neither the Club nor the Player, i.e. the parties to the Contract, in which a reference was made to another organ than the FIFA DRC, contested FIFA's competence. Consequently, the New Club – not being a party to the

Contract – is not in position to object to the jurisdiction of the FIFA judicial bodies since this has been validly accepted by the parties that had originally agreed on another judicial body.

The validity of the unilateral extension option

First, the Panel wishes to remark that the FIFA regulations, in particular the RSTP, do not contain any express provision which prohibits the unilateral extension of employment contracts. In fact, and as rightfully stated by the panel in CAS 2013/A/3260, the decisions by the FIFA DRC and the CAS on unilateral extension options have always been based on the spirit and legal framework which the FIFA regulations intend to foster, ie principles which prohibit excessive and unwarranted restrictions on a player's freedom of movement and personality rights.

In the past, the FIFA and the CAS have decided several times on the validity of unilateral extension options, more specifically in favour of their validity, provided certain requirements were fulfilled.

More specifically, it follows from the leading jurisprudence that several elements can be taken into account in order to determine the validity of a unilateral extension option:

- the potential maximum duration of the labour relationship should not be excessive;
- the option should be exercised within an acceptable deadline before the expiry of the current contract;
- the salary reward deriving from the option right should be defined in the original contract;
- one party should not be at the mercy of the other party with regard to the contents of the employment contract;
- the option should be clearly established and emphasized in the original contract so that the player is conscious of it at the moment of signing the contract;
- the extension period should be proportional to the main contract; and
- it would be advisable to limit the number of extension options to one sole extension.

In view of the above, the majority of the Panel finds that the above elements give helpful guidance as to the question whether or not the Extension Option is valid. However, for the sake of avoiding any misunderstanding, it must be underlined that even if all criteria are met, this still does not automatically mean that a unilateral extension option is valid, and *vice versa*: even if not all the above criteria are met, this does not per definition lead to the invalidity of the option. The above elements must be seen as guidelines to assess the validity and the overall package of elements is decisive in order to assess the validity of such clause. As previously indicated, the specific circumstances of each and every case are always decisive.

In particular, and in addition to the above seven criteria, it can also be relevant to assess whether or not the player was assisted during the negotiations that led to the conclusion of the contract in which the unilateral option clause was inserted, also in light of the equal balance between the parties. In this regard, it can be of relevance whether he or any agent of the player spoke the language in which the contract has been drafted. Further to this, also the stance of the parties can provide further guidance. For example, whether the player agreed with the effects of the unilateral extension option by means of not immediately objecting thereto and

keep training and playing games for the club and still receiving his increased salary after the extended period started to run.

The Panel will now assess, in light of the above jurisprudence of FIFA and CAS and taking into account the specific circumstances of the case at hand, whether the Extension Option is valid or not.

As a starting point and going through the seven elements as listed above, the majority of the Panel is comfortably satisfied that all these criteria are met in the present case.

First, the potential maximal duration of the Contract is not excessive. The Contract started on 6 July 2017 and the initial expiry date was 30 June 2019. By means of the Extension Option, the Club had the right to extend the contract for another season, i.e. until 30 June 2020. The potential maximum duration would therefore be three years, which is a reasonable period, also in view of the maximum length of five years as provided for under Article 18(5) RSTP.

Second, the Extension Option was exercised within an acceptable deadline before the initial expiry of the Contract. As a matter of fact, as follows from the Extension Option, latter had to be invoked by the Club before 31 May 2019. It is undisputed that the Player, by means of the Club's letter of 28 February 2019, was notified of the exercise of the option by the Club several months before the expiry of the original duration of the Contract.

With regard to the third and fourth criterion, the salary under the optional period was clearly defined in the Extension Option. The Player would receive for the season 2019/2020 an amount 30% higher than during the initial period of the Contract, which is a substantial increase. This is sufficient for the Panel to conclude that the Player was not at the mercy of the Club. In other words, there was a proper financial gain for the Player. Consequently, the third and fourth criteria are also met in the present case.

The fifth element is that the option must be clearly established and emphasised in the contract so that a player is aware of it at the time of signing the contract. There is no doubt that also this criterion is fulfilled. As set out before, the Extension Option was clearly defined in the Contract.

As to the sixth element, the extension period of one additional year (season 2018/2019) is clearly proportional to the main initial contract with has a duration of two years. As such, the optional period (one year) is not longer than the initial contractual period of the Contract (two years).

With regard to the seventh element, there is no issue at stake here as only one unilateral extension clause was inserted in the Contract.

In addition to the above seven criteria, it is recalled that the Player had assistance from his agent during the negotiations that led to the conclusion of the Contract. At the same time, a party signing a document of legal significance, as a general rule, does so on its own responsibility and is so liable to bear the legal consequences arising from the execution of such document. By the same token, it should also not be left unmentioned, that the Player and his agent both spoke the language in which the Contract was drafted.

Consequently, in view of all the foregoing and in light of the specific circumstances of the case, the majority of the Panel concludes that the Extension Option is valid and binding and, therefore, dismisses the submissions of the Respondents that the option clause should be declared invalid.

The Panel therefore concluded that the Player terminated the contract without just caused and condemned him to pay compensation, which the Panel calculated on the basis of the average of the value of the Player's contracts with the Club and the New Club.

The player's New Club was found jointly and severally liable, pursuant to Article 17(2) RSTP.

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